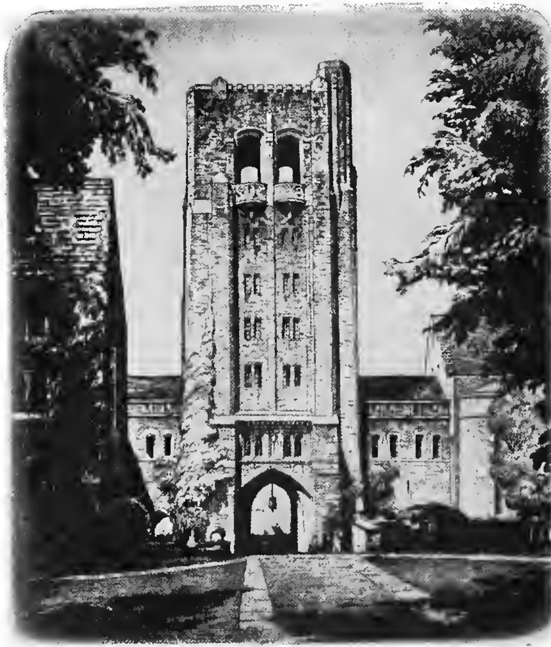

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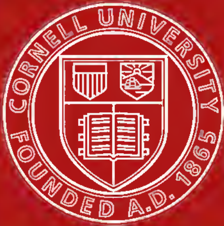

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A TREATISE

ON

CRIMINAL PROCEDURE

BY

FRANCIS WHARTON, LL.D.,

AUTHOR OF TREATISE ON "CRIMINAL LAW," "EVIDENCE," "CONFLICT OF LAWS," "MEDICAL JURISPRUDENCE," ETC., ETC.

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CHAPTER XLIX.

INDICTMENT—SPECIFIC CRIMES.

Games and Gaming.

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§ 708. INDICTMENT OR INFORMATION[1]—IN GENERAL. Gaming being purely a statutory offense,[2] the indictment or information must be drawn with reference to the particular statute, and the offense charged must be brought strictly within the inhibition of that statute.[3] It is generally sufficient to allege that the accused did bet, play, or gamble,[4] or did keep a house, place, game, table, and

1 **As to forms of indictment** charging gaming, in any of its phases, see Forms Nos. 143-145, 1037-1080.

2 See, among other cases, Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; State ex rel. Rhodes v. Saunders, 66 N. H. 39, 18 L. R. A. 646, 25 Atl. 588; R. v. Rogier, 1 Barn. & C. 272, 8 Eng. C. L. 117; R. v. Higginson, 2 Burr. 1232, 97 Eng. Repr. 806; R. v. Dixon, 10 Mod. 336, 88 Eng. Repr. 753.

3 ALA.—Rosson v. State, 92 Ala. 76, 9 So. 357. ARK.—Graham v. State, 1 Ark. 171. FLA.—Jackson v. State, 26 Fla. 510, 7 So. 862. OHIO—Roberts v. State, 32 Ohio St. 171. TEX.—Short v. State, 23 Tex. App. 312, 4 S. W. 903.

Charging accused did unlawfully play at a game of cards in a public house, to wit, a certain printing office, commonly open to the public for business purposes, held to be sufficient.—Turbeville v. State, 37 Tex. Cr. Rep. 145, 38 S. W. 1010.

Charging the offense of keeping a gambling place, without paying a license, the indictment is sufficient where it charges accused with carrying it on as the employee of another.—State v. Gray, 19 Mont. 206, 47 Pac. 900.

Under a statute declaring a person who frequents any place where gambling is permitted to be a common gambler, and prescribing punishment therefor, it is sufficient to charge accused with being a common gambler without alleging the kind of gambling permitted at the place frequented, and neither is it necessary to allege that accused frequented the room for the purpose of gambling with cards or any other kind of game permitted to be played therein.—Howard v. State, 64 Ind. 516.

4 **"A game of cards"** sufficiently charges the statutory offense of playing "a game with cards."—State v. Shult, 41 Tex. 548.

"At a game of cards or dice" instead of the statutory phrase, "at a game with cards or dice," sufficient.—Cochran v. State, 30 Ala. 542.

"At a game called 'pool'" instead of the statutory phrase, "a game of pool."—Thompson v. State, (Tex.) 28 S. W. 684.

"Did play and bet for money and other things of value at a game played with cards" being charged, is sufficient, although it does not allege in what the "other things of value" consisted, and gives no description thereof.—Brand v. State, 112 Ga. 25, 26, 37 S. E. 100, 174.

"Gamble, hazard, and bet on a game of hazard called 'thimble,' and did hazard on said game money," describing it, sufficiently

so forth, prohibited by statute;[5] but the indictment or information must set forth every essential and material element in the offense under the particular statute clearly and explicitly.[6] But it is especially provided by statute, in some jurisdictions, that an indictment or information charging gambling, in any of its phases, shall be sufficient where it so clearly and explicitly sets forth the offense complained of, as to enable the accused to understand the accusation and prepare his defense,[7] and that mere defects of form shall not vitiate.[8]

charged accused played the game. —Bennett v. State, 10 Tenn. (2 Yerg.) 472.

"Played at cards" sufficient under a statute prohibiting playing a game with cards.—Holland v. State, 3 Port. (Ala.) 292; Coggins v. State, 7 Port. (Ala.) 263.

5 See: ALA.—Dreyfus v. State, 83 Ala. 54, 3 So. 430; Tolbert v. State, 87 Ala. 27, 6 So. 284; Rosson v. State, 92 Ala. 76, 9 So. 357. ARK. — Graham v. State, 1 Ark. 171. IND.—Mount v. State, 7 Ind. 654. N. C.—State v. Taylor, 111 N. C. 680, 16 S. E. 168. OHIO—Davis v. State, 7 Ohio (pt. I) 204; Carper v. State, 27 Ohio St. 572; Roberts v. State, 32 Ohio St. 171. TEX.—McKissick v. State, 2 Tex. 356; State v. Ward, 9 Tex. 370; State v. Prewitt, 10 Tex. 310; Tate v. State, 21 Tex. 202; State v. Kelly, 24 Tex. 182; Booth v. State, 26 Tex. 203; Blair v. State, 32 Tex. 474; Wardlow v. State, 18 Tex. App. 356; Short v. State, 23 Tex. App. 312, 4 S. W. 903; Grant v. State, 33 Tex. Cr. Rep. 527, 27 S. W. 127; Thompson v. State, 28 S. W. 684.

6 ALA.—Covey v. State, 4 Port. 186; Dreyfus v. State, 83 Ala. 54, 3 So. 430. FLA.—Montgomery v. State, 40 Fla. 174, 24 So. 68. MO.—State v. Burke, 151 Mo. 136, 52 S. W. 226. N. J.—State v. Spear, 63 N. J. L. 179, 42 Atl. 840. N. Y.—People v. Stedeker, 175 N. Y. 57, 17 N. Y. Cr. Rep. 326, 67 N. E. 132, reversing 75 App. Div. 449, 17 N. Y. Cr. Rep. 127, 78 N. Y. Supp. 316; People v. Klock, 48 Hun 275. R. I.—State v. Melville, 11 R. I. 417. TEX.—Goldstein v. State, 36 Tex. Cr. Rep. 193, 36 S. W. 278; Cothran v. State, 36 Tex. Cr. Rep. 196, 36 S. W. 273; Meyers v. State, 41 Tex. Cr. Rep. 508, 55 S. W. 818. VT.—State v. McMillan, 69 Vt. 105, 37 Atl. 278.

7 Com. v. Coleman, 184 Mass. 198, 68 N. E. 220; Lawrence v. Com., 86 Va. 573, 10 S. E. 840.

Charging accused "did play a game with cards upon which money was then and there bet a certain public house," held to be bad, it not being within the province of the court to supply any word between "bet" and "a public house."—State v. Huston, 12 Tex. 245.

Using "gambling" instead of the statutory word "gaming" does not vitiate.—State v. Nelson, 19 Mo. 393.

8 See Com. v. Tiernan, 45 Va.

Jurisdiction and venue must be properly laid and set forth. The indictment or information must allege the offense charged to have been committed on a day certain,[9] which day must have been before the finding of the indictment[10] or the presentation of the information and within the period of limitation.[11] It is sufficient that the locus of the offense charged was at a designated city, or place within the county;[12] and where the offense charged is that of betting on a prohibited game, and the like, it being charged that the bet was laid in the county, it is not necessary to allege that the game, or the like, was played in the county.[13]

Surplusage will be disregarded. Thus, where an indictment or information charges the proprietor of a public house with permitting persons "to play at cards and other unlawful games," the words "and other unlawful games" are not in any way descriptive of the offense, are entirely unnecessary, and will be disregarded as surplusage;[14] and where an indictment or information charging

(4 Gratt.) 545; Lawrence v. Com., 86 Va. 573, 10 S. E. 840.

Under some statutes, an indictment for betting on an election is unauthorized, without a prosecutor being indorsed thereon.—State v. Smith, 19 Tenn. (Meigs) 99, 33 Am. Dec. 132.

9 Anthony v. State, 23 Tenn. (4 Humph.) 83.

10 State v. Noland, 29 Ind. 212.

11 State v. Noland, 29 Ind. 212; Anthony v. State, 23 Tenn. (4 Humph.) 83.

12 See: ALA.—Covy v. State, 4 Port. (Ala.) 186. FLA.—Groner v. State, 6 Fla. 39; Parkhill v. State, 47 Fla. 88, 36 So. 170. ILL.—Bobel v. People, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322. IND.—App v. State, 90 Ind. 73; Keith v. State, 90 Ind. 89. KAN.—State v. Oswald, 59 Kan. 508, 53 Pac. 525. MO.—State v. Kyle, 10 Mo. 389; State v. Burke, 151 Mo. 136, 52 S. W. 226. N. Y.—People v. Stedeker, 175 N. Y. 57, 17 N. Y. Cr. Rep. 326, 67 N. E. 132, reversing 75 App. Div. 449, 17 N. Y. Cr. Rep. 127, 78 N. Y. Supp. 316; People v. Buddensieck, 103 N. Y. 487, 57 Am. Rep. 766, 5 N. Y. Cr. Rep. 69, 9 N. E. 44, affirming 4 N. Y. Cr. Rep. 230. S. C.—State v. Font, 2 Brev. L. 487. TEX.—Woodman v. State, 32 Tex. 772; Eylar v. State, 37 Tex. Cr. Rep. 257, 39 S. W. 665; Aguar v. State, 47 S. W. 464. VA.—Leath v. Com., 73 Va. (32 Gratt.) 873.

13 State v. Kyle, 10 Mo. 389.

14 Com. v. Bolkon, 20 Mass. (3 Pick.) 281.

the keeping of a common gaming-house, after charging such keeping, also charges accused with procuring persons of evil fame and disposition to assemble there, and to practice the various vices that are apt to be indulged in at such resorts, this latter charge being merely matters of description, is held to be immaterial and therefore may be disregarded as surplusage,[15] it being sufficient simply to allege the keeping of such house generally, without further charge or additional allegations;[16] indeed, it has been questioned whether the government should be permitted, in proof of a general charge of keeping a gaming house, or the like, to give in evidence the particular acts.[17]

§ 709. —— CERTAINTY AND PARTICULARITY—SUFFICIENCY. An indictment or information charging gaming, in any of its branches, must be certain and explicit, and will be sufficient where it gives a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of ordinary understanding to know what offense is intended to be charged thereby, and upon which he will be tried;[1] that the jury may be warranted in their verdict;[2] that the court may pass the proper sentence;[3] and that the

15 See Lord v. State, 16 N. H. 325, 41 Am. Dec. 729.

16 R. v. Rogier, 1 Barn. & C. 272, 8 Eng. C. L. 117.

17 Clark v. Periam, 2 Atk. 333, 339, 26 Eng. Repr. 603, 606; J'Anson v. Stuart, 1 T. R. 748, 752, 99 Eng. Repr. 1357, 1359.

1 Reasonable certainty is all that is required, the statutes against gambling being remedial. —Seal v. State, 21 Miss. (13 Smed. & M.) 286.

2 See authorities next footnote.

A wrong designation of the crime in the information does not render it obnoxious to a demurrer if it be otherwise sufficient.—State v. Robey, 74 Wash. 562, 134 Pac. 174.

"Conducting a gambling game as owner" is not a proper designation, but the statute designates the person as a "common gambler" who commits that crime.—State v. Robey, 74 Wash. 562, 134 Pac. 174.

3 ALA.—Ward v. State, 22 Ala. 16; Tolbert v. State, 87 Ala. 27, 6 So. 284. FLA.—Tuberson v. State, 26 Fla. 472, 7 So. 858; Montgomery v. State, 40 Fla. 174, 24 So. 68. GA.—Brand v. State, 112 Ga. 25, 37 S. E. 100. IND.—Meyers

accused may plead an acquittal or a conviction as a bar to another prosecution for the same offense.[4] All the essential elements to constitute the offense sought to be charged must be set forth. Thus, in an indictment charging betting on a game, it must be alleged that the game was played.[5] Charging accused with "playing cards in a house for retailing spirituous liquors," the place is sufficiently identified if the name of the parties, and the proper number of the building are stated.[6] Charging accused did unlawfully play a game with cards at a public place, to-wit, a gambling house, is sufficient;[7] but alleging playing "at or near" a named place, is bad for uncertainty.[8] Charging three or more with card playing, it must be alleged that they played with each other.[9] An indictment or information charging keeping a pool room properly states the particular acts relied upon to support the charge;[10] but charging dealing monte for money, the indictment or information need not give the particulars attending and characterizing the game, such as the person playing, the room, the persons betting, and

v. State, 100 Ind. 251; Bickel v. State, 32 Ind. App. 656, 70 N. E. 548. KY.—Brooks v. Com., 98 Ky. 143, 32 S. W. 403; Perry v. Com., 5 Ky. L. Rep. 611, 6 Id. 134. MD.—Stearns v. State, 81 Md. 341, 32 Atl. 282. MO.—State v. Burke, 151 Mo. 136, 52 S. W. 226; State v. Howell, 83 Mo. App. 198. OHIO—Carper v. State, 27 Ohio St. 572. TENN. — Daubkins v. State, 21 Tenn. (2 Humph.) 424. TEX.—McKissick v. State, 2 Tex. 356; Hale v. State, 8 Tex. 171; Fullerton v. State, 75 S. W. 533. VA.—Bishop v. Com., 54 Va. (13 Gratt.) 785.

4 Com. v. Perrigo, 60 Ky. (3 Metc.) 5.

5 Dryfus v. State, 83 Ala. 54, 3 So. 430.

Charging accused unlawfully bet and wagered at a certain game with dice, but not alleging that any money or other thing of value was bet on said game, held insufficient.—Long v. State, 22 Tex. App. 194, 58 Am. Rep. 633, 2 S. W. 541.

6 Koenig v. State, 33 Tex. Cr. Rep. 367, 47 Am. St. Rep. 35, 26 S. W. 835.

7 Griffin v. State, 43 Tex. Cr. Rep. 428, 66 S. W. 782; Gerstenkorn v. State, (Tex.) 66 S. W. 568.

8 Bishop v. Com., 54 Va. (13 Gratt.) 785.

9 Parker v. State, 26 Tex. 204.

10 Earlich v. Com., 125 Ky. 742, 128 Am. St. Rep. 269, 10 L. R. A. (N. S.) 995, 102 S. W. 289.

the like.[11] An indictment or information charging the crime of dealing in and selling futures, need not allege an actual sale;[12] but an attempt to allege a separate offense on each day of successive days on which such sales were made or attempted, not setting out in distinct counts the different days on which each offense occurred, but attempting to charge in one count a separate offense for each day, the indictment or information is vicious, and will not be cured by a ruling of the court confining the prosecution to one day only.[13] Charging, in the language of the statute, that the accused kept a certain machine, the same being then and there a device on the result of the action of which money or other valuable thing is staked, the indictment or information is sufficient without alleging that such thing of value was then and there staked.[14] Keeping slot-machine charged, alleging time and place, where indictment or information charges that the accused, on a certain day, in a particular county and state "unlawfully and wilfully did, in a certain room," and so forth, "keep a certain slot-machine," it will be good, without the use of the words

11 People v. Saviers, 14 Cal. 29.

12 Scales v. State, 46 Tex. Cr. Rep. 296, 108 **Am. St. Rep.** 1014, 66 **L. R. A.** 730, 81 S. W. 947.

Bucket-shop charged to have been kept by accused, namely, an office, in which said bucket-shop, namely, said office, the accused did then and there conduct and permit the pretended buying and selling of stocks on margins and otherwise, without any intention of receiving and paying for the property so bought or of delivering the property so sold, held to be sufficient.—State v. Corcoran, 73 Vt. 404, 50 Atl. 1110.

Keeping place wherein is conducted the buying and selling of stocks, grains, shares of stock, and so forth, on margins, being unlawful by statute, an indictment or information charging accused with keeping a place wherein he conducted, and therein permitted persons named, and others unknown, to engage in the pretended business of buying and selling stocks in unknown corporations, and certain agricultural products, on margins, not intending to receive the same if purchased or to deliver the same if sold, held to be sufficient. — State v. Kentner, 175 Mo. 487, 77 S. W. 522.

13 Scales v. State, 46 Tex. Cr. Rep. 296, 108 **Am. St. Rep.** 1014, 66 **L. R. A.** 730, 81 S. W. 947.

14 Bobel v. People, 173 Ill. 19, 64 **Am. St. Rep.** 64, 50 N. E. 322.

"then and there" before the word "keep"; the reason assigned for this is the fact that the allegations as to time and place, being adverbial clauses, modify the verb "did keep," and that there is no other word in such indictment or information which they can modify.[15] Keeping a house for gambling, or suffering house to be used for gambling being prohibited by statute, an indictment or information alleging that accused permitted persons to bet and wager the "hire of a billiard table," was said to be insufficient because of its failure to allege that the "hire" was of any value, and its failure further to show of what such hire consisted;[16] but it has been said that playing for the price of the game,[17] such as bagatelle,[18] billiards,[19] pool,[20] ten-pins,[21] and the like, the loser to pay the price of the table or the alley, constitutes a violation of the gaming and gambling laws, although there are authorities to the effect that the mere fact that the loser of a game pays the charges therefor, does not show gaming within the meaning of the stat-

15 Bobel v. People, 173 Ill. 19, 64 **Am. St. Rep.** 64, 50 N. E. 322.

16 Carr v. State, 50 Ind. 178.

17 State v. Book, 41 Iowa 550, 20 **Am. Rep.** 609; State v. Miller, 53 Iowa 154, 4 N. W. 900.

18 People v. Cutler, 28 Hun (N. Y.) 465, 1 N. Y. Cr. Rep. 178.

19 IND. — Hamilton v. State, 75 Ind. 586; Middaugh v. State, 103 Ind. 78, 2 N. E. 292. MASS.—Murphy v. Rogers, 151 Mass. 118, 24 N. E. 35. N. J.—State v. Belvidere, 44 N. J. L. (15 Vr.) 350. N. H.—State v. Leighton, 23 N. H. 167. N. Y.—People v. Sergeant, 8 Cow. 139; People v. Harrison, 28 How. Pr. 247. OHIO—Ward v. State, 17 Ohio St. 32; Steuer v. Royal Cigar Co., 9 Ohio Cir. Dec. 456.

Playing the "rub" to determine which player shall pay for the use of the tables.—State v. Belvidere, 44 N. J. L. (15 Vr.) 350; People v. Sergeant, 8 Cow. (N. Y.) 139.

20 ARK. — State v. Sanders, 86 Ark. 353, 19 **L. R. A.** (N. S.) 913, 111 S. W. 454. GA.—Hopkins v. State, 122 Ga. 583, 69 **L. R. A.** 117, 2 **Ann. Cas.** 617, 50 S. E. 351. IND.—Hamilton v. State, 75 Ind. 586; Alexander v. State, 99 Ind. 450; Middaugh v. State, 103 Ind. 78, 2 N. E. 292. N. Y.—People v. Cutler, 28 Hun 465, 1 N. Y. Cr. Rep. 178. TEX.—State v. Howery, 41 Tex. 506.

Compare: Longworth v. State, 41 Tex. 508; Vanwey v. State, 41 Tex. 639; Tuttle v. State, 1 Tex. App. 364; Stone v. State, 3 Tex. App. 675.

21 State v. Records, 4 Harr. (Del.) 554; Mount v. State, 7 Ind. 654; State v. Hall, 32 N. J. L. (3 Vr.) 158.

ute.[22] Accused charged with unlawfully renting to another a house to be used as a place for playing games with cards, dice and dominoes, and for the purpose of dealing and exhibiting faro, monte, and other games inhibited by law, the indictment or information must further charge that the house is one of the houses inhibited by the statute from the playing of such games, and must state that such house is not a private residence and that the banking game and table-games were kept and exhibited for the purpose of gaming, to be sufficient.[23] Accused charged with unlawfully maintaining a house in a named city within the jurisdiction of the court, of which house he had charge, management and control, an indictment or information alleging that he did procure, suffer and permit persons to play and engage in games of chance with cards, for money and other things of value, but which does not charge that accused kept or maintained a gaming-table, gaming-implements, or a house for the purpose of gaming, and which does not allege that he procured or permitted any person to play for money, or for any other thing of value, in any game whatever, in any place directly or indirectly under his charge, control or management, will be insufficient, for the reason that it does not bring the accused within the prohibition of the statute.[24]

§ 710. —— LANGUAGE OF STATUTE. The general rule, applicable to all statutory crimes, permitting the offense to be charged in the language of the statute, applies to gambling in all its phases; hence, an indictment or information following the language of the statute defining

22 ILL.—Harbaugh v. People, 40 Ill. 294. KY.—Wakefield v. Com., 7 Ky. L. Rep. 295. LA.—State v. Quaid, 43 La. Ann. 1076, 26 Am. St. Rep. 207, 10 So. 183. MISS.—Blewett v. State, 34 Miss. 606. N. J.—State v. Hall, 32 N. J. L. (3 Vr.) 158; State v. Belvidere, 44 N. J. L. (15 Vr.) 350. N. Y.—People ex rel. Healey v. Forbes, 52 Hun 30, 4 N. Y. Supp. 757.

23 Eylar v. State, 37 Tex. Cr. Rep. 257, 39 S. W. 665.

24 Montgomery v. State, 40 Fla. 174, 24 So. 68.

the particular phase of the crime, or the particular game, place, device, and the like, will be sufficient.[1] The exact

[1] ALA.—State v. Atkyns, 1 Ala. 180; Clark v. State, 19 Ala. 552; Smith v. State, 22 Ala. 54; Rodgers v. State, 26 Ala. 76; Burnett v. State, 30 Ala. 19 (gaming); Harris v. State, 31 Ala. 362. ARK. — State v. Grider, 18 Ark. 297; Medlock v. State, 18 Ark. 363; Portis v. State, 27 Ark. 360 (exhibiting gambling device); Fortenbury v. State, 47 Ark. 188, 1 S. W. 58 (dealing in futures); Riley v. State, 120 Ark. 450, 179 S. W. 661 (keeping a gaming-table). CAL.—People v. Saviers, 14 Cal. 29 (monte); People v. Carroll, 80 Cal. 153, 22 Pac. 129 (banking game). ILL.—Blemer v. People, 76 Ill. 265; Bobel v. People, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322 (keeping slot machine). IND. — State v. Miller, 5 Blackf. 502; McAlpine v. State, 3 Ind. 567; Kleespies v. State, 106 Ind. 383, 7 N. E. 186; State v. Bridgewater, 171 Ind. 725, 85 N. E. 715; Fisher v. State, 2 Ind. App. 365, 28 N. E. 565 (renting house to be used for gambling); Emperly v. State, 13 Ind. App. 393, 41 N. E. 840 (keeping building or room for gambling). KAN.—State v. Turner, 87 Kan. 449, 124 Pac. 424 (keeping gambling device). KY.—Com. v. Lampton, 7 Ky. (4 Bibb) 261; Lancaster Hotel Co. v. Com., 149 Ky. 443, 149 S. W. 942; Com. v. Starr, 160 Ky. 260, 169 S. W. 743 (operating a pool-room to bet on races). LA.—State v. George, 34 La. Ann. 261. MD.—Wheeler v. State, 42 Md. 563 (keeping a gaming-table). MASS.—Com. v. Swain, 160 Mass. 354, 35 N. E. 862. MO.—State v. Ellis, 4 Mo. 474; Spratt v. State, 8 Mo. 247; State v. Bates, 10 Mo. 166; State v. Kesslering, 12 Mo. 561; State v. Austin, 12 Mo. 576; State v. Herryford, 19 Mo. 378; State v. Nelson, 19 Mo. 393; State v. Scaggs, 33 Mo. 92; State v. Stogsdale, 67 Mo. 630; State v. Kentner, 178 Mo. 487, 15 Am. Cr. Rep. 35, 77 S. W. 523 (keeping a bucket-shop); State v. Cannon, 232 Mo. 205, 134 S. W. 513 (keeping gaming-tables); State v. Johns, 259 Mo. 361, 168 S. W. 587 (keeping gaming-devices); State v. Runzi, 105 Mo. App. 319, 80 S. W. 36; State v. Ramsauer, 140 Mo. App. 401, 124 S. W. 67; State v. Leaver, 171 Mo. App. 371, 157 S. W. 821. MONT.—State v. Ross, 38 Mont. 319, 99 Pac. 1056 (stud poker). N. Y.—People v. Adams, 176 N. Y. 351, 98 Am. St. Rep. 675, 63 L. R. A. 406, 17 N. Y. Cr. Rep. 558, 19 N. Y. Cr. Rep. 425, 68 N. E. 636, affirming 85 App. Div. 390, 83 N. Y. Supp. 401; affirmed, 192 U. S. 585, 48 L. Ed. 575, 24 Sup. Ct. Rep. 372 (having in possession gambling paraphernalia); People v. Corbalis, 86 App. Div. 531, 17 N. Y. Cr. Rep. 469, 83 N. Y. Supp. 782; reversed on another point, 178 N. Y. 516, 18 N. Y. Cr. Rep. 356, 71 N. E. 106; People v. Kelly, 3 N. Y. Cr. Rep. 272 (keeping book-making room). N. C.—State v. Howe, 100 N. C. 449, 5 S. E. 671 (keeping gaming-table). OHIO—Davis v. State, 32 Ohio St. 24. ORE. — Frisbie v. State, 1 Ore. 264; State v. Carr, 6 Ore. 133; State v. Light, 17 Ore. 358, 8 Am. Cr. Rep. 358, 21 Pac. 132 (playing

language of the statute is not required,[2] provided the offense is described with clearness and certainty,[3] and the words made use of are of substantially the same meaning and import as the words of the statute,[4] stating the acts constituting the offense in ordinary and concise lan-

stud poker). TEX.—Bosshard v. State, 25 Tex. Supp. 207; Blair v. State, 32 Tex. 474; State v. Stewart, 35 Tex. 499; Polk v. State, 69 Tex. Cr. Rep. 430, 154 S. W. 988 (maintaining policy-game). VA.—Leath v. Com., 73 Va. (32 Gratt.) 873. WASH.—Schilling v. Territory, 2 Wash. Ter. 283, 5 Pac. 926; State v. Wilson, 9 Wash. 16, 36 Pac. 967.

Contra: State v. McMillan, 69 Vt. 105, 37 Atl. 278, holding an indictment for keeping a bucket-shop bad, although it followed the words of the statute, because it simply charged the accused by inference.

Betting on election charged substantially in the language of statute, is sufficient.—State v. Ragan, 22 Mo. 459.

Dealing in futures charged in the language of the statute, is sufficient.—Fortenbury v. State, 47 Ark. 188, 1 S. W. 58.

Keeping billiard-tables without license, in language of the statute, is good.—State v. Kesslering, 12 Mo. 565; State v. Austin, 12 Mo. 576.

Keeping book-making room charged in the language of the statute defining the offense, is sufficient.—People v. Kelly, 3 N. Y. Cr. Rep. 272.

Suffering gambling device to be set up and used for purpose of gaming charged in the language of the statute, sufficient.—Frisbie v. State, 1 Ore. 264.

2 Drummond v. Republic, 2 Tex. 156.

3 Lord v. State, 16 N. H. 325, 41 **Am. Dec.** 729. See, also, State v. Price, 12 Gill & J. (Md.) 260, 37 **Am. Dec.** 81.

4 CONN.—State v. Scott, 80 Conn. 317, 68 Atl. 258 (pool-selling). FLA.—McBride v. State, 39 Fla. 442, 22 So. 711 (keeping room or house for gambling). IND.—State v. Frederick, 183 Ind. 509, 109 N. E. 747 (where the indictment charged accused with visiting a "gaming house" and the statute denounced the offense as visiting a "gambling house"). IOWA—State v. Middleton, 11 Iowa 246. LA.—State v. George, 34 La. Ann. 261. MD.—State v. Price, 12 G. & J. 260, 37 **Am. Dec.** 81. R. I.—State v. Marchant, 15 R. I. 539, 7 **Am. Cr. Rep.** 217, 9 Atl. 902 (keeping a gambling place). TEX.—Drummond v. Republic, 2 Tex. 156; McGaffey v. State, 4 Tex. 156; Estes v. State, 10 Tex. 300. VA.—Leath v. Com., 73 Va. (32 Gratt.) 873 (using word "and" instead of "or").

Where the statute read "his" house but the indictment read "a" house.—State v. Hubbard, 3 Ind. 530.

Superfluous allegations added to the words of the statute, showing a cause not within the statute, will render the indictment bad on demurrer.—State v. Mahan, 2 Ala. 340.

guage, and in such a way that a person of common understanding may know what is intended.[5] However, whether the indictment or information follows the language of the statute, or substantially follows that language, to be sufficient, it must inform the accused with reasonable certainty of the nature of the charge against him,[6] and be such as to enable him to plead a judgment of conviction or acquittal in bar of a second prosecution for the same offense.[7] Hence, where the statute is drawn in such generic terms that, by the use of its language, the accused is not sufficiently notified as to what he has to meet, an indictment or information following the language of the statute will be insufficient.[8]

Form prescribed by code or statute being followed, the indictment or information will be sufficient, although it characterizes the game as being played "at an out-house where people resort," instead of the statutory words "where people resorted at the time of the commission of the offense."[9]

§ 711. —— NEGATIVING EXCEPTIONS AND PROVISOS. The general rule of criminal pleading relative to negativing exceptions in the enacting clause,[1] in the definition of the crime, or in the particular clause applicable to the offense charged, applies to the crimes of games and gam-

5 People v. Saviers, 14 Cal. 29; Tuberson v. State, 26 Fla. 472, 7 So. 858; Bagley v. State, 20 Tenn. (1 Humph.) 486.

"All the elements necessary to constitute the crime must be averred, and these elements must be gathered from the statute describing the offense, and in allunde."—Davis v. State, 32 Ohio St. 24.

6 State v. Ramsauer, 140 Mo. App. 401, 124 S. W. 67.

7 ARK.—Parrott v. State, 10 Ark. 574; Moffatt v. State, 11 Ark. 169; Jester v. State, 14 Ark. 552; Barkman v. State, 13 Ark. 703. FLA.—Groner v. State, 6 Fla. 39; Sharp v. State, 28 Fla. 357, 9 So. 651. KY.—Com. v. Lampton, 7 Ky. (4 Bibb) 261. NEB.—Moore v. State, 96 N. W. 196.

8 State v. Leaver, 171 Mo. App. 371, 157 S. W. 821.

9 Burnett v. State, 30 Ala. 19.

1 Jefferson v. People, 101 N. Y. 19, 3 N. Y. Cr. Rep. 572, 3 N. E. 797.

ing in all their phases,[2] and such exceptions must be properly and clearly negatived in the indictment or information,[3] in order to bring the subject—e. g., the game, the place, the table, and the like—or the accused under the provisions of the statute by showing that such subject or person is not within such exception;[4] although there is authority to the effect that where the exception occurs in any clause other than the enacting clause, it is a matter of defense purely, and need not be pleaded.[5] The better doctrine is thought to be that where the excep-

2 State v. Dupies, 91 Ind. 233; Colchell v. State, 23 Tex. App. 584, 5 S. W. 139.

Where gaming with dice is prohibited except where the game is played at a private residence the information must negative that the gaming was at a private residence.—Borders v. State, (Tex.) 66 S. W. 1102.

An indictment charging betting at cards was held insufficient for not negativing the fact that the offense occurred in a private dwelling.—George v. State, 65 Tex. Cr. Rep. 91, 488, 143 S. W. 621, 144 S. W. 1138.

Charge ex natura rei conclusively importing a negative, the general rule does not apply.—State v. Price, 12 G. & J. (Md.) 260, 37 Am. Dec. 81.

Under N. Y. Pen. Code, § 351, the indictment should negative that the room was not on a race course authorized by statute, because under another statute a different penalty is prescribed in such case. — People v. Stedeker, 175 N. Y. 57, 17 N. Y. Cr. Rep. 326, 67 N. E. 132, reversing 75 App. Div. 449, 17 N. Y. Cr. Rep. 127, 78 N. Y. Supp. 316.

3 ALA.—Clark v. State, 19 Ala. 552. IND. — State v. Dupies, 91 Ind. 233. MD.—Stearns v. State, 81 Md. 341, 32 Atl. 282. N. Y.—Jefferson v. People, 101 N. Y. 19, 3 N. Y. Cr. Rep. 572, 3 N. E. 797; People v. Stedeker, 175 N. Y. 57, 17 N. Y. Cr. Rep. 326, 67 N. E. 132, reversing 75 App. Div. 449, 17 N. Y. Cr. Rep. 127, 78 N. Y. Supp. 316. S. C.—State v. Reynolds, 2 Nott & M. 365. TENN.—State v. Posey, 20 Tenn. (1 Humph.) 384. TEX.—Colchell v. State, 23 Tex. App. 584, 5 S. W. 139; Russell v. State, 44 Tex. Cr. Rep. 465, 72 S. W. 190; Borders v. State, 66 S. W. 1102.

Exception to the rule applies in those cases in which the charge preferred ex natura rei conclusively imports a negative of the exception.—State v. Price, 12 Gill & J. (Md.) 260, 37 Am. Dec. 81.

4 ALA.—Clark v. State, 19 Ala. 552. IND.—State v. Dupies, 91 Ind. 233. IOWA — Romp v. State, 3 G. Greene 278. MD. — Stearns v. State, 81 Md. 341, 32 Atl. 282. S. C.—Reynolds v. State, 2 Nott & M. 365. TEX.—Colchell v. State, 23 Tex. App. 584, 5 S. W. 139.

5 Jefferson v. People, 101 N. Y. 19, 3 N. Y. Cr. Rep. 572, 3 N. E. 797.

tion is set out in a clause other than the enacting clause or the clause under which the prosecution is had, there is no necessity for negativing such exception.[6]

Provisos are not required to be negatived.[7]

§ 712. —— ALTERNATIVE AND DISJUNCTIVE ALLEGATIONS. The decisions are not harmonious regarding the point whether alternative and disjunctive allegations in an indictment or information charging gaming are sufficient; according to some decisions, the allegation must not be in the alternative,[1] and when in the alternative the indictment may be quashed on special demurrer;[2] but the weight of authority is to the effect that where offenses are of the same general character and subject to the same punishment, accused may in the same count be charged in the alternative with the commission of either offense;[3] that is to say, if a game may be carried on by either of different means named, or at either of different places set out in the statute, the indictment or information may allege the means or the place in the alternative.[4] Thus, an indictment alleging that accused "bet at a certain gaming table or bank, to-wit, a pool-table," has been held to be good;[5] and an indictment charging that accused "bet at a game of hazard or skill" was held to be sufficient where it afterward set out that the game was one of "craps."[6] On the other hand, a charge that accused "played at a game of cards at or near" a designated

6 Clark v. State, 19 Ala. 554; Romp v. State, 3 G. Greene 276.

7 Clark v. State, 19 Ala. 552.

1 Cooper v. State, 9 Ga. App. 877, 72 S. E. 436.

2 An indictment alleging that the accused on a certain day "did play and bet for money or other thing of value, at a game played with cards" should have been quashed. —Cooper v. State, 9 Ga. App. 877, 72 S. E. 436.

3 ALA. — Burdine v. State, 25 Ala. 60; Ford v. State, 123 Ala. 81, 26 So. 503. GA.—Wingard v. State, 13 Ga. 396. TEX.—Hart v. State, 2 Tex. App. 39.

Compare: Stearns v. State, 81 Md. 341, 32 Atl. 282; Bishop v. Com., 54 Va. (13 Gratt.) 785.

4 State v. Hester, 48 Ark. 40, 2 S. W. 339; State v. Carr, 6 Ore. 133.

Compare: Com. v. Perrigo, 60 Ky. (3 Metc.) 5.

5 Moon v. State, (Tex.) 100 S. W. 1161.

6 State v. Hester, 48 Ark. 40, 2 S. W. 339.

place, has been held bad for uncertainty;[7] also charging accused with gambling "on a trotting or running race" without specifically alleging whether the race was a "trotting" or a "running" race;[8] and where the indictment charged accused suffered persons to play in a house, or on premises in the county, then in the occupancy and under control of the accused, a game of cards, at which game of cards, played as aforesaid, money or property was lost and won, it was held defective for uncertainty.[9]

§ 713. —— Allegation of intent. Where, under the statute relative to games and gaming, intent is not an ingredient of the offense, the indictment or information need not contain an allegation charging intent on the part of the accused.[1] Thus, where the statute positively inhibits exhibiting a faro bank,[2] keeping a bucket-shop[3] or a house for gaming,[4] or suffering gaming on one's premises,[5] an allegation of intent is not necessary. But where, under the statute, intent is a necessary element either directly or by implication in the offense charged, such intent on the part of the accused must be alleged, or the indictment or information will be insufficient.[6]

7 Bishop v. Com., 54 Va. (13 Gratt.) 785.

8 Stearns v. State, 81 Md. 341, 32 Atl. 282.

9 Com. v. Perrigo, 60 Ky. (3 Metc.) 5.

1 ARK. — State v. Holland, 22 Ark. 242. KY.—Linebaugh v. Com., 7 Ky. L. Rep. 295. MASS.—Com. v. Smith, 166 Mass. 370, 44 N. E. 503. MO.—State v. Kentner, 178 Mo. 487, 15 Am. Cr. Rep. 35, 77 S. W. 522. N. Y.—People v. Adams, 176 N. Y. 351, 98 Am. St. Rep. 675, 63 L. R. A. 406, 17 N. Y. Cr. Rep. 558, 19 N. Y. Cr. Rep. 425, 68 N. E. 636, affirming 85 App. Div. 390, 83 N. Y. Supp. 481; affirmed, 192 U. S. 585, 48 L. Ed. 575, 24 Sup. Ct. Rep. 372. TEX.—Stringfellow v. State, 23 S. W. 893; Otto v. State, 25 S. W. 285.

2 State v. Holland, 22 Ark. 242.

3 State v. Kentner, 178 Mo. 487, 15 Am. Cr. Rep. 35, 77 S. W. 523.

4 State v. Cure, 7 Iowa 479.

5 Linebaugh v. Com., 7 Ky. L. Rep. 295; Wakefield v. Com., (Ky.) 7 Crim. L. Mag. 385; Stringfellow v. State, (Tex.) 23 S. W. 893.

6 CONN.—State v. Carpenter, 60 Conn. 97, 22 Atl. 497; State v. Falk, 66 Conn. 250, 33 Atl. 913. IND. — Emperly v. State, 13 Ind. App. 393, 41 N. E. 840. IOWA—State v. Cure, 7 Iowa 479. VT.—State v. Corcoran, 73 Vt. 404, 50

§ 714. —— ALLEGATION AS TO KNOWLEDGE. Whether or not an indictment or information, under the games and gaming laws, should contain an allegation as to knowledge on the part of the accused, like the question of intent,[1] depends almost wholly upon the statutory provisions. Thus, it has been said that under a statute imposing a fine on any person who suffers any game whatever, at which money or property is won or lost, to be played on premises under his control, an indictment or information is not demurrable because it fails to allege that the game was suffered or permitted with the knowledge of the accused, where the indictment follows the language of the statute.[2] Knowledge is sufficiently shown where the charge alleged is that of permitting the game on the premises;[3] but where the offense denounced by the statute is that of "knowingly" keeping a building to be used or occupied for gambling purposes, knowledge must be alleged.[4] The charge being that of engaging in the business of sending money outside of the state to be bet on horse races, the indictment or information must allege that the accused had knowledge of the unlawful purpose for which the money was sent.[5]

§ 715. —— ALLEGATION OF NAMES OF PLAYERS. The question whether an indictment or information charging gambling must set out the names of the players, like the question of intent[1] and of knowledge,[2] is one depending largely upon the provisions of the particular statute under which the indictment is drawn.[3] Governed by the varying statutory provisions under which the decisions

Atl. 1110. FED.—Washington v. Cooly, 4 Cr. C. C. 103, Fed. Cas. No. 17226.

1 See, supra, § 713.

2 Bunnell v. Com., 30 Ky. L. Rep. 491, 99 S. W. 237.

3 State v. Kaufman, 59 Iowa 273.

4 Emperly v. State, 13 Ind. App. 393, 41 N. E. 840.

5 State v. Folk, 66 Conn. 250, 33 Atl. 913.

1 See, supra, § 713.

2 See, supra, § 714.

3 ARK.—Drew v. State, 10 Ark. 82; Parrott v. State, 10 Ark. 574; Moffatt v. State, 11 Ark. 169; Barkman v. State, 13 Ark. 703; Jester v. State, 14 Ark. 552; Orr

were made, some of the cases hold that the indictment or information need not identify the players,[4] naming them,[5] while there are many other authorities holding that the names of the players must be alleged,[6] or an allegation that their names are to the grand jurors unknown.[7] In the absence of statutory provision, it is thought that where the playing is not the essence of the

v. State, 18 Ark. 540; Goodman v. State, 41 Ark. 228. FLA.—Sharp v. State, 28 Fla. 357, 9 So. 651. GA.—Hinton v. State, 68 Ga. 322. ILL.—Green v. People, 21 Ill. 125. IND.—Butler v. State, 5 Blackf. 280; State v. Little, 6 Blackf. 267; State v. Stallings, 3 Ind. 531. KY.—Com. v. Lampton, 7 Ky. (4 Bibb) 261. NEB.—Moore v. State, 96 N. W. 196.

See, also, discussion, infra, § 728.

4 Hicks v. State, 16 Ga. App. 228, 84 S. E. 837.

5 ARK. — Goodman v. State, 41 Ark. 228. FLA.—Sharp v. State, 28 Fla. 357, 9 So. 651. GA.—Hinton v. State, 68 Ga. 322. ILL.—Green v. People, 21 Ill. 125. IOWA—Romp v. State, 3 G. Greene 276. MASS.—Com. v. Swain, 160 Mass. 354, 35 N. E. 862; Com. v. Coleman, 184 Mass. 198, 68 N. E. 220. OHIO—Carper v. State, 27 Ohio St. 572; Roberts v. State, 32 Ohio St. 171. OKLA.—Schweizer v. Terr., 5 Okla. 297, 47 Pac. 1094; State v. Carter, 2 Okla. Cr. 706, 103 Pac. 1042. ORE. — State v. Light, 17 Ore. 358, 8 Am. Cr. Rep. 326, 21 Pac. 132. TENN.—State v. McBride, 27 Tenn. (8 Humph.) 66. TEX.—Johnson v. State, 36 Tex. 198.

An indictment for permitting poker playing need not give the names of the players.—State v. Radmilovich, 40 Mont. 93, 105 Pac. 91.

While giving the names of the players is unnecessary, yet when given they must be proved as laid. —Hany v. State, 9 Ark. 193.

Misnomer can not be pleaded to an indictment for a violation of the statute prohibiting gaming.—Com. v. Adkinson, 2 Va. Cas. 513.

6 ARK. — Parrott v. State, 10 Ark. 574; Jester v. State, 14 Ark. 552. FLA.—Groner v. State, 6 Fla. 39; Sharp v. State, 28 Fla. 357, 9 So. 651. GA.—Davis v. State, 22 Ga. 101. IND.—State v. Irvin, 5 Blackf. 343; Ball v. State, 7 Blackf. 242; State v. Stallings, 3 Ind. 531; Alexander v. State, 48 Ind. 394. NEB.—Moore v. State, 69 Neb. 653, 96 N. W. 196. OHIO—Davis v. State, 7 Ohio 204.

Christian name of one of the players omitted, held not to vitiate the indictment.—Com. v. Lampton, 7 Ky. (4 Bibb) 261.

7 ARK.—Orr v. State, 18 Ark. 540. IND. — State v. Maxwell, 5 Blackf. 230; Butler v. State, 5 Blackf. 280; Webster v. State, 8 Blackf. 400; Alexander v. State, 48 Ind. 394. MISS.—Johnston v. State, 15 Miss. 58. NEB.—Moore v. State, 69 Neb. 653, 96 N. W. 196. N. H.—State v. Prescott, 33 N. H. 212. TENN.—State v. Trotter, 13 Tenn. (5 Yerg.) 184. TEX.—State v. Ake, 9 Tex. 322.

offense, and where the transaction is otherwise sufficiently identified, the names of the players need not be stated.[8] But in the case of an indictment charging the keeping of a gambling-house, the names of the players need not be set out,[9] nor need it be averred that their names are to the grand jury unknown.[10]

§ 716. —— BETTING AT GAMING TABLE OR DEVICE. Under a statute inhibiting the keeping of named gaming-tables and devices, an indictment or information charging betting at such a table or device, without further allegation, is sufficient;[1] but where the table or device is other than one which is named in the statute, the indictment or information should charge that the same was exhibited or kept for purposes of gaming.[2] And where a number of persons are charged with betting at faro, or any other game of like nature, in which the players bet against the

8 ARK.—Drew v. State, 10 Ark. 82; Orr v. State, 18 Ark. 540; Goodman v. State, 41 Ark. 228. COLO.—Chase v. People, 2 Colo. 509. GA.—Hinton v. State, 68 Ga. 322. ILL.—Green v. People, 21 Ill. 125. IOWA—Romp v. State, 3 G. Greene 276. MASS.—Com. v. Swain, 160 Mass. 354, 35 N. E. 862; Com. v. Coleman, 184 Mass. 198, 68 N. E. 220. MINN.—State v. Crummey, 17 Minn. 72. N. H.—State v. Prescott, 33 N. H. 212. OHIO—Carper v. State, 27 Ohio St. 572; Roberts v. State, 32 Ohio St. 171. OKLA.—Sweitzer v. Territory, 5 Okla. 297, 47 Pac. 1094. ORE.—State v. Light, 17 Ore. 358, 21 Pac. 132. TENN.—State v. McBride, 27 Tenn. (8 Humph.) 66. TEX.—Johnson v. State, 36 Tex. 198; Day v. State, 27 Tex. App. 143, 11 S. W. 36. WASH.—Schilling v. Territory, 2 Wash. Ter. 283, 5 Pac. 926; Foster v. Territory, 1 Wash. 411, 25 Pac. 459; State v. Wilson, 9 Wash. 16, 36 Pac. 967.

9 Carpenter v. State, 14 Ind. 109; State v. Crummey, 17 Minn. 72; State v. Prescott, 33 N. H. 212.

Contra: Buck v. State, 1 Ohio St. 61.

10 State v. Crummey, 17 Minn. 72.

Contra: Buck v. State, 1 Ohio St. 61.

1 State v. Burton, 25 Tex. 420; Booth v. State, 26 Tex. 203; State v. Blair, 41 Tex. 30; Anderson v. State, 9 Tex. App. 177.

2 Crow v. State, 6 Tex. 334; Randolph v. State, 9 Tex. 521; Booth v. State, 26 Tex. 203; State v. Blair, 41 Tex. 30; Negro Ben v. State, 9 Tex. App. 107; Anderson v. State, 9 Tex. App. 177; Wardlow v. State, 18 Tex. App. 356.

"bank" or dealer, they should be charged with having severally bet.[3]

§ 717. KEEPING GAMING-TABLE OR DEVICE—IN GENERAL. Where the statute inhibits the keeping of a gaming-table or device for purposes of gaming, an indictment or information is sufficient which charges that the accused did then and there unlawfully keep and exhibit, for the purpose of gaming, a certain gaming-table and bank,[1] or that he suffered to be carried and exhibited a gaming-table called a faro bank,[2] although it is not necessary to allege the name of the particular table or device prohibited by statute.[3] The early federal cases, however, hold that the indictment should allege that it was a common gaming-table or device.[4] Where the particular game or gaming-table designated in the indictment or informa-

3 Johnson v. State, 13 Ark. 684; Barkman v. State, 13 Ala. 703; Ward v. State, 22 Ala. 16.

1 ALA. — State v. Whitworth, 8 Port. 432. CAL.—People v. Sam Lung, 70 Cal. 515, 11 Pac. 673. DAK.—People v. Sponsler, 1 Dak. 289, 46 N. W. 459; People v. Wambole, 1 Dak. 301, 46 N. W. 463. DEL.—State v. Norton, 9 Houst. 586, 33 Atl. 438. IND.—App v. State, 90 Ind. 73; Keith v. State, 90 Ind. 89; Pemberton v. State, 85 Ind. 507. OHIO—Davis v. State, 32 Ohio St. 24. OKLA.—Johnson v. State, 10 Okla. Cr. 597, 140 Pac. 622, overruling Proctor v. Territory, 18 Okla. 378, 92 Pac. 389. TEX. — Longworth v. State, 41 Tex. 508; Parker v. State, 13 Tex. App. 213; Adams v. State, 29 S. W. 384; Perkins v. State, 33 S. W. 341; Rabby v. State, 37 S. W. 741; Ranirez v. State, 40 S. W. 278. WASH. — Foster v. Territory, 1 Wash. 411, 25 Pac. 459; State v. Wilson, 9 Wash. 16, 36 Pac. 967.

2 Clark v. State, 19 Ala. 552; State v. Burton, 25 Tex. 420; State v. Blair, 41 Tex. 30; Anderson v. State, 9 Tex. App. 177.

3 Bibb v. State, 83 Ala. 84, 3 So. 711; People v. Wambole, 1 Dak. 301, 46 N. W. 463; People v. Sponsler, 1 Dak. 289, 46 N. W. 459; Irvin v. State, 52 Fla. 51, 10 Ann. Cas. 1003, 41 So. 785; Pemberton v. State, 85 Ind. 507.

Nature or kind of table need not be set forth.—Irvin v. State, 52 Fla. 5, 10 Ann. Cas. 1003, 41 So. 785.

4 United States v. McCormick, 4 Cr. C. C. 104, Fed. Cas. No. 15661; United States v. Smith, 4 Cr. C. C. 629, Fed. Cas. No. 16328; United States v. Cooly, 4 Cr. C. C. 707, Fed. Cas. No. 14859; United States v. Ringold, 5 Cr. C. C. 378, Fed. Cas. No. 16167; United States v. Milburn, 5 Cr. C. C. 390, Fed. Cas. No. 15768; Marcus v. United States, 2 Hayw. & H. 347, Fed. Cas. No. 9062a.

tion—e. g., billiards, faro, monte, pool, roulette, tan, and the like—is named in the statute, it is unnecessary to allege that it was exhibited for the purpose of gaming, as that fact will be inferred as a matter of law.[5] The gaming-table or gaming device being named or described in the statute, an indictment or information, in the language of the statute,[6] will be sufficient;[7] but it will be otherwise where the tables, instruments or devices are not named in the statute, in which case they must be so described as to show that they are prohibited tables, instruments and devices within the meaning and prohibition of the statute.[8]

§ 718. —— ALLEGATION AS TO GAME AND PERSON CONDUCTING. An indictment or information charging accused

[5] ALA. — State v. Whitworth, 8 Port. 432. ARK.—State v. Holland, 22 Ark. 242. KY.—Com. v. Monarch, 69 Ky. (6 Bush) 298; Waddell v. Com., 84 Ky. 276, 1 S. W. 480. TEX. — Booth v. State, 26 Tex. 203; Wardlow v. State, 18 Tex. App. 356. VA.—Leath v. Com., 73 Va. (32 Gratt.) 873. WASH.—State v. Wilson, 9 Wash. 16, 36 Pac. 967.

See, however, infra, § 718, footnotes 3 and 4.

An indictment for keeping a gaming table must charge that the defendant was interested in the loss or gain of the table, this being required by statute.—Brazele v. State, 86 Miss. 286, 38 So. 318.

[6] **As to indictment or information in the language of the statute**, see, supra, § 710.

[7] ARK.—Brown v. State, 10 Ark. 607; Portis v. State, 27 Ark. 360. KAN.—Rice v. State, 3 Kan. 141. KY.—Montee v. Com., 26 Ky. (3 J. J. Marsh.) 132; Com. v. Monarch, 69 Ky. (6 Bush) 298; Waddell v. Com., 84 Ky. 276, 1 S. W. 480. MD.—Wheeler v. State, 42 Md. 563. TEX.—Campbell v. State, 2 Tex. App. 187; Jefferson v. State, 22 S. W. 148; Kinney v. State, 84 S. W. 590. VA.—Leath v. Com., 73 Va. (32 Gratt.) 873.

Compare: Rawls v. State, 70 Miss. 739, 12 So. 584.

[8] CAL.—Ex parte Williams, 7 Cal. Unrep. 301, 87 Pac. 565; People v. Carroll, 80 Cal. 153, 22 Pac. 129. DEL.—State v. Norton, 9 Houst. 586, 33 Atl. 438. IND.—Carr v. State, 50 Ind. 178. KAN.—Rice v. State, 3 Kan. 141. KY.—Holt v. Com., 65 Ky. (2 Bush) 33; Com. v. Monarch, 69 Ky. (6 Bush) 298; Jones v. Com., 8 Ky. L. Rep. 698, 3 S. W. 128; Com. v. Weirand, 8 Ky. L. Rep. 784. MO.—State v. Etchman, 184 Mo. 193, 83 S. W. 978; State v. Rosenblatt, 185 Mo. 114, 83 S. W. 975. TEX.—State v. Kelly, 24 Tex. 182; Longworth v. State, 41 Tex. 508; Kramer v. State, 18 Tex. App. 13; Longenotti v. State, 22 Tex. App. 61, 2 S. W. 620.

with unlawfully maintaining and exhibiting a gaming-table, prohibited by law, for the purposes of gaming, need not allege that the game to be, and usually played thereon, was an ordinary game for betting or hazard,[1] that any game was played thereon,[2] or that it was exhibited for gain;[3] but where it is charged that a game was played thereon, it need not be alleged that it was played for money or other thing of value,[4] although there are cases seemingly holding the contrary, under particular statutes.[5] And where the indictment or information charges that accused did wilfully and unlawfully carry on and conduct, and exhibit for gaming purposes a gaming-table prohibited by statute—e. g., the game of roulette, stud poker, tan, and the like—it need not set out the name of the person who carried on and conducted the game or exhibited the gaming-table,[6] nor state the capacity in which he conducted or carried on the prohibited game, whether he did so as employee or as owner of the game.[7]

§ 719. —— ALLEGATION AS TO PLACE OF KEEPING. An indictment or information charging accused with keeping a gaming-table or gambling devices prohibited by law, for the purpose of gaming, need not describe the particular town or the precise building or spot in and at which the offense charged was committed,[1] the state and county

1 Com. v. Monarch, 69 Ky. (6 Bush) 301.

2 McAlpine v. State, 3 Ind. 567; State v. Thomas, 50 Ind. 292; State v. Beedles, 50 Ind. 294; State v. Scraggs, 33 Mo. 92.

3 Leath v. Com., 73 Va. (32 Gratt.) 873.

4 Johnson v. State, 10 Okla. Cr. 579, 140 Pac. 622, overruling Proctor v. Territory, 18 Okla. 378, 92 Pac. 389.

5 See People v. Carroll, 80 Cal. 153, 22 Pac. 129; Brown v. Territory, 5 Okla. Cr. 41, 113 Pac. 219.

6 Clark v. State, 19 Ala. 552.

7 State v. Sam Lung, 70 Cal. 515, 11 Pac. 673; State v. Wakely, 43 Mont. 427, 117 Pac. 93; Johnson v. State, 10 Okla. Cr. 597, 140 Pac. 622; State v. Preston, 49 Wash. 298, 95 Pac. 82.

See Chase v. People, 2 Colo. 509; State v. Gray, 19 Mont. 206, 47 Pac. 900.

1 State v. Johnson, 24 S. D. 590, 124 N. W. 847.

being properly named,[2] where the statute does not make any particular place or locality an ingredient of the offense;[3] but where a particular place is designated, it must be proved as laid.[4] The only description of place requisite in the indictment or information is such as will show that the offense was committed within the proper county and state, no more particular averment being necessary.[5] Thus, where the statute prohibits playing at cards in certain places, but excludes a private residence, the indictment or information need not allege the place of the offense further than to negative that it was in a private residence.[6]

§ 720. Keeping gaming-house or room—In general. Where the statute prohibits a person from keeping a building or other place particularly described and designated in the statute, to be used for gaming purposes, it is generally sufficient for the indictment or information to follow the language of the statute.[1] It is generally sufficient to allege that the accused, at a certain time and place, then and there, did unlawfully and knowingly keep, for gambling purposes, a certain place, to-wit, a certain room for gambling,[2] or to charge that he kept a certain

2 Dohme v. State, 68 Ga. 339; App v. State, 90 Ind. 73; Keith v. State, 90 Ind. 89; Withers v. State, 21 Tex. App. 210, 17 S. W. 725.

3 Keith v. State, 90 Ind. 89.

4 Withers v. State, 21 Tex. App. 210, 17 S. W. 725.

5 State v. Oswald, 59 Kan. 508, 53 Pac. 525.

Particular locality of the county need not be set forth in an indictment for keeping a gaming table in a named county.—Parkhill v. State, 47 Fla. 88, 36 So. 170.

6 Osborn v. State, (Tex. Cr.) 72 S. W. 592; McAllister v. State, 55 Tex. Cr. Rep. 264, 116 S. W. 582.

1 CAL. — People v. Saviers, 14 Cal. 29 (even though the statute creates a new crime). IND.—State v. Hubbard, 3 Ind. 530; Enwright v. State, 58 Ind. 567; Padgett v. State, 68 Ind. 46; Hamilton v. State, 75 Ind. 586; Emperly v. State, 13 Ind. App. 303, 41 N. E. 840. IOWA — State v. Crogan, 8 Iowa 523. LA. — State v. Behan, 113 La. 754, 37 So. 714. MD.—Wheeler v. State, 42 Md. 563. MINN. — State v. Crummey, 17 Minn. 72. MO.—State v. Ellis, 4 Mo. 474. N. H.—State v. Noyes, 30 N. H. 279. R. I.—State v. Marchant, 15 R. I. 539, 9 Atl. 902.

2 Padgett v. State, 68 Ind. 46;

tenement resorted to for the purpose of illegal gaming,[3] it not being necessary to allege in direct terms that gaming was permitted by the accused,[4] or to charge ownership of the house.[5] It is not necessary to allege who permitted the gambling, because the proprietor of the establishment is responsible therefor;[6] nor need it be alleged that the games played were games of chance, or that they were played at a place or table where games of chance are played.[7]

§ 721. —— ALLEGATION AS TO PLACE OF KEEPING. An indictment or information charging accused with unlawfully keeping and maintaining a gaming-house or room, as in the case of keeping a gaming-table,[1] need not specifically describe the house, room or place,[2] it being sufficiently laid in a building within the county,[3] the only description of the house required being that it shall be located within the jurisdiction of the court;[4] but the indictment or in-

Wheeler v. State, 42 Md. 563; Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; State v. Crowder, 39 Tex. 47.

"Gambling," instead of "for purposes of gaming," held to be insufficient because too general.—State v. Bullion, 42 Tex. 77, overruling State v. Crowder, 39 Tex. 47.

3 ARK.—Vanderworker v. State, 13 Ark. 700. IND.—State v. Miller, 5 Blackf. 502; State v. Pancake, 74 Ind. 15. ME.—State v. Eaton, 85 Me. 237, 27 Atl. 126. MASS.—Com. v. Stowell, 50 Mass. (9 Metc.) 572; Com. v. Edds, 80 Mass. (14 Gray) 406; Com. v. Baker, 155 Mass. 287, 29 N. E. 512.

Charging house kept with intent that persons "might" resort thereto, instead of "should" resort thereto, for gaming, does not vitiate the indictment.—State v. Griffin, 84 N. J. L. 429, 87 Atl. 138.

4 Com. v. Crupper, 33 Ky. (3 Dana) 466.

5 State v. Grimes, 74 Minn. 257, 77 N. W. 4.

6 State v. Ellis, 4 Mo. 474.

7 State v. Morgan, 133 N. C. 743, 45 S. E. 1033.

1 See, supra, § 719.

2 State v. Prescott, 33 N. H. 212.

3 Parkhill v. State, 47 Fla. 88, 36 So. 170; Dohme v. State, 68 Ga. 339; State v. Prescott, 33 N. H. 212; Rasor v. State, 57 Tex. Cr. 10, 121 S. W. 512.

4 Dohme v State, 68 Ga. 339; State v. Prescott, 33 N. H. 212; People v. Stedeker, 175 N. Y. 75, 17 N. Y. Cr. Rep. 326, 67 N. E. 132, reversing 75 App. Div. 449, 17 N. Y. Cr. Rep. 127, 78 N. Y. Supp. 316.

There need be no particular description of the house for the purpose of identifying it.—Sublett v. State, 9 Tex. 53.

formation must distinctly allege that the gaming-house or room is located, and the offense was committed within the jurisdiction of the court.[5] The particular kind of gambling allowed,[6] or the particular kind of gambling-table kept[7] by the accused, need not be alleged.

§ 722. ——ALLEGATION AS TO USE OF HOUSE OR ROOM. In an indictment or information charging accused with keeping a gaming-house or room, it is not necessary to allege that gaming actually took place therein,[1] the essence of the crime consisting in the maintaining of the prohibited place regardless of whether accused secured customers or not.[2] The question of intention in such a case is merely a matter of proof, and if that can be established, it is immaterial whether the prohibited establishment shall do the prohibited business.[3]

§ 723. —— ALLEGATION AS TO PERSONS RESORTING, ETC. In an indictment or information charging the unlawful keeping and maintaining of a gaming-house or room, it is not necessary to allege that persons did actually resort to the same, for the purpose of gaming or playing at pro-

5 Mohan v. State, 42 Tex. Cr. 410, 60 S. W. 552.

An allegation that the defendant "in the county of Navarro and state of Texas, did then and there unlawfully rent" to another for gaming purposes is not an allegation that the house was situated in that county, and the indictment is therefore defective.—Eylar v. State, 37 Tex. Cr. Rep. 257, 39 S. W. 665.

6 ARK.—Vanderworker v. State, 13 Ark. 700. IND.—State v. Miller, 5 Blackf. 502. MD.—Wheeler v. State, 42 Md. 563. MASS.—Com. v. Edds, 80 Mass. (14 Gray) 406. N. H.—State v. Prescott, 33 N. H. 212. N. C.—State v. Howe, 100 N. C. 449, 5 S. E. 67.

7 Wheeler v. State, 42 Md. 563; State v. Scaggs, 33 Mo. 92.

1 Chase v. People, 2 Colo. 509; State v. Miller, 5 Blackf. (Ind.) 502; Sowle v. State, 11 Ind. 492; Howard v. State, 64 Ind. 516.

2 Chase v. People, 2 Colo. 509; Ward v. People, 23 Ill. App. 510; State v. Miller, 5 Blackf. (Ind.) 502; Com. v. Stowell, 50 Mass. (9 Metc.) 572.

Compare: Com. v. Crupper, 33 Ky. (3 Dana) 466.

3 Chase v. People, 2 Colo. 509; State v. Miller, 5 Blackf. (Ind.) 502; Howard v. State, 64 Ind. 516.

hibited games,[1] or to set out the names of the persons assembling and gaming or playing thereat.[2]

§ 724. —— Allegation as to knowledge. We have already seen that intent[1] and knowledge[2] may be a factor in the crime of gaming, but in the absence of statutory provision so requiring, an indictment or information charging accused with unlawfully keeping and maintaining a gaming-house or room, where charging the premises to be under his entire control, need not specifically allege knowledge on the part of the accused.[3] An averment that he permitted gaming in a room under his control sufficiently alleges knowledge on his part that money and other things of value were played for, won and lost;[4] and the charge that he unlawfully and wilfully kept the prohibited house or room sufficiently charges knowledge and illegal intent.[5] But where the statute is so phrased that knowledge on the part of the accused is an essential element, an indictment or information which fails to allege knowledge on his part will be fatally defective.[6]

§ 725. Permitting gaming on premises—In general. Statutes prohibiting the use of property or premises for purposes of gaming, or prohibiting the permitting of gaming on premises, resemble very closely statutes prohibit-

1 Chase v. People, 2 Colo. 509; Com. v. Stowell, 50 Mass. (9 Metc.) 572.

2 COLO. — Chase v. People, 2 Colo. 509. IND.—Dormer v. State, 2 Ind. 308; Carpenter v. State, 14 Ind. 109; Crawford v. State, 33 Ind. 304; Padgett v. State, 68 Ind. 46; State v. Pancake, 74 Ind. 15. KY.—Montee v. Com., 26 Ky. (3 J. J. Marsh.) 132; Com. v. Crupper, 33 Ky. (3 Dana) 466. MINN.—State v. Crummey, 17 Minn. 72. N. H.—State v. Prescott, 33 N. H. 212. WASH.—State v. Wilson, 9 Wash. 16, 36 Pac. 967.

Compare: Buck v. State, 1 Ohio St. 61.

See, also, discussion and cases, infra, § 728.

1 See, supra, § 713.

2 See, supra, § 714.

3 Soby v. People, 31 Ill. App. 242; Com. v. Fraize, 68 Ky. (5 Bush) 325; Stringfellow v. State, (Tex.) 23 S. W. 893.

4 State v. Cure, 7 Iowa 479; State v. Ellis, 4 Mo. 474.

5 State v. Cure, 7 Iowa 479.

6 Emperly v. State, 13 Ind. App. 393, 41 N. E. 840.

ing the keeping of gaming-houses or rooms, treated above,[1] and an indictment or information charging either of these offenses in the language of the statute[2] is sufficient.[3] But it is necessary to follow the language, or to substantially follow the language of the statute, it being sufficient to charge that the accused did then and there unlawfully and knowingly keep and suffer his house or place, or a house or place under his control, to be used for the purpose of gaming;[4] or that he did unlawfully and knowingly suffer and permit gaming devices to be set up and run, and used in his house or place, or in a house or place under his control, at which prohibited games of chance, naming them,[5] were permitted to be played for money, or any other thing of value.[6]

§ 726. —— DESCRIPTION OF HOUSE OR PLACE AND LOCATION. An indictment or information charging unlawfully

1 See, supra, § 720.

2 As to charging in the language of the statute gaming in any of its phases, see, supra, § 710.

3 ALA.—Covy v. State, 4 Port. 186. ILL.—Stoltz v. State, 5 Ill. 168. IND.—State v. Staker, 3 Ind. 570; State v. Johnson, 115 Ind. 467, 17 N. E. 910; State v. Darroch, 12 Ind. App. 527, 40 N. E. 639. IOWA—State v. Cure, 7 Iowa 479; State v. Middleton, 11 Iowa 246; State v. Kaufman, 59 Iowa 273, 13 N. W. 292. KY.—Com. v. Branham, 66 Ky. (3 Bush) 1; Com. v. Fraize, 68 Ky. (5 Bush) 325; Com. v. Schatzman, 26 Ky. L. Rep. 508, 82 S. W. 238. MASS.—Com. v. Smith, 166 Mass. 370, 44 N. E. 503. MO.—State v. Dyson, 39 Mo. App. 297; State v. Mohr, 55 Mo. App. 329. N. Y.—People ex rel. Lewishon v. Wyatt, 81 App. Div. 51, 80 N. Y. Supp. 816; affirmed, 176 N. Y. 253, 66 N. E. 353. TEX.—McGaffey v. State, 4 Tex. 156; Borchers v. State, 31 Tex. Cr. Rep. 517, 192.

4 McAlpin v. State, 3 Ind. 567; State v. Staker, 3 Ind. 570; State v. Kaufman, 59 Iowa 273, 13 N. W. 292; Robinson v. State, 24 Tex. App. 4, 5 S. W. 509.

5 "To play at cards and other unlawful games," in a charge against an inn-keeper for permitting gaming on his premises in violation of the statute, is sufficient, "cards" being used in the statute as the name of a prohibited game; the words "and other unlawful games" will be treated as surplusage. — Com. v. Bolkom, 20 Mass. (3 Pick.) 281. See State v. Dyson, 39 Mo. App. 297. See, also, reading note in footnote 1, infra, § 730.

6 Com. v. Bolkom, 20 Mass. (3 Pick.) 281; Lowry v. State, 1 Mo. 724; State v. Foster, 2 Mo. 210; State v. Dyson, 39 Mo. App. 297.

and knowingly permitting gaming on premises by the accused, is sufficient where it lays the house or place within the jurisdiction of the court;[1] but where the statute describes certain designated places in which knowingly permitting gaming shall be unlawful, with a proviso or exception as to other places, the house or place at which it is charged the gaming was permitted must be sufficiently described to show that it was one of the places inhibited by the statute,[2] or the exceptions in the statute should be properly negatived,[3] otherwise the indictment or information will not be sufficient. An indictment or information, in the language of the statute,[4] charging accused with permitting gambling in one of the places prohibited by statute—e. g., a "dram-shop"—is sufficiently descriptive of the premises.[5]

§ 727. ——LEASING FOR GAMING PURPOSES. An indictment or information charging accused with having leased a house, or place, or premises, to be used and occupied for gaming purposes, in violation of the statute, in the language of the statute[1] is sufficient, without setting out the name of the tenant;[2] but the description of the premises and of the accused must be such as to bring both the accused and the place or premises within the provisions of the statute.[3] The particular terms of the statute under which the prosecution is had must be strictly pursued,[4]

1 Kleespies v. State, 106 Ind. 383, 7 N. E. 186; State v. Fant, 2 Brev. L. (S. C.) 487; McGaffey v. State, 4 Tex. 156; Eylar v. State, 37 Tex. Cr. Rep. 257, 39 S. W. 665.

See, also, authorities cited supra, § 721.

2 Perez v. State, 48 Ala. 356; Ballentine v. State, 48 Ark. 45, 2 S. W. 304.

3 As to negativing exceptions and provisos, see, supra, § 711.

4 See, supra, §§ 710, 717, footnotes 6 and 7; § 720, footnote 1.

5 Farmer v. State, 45 Ark. 95. See, also, infra, §§ 735, 736.

1 See, supra, § 726, footnote 4.

2 Bashinski v. State, 123 Ga. 508, 51 S. E. 499; Kleespies v. State, 106 Ind. 383, 7 N. E. 186; Fisher v. State, 2 Ind. App. 365, 28 N. E. 565; People v. Weithoff, 100 Mich. 393, 58 N. W. 1115.

3 State v. Johnson, 115 Ind. 467, 17 N. E. 910; State v. Howard, 9 Ind. App. 635; State v. Darroch, 12 Ind. App. 527, 40 N. E. 639.

4 See State v. Kennedy, 1 Ala. 31; Buford v. Com., 53 Ky. (14

and where the statute provides that it shall be an offense where the act is done for "hire, gain or reward," an indictment or information which fails to allege that the act charged was done for "hire, gain and reward" will be insufficient.[5]

§ 728. NAMES OF PERSONS PLAYING—IN GENERAL. We have already seen that the question whether the names of the persons playing at a prohibited game must be set out in the indictment or information depends upon the provisions of the particular statute under which the prosecution is had.[1] It may be safely stated to be the general rule that, in the absence of any statutory provision requiring otherwise, it is not necessary to set out in an indictment or information, charging the accused with gaming, the names of the persons with whom he played,[2] the gravamen of the offense being the playing of a prohibited game;[3] that in charging accused with keeping a gaming-house, or room, or place, it is not necessary to aver in the indictment or information that persons actually resorted thereto, or to set out their names.[4]

B. Mon.) 20; Com. v. Bolkom, 20 Mass. (3 Pick.) 281.

5 People v. Weithoff, 100 Mich. 393, 58 N. W. 1115.

1 See, supra, § 715.

2 See: ARK.—Medlock v. State, 18 Ark. 363; Orr v. State, 18 Ark. 540; Goodman v. State, 41 Ark. 228. CAL.—People v. Saviers, 14 Cal. 30; People v. Carroll, 80 Cal. 153, 22 Pac. 129. COLO.—Chase v. People, 2 Colo. 509. GA.—Hinton v. State, 68 Ga. 322. ILL.—Green v. People, 21 Ill. 125. IND.—Dormer v. State, 2 Ind. 308; Winemiller v. State, 11 Ind. 516; Carpenter v. State, 14 Ind. 109; State v. Thomas, 50 Ind. 292; State v. Beedles, 50 Ind. 294; State v. Pancake, 75 Ind. 14; Jessup v. State, 14 Ind. App. 230, 42 N. E. 948. IOWA — Romp v. State, 3 G. Greene 276. KAN. — Rice v. State, 3 Kan. 141. MASS.—Com. v. Swain, 160 Mass. 354, 35 N. E. 862. MINN.—State v. Crummey, 17 Minn. 72. OHIO—Roberts v. State, 32 Ohio St. 171. ORE.—State v. Light, 17 Ore. 358, 21 Pac. 132. TENN.—State v. McBride, 27 Tenn. (8 Humph.) 66. TEX.—Day v. State, 27 Tex. App. 143, 11 S. W. 36. WASH.—Foster v. Territory, 1 Wash. 411, 25 Pac. 459.

3 Chase v. People, 2 Colo. 509; Foster v. Territory, 1 Wash. 411, 25 Pac. 459.

4 See, supra, § 723.

Under statutory provisions, as we have already seen,[5] the indictment or information may be required to set out the names of the players, or to state that their names are to the grand jury unknown.[6] The reason for this rule is said to be the fact that under the stricter statutes more precise allegations as to the distinct offense are required, and that under such statutes that which, under other statutes is merely matter of evidence, becomes matter of necessary allegation.[7] In yet other jurisdictions, strictness of allegation is relaxed by statute.[8] The particular statute under which prosecution is had must be studied and complied with.

§ 729. DESCRIPTION OF GAME—IN GENERAL. Where the charge against the accused is that he unlawfully and in violation of statute played at a prohibited game,[1] or that he kept and exhibited a gaming-table or device,[2] or that he kept and maintained a gaming-house or room,[3] or that he permitted prohibited games to be played on his premises or on premises under his control,[4] the indictment or information must set out such a description of the game or games alleged to have been played as to bring the same within the prohibition of the statute, by setting forth all the essential elements of the offense sought to be charged.[5] This may be done in the language of the

5 See, supra, § 715, footnotes 6 and 7.

6 ARK.—Parrott v. State, 10 Ark. 574; Barkman v. State, 13 Ark. 703; Jester v. State, 14 Ark. 552; State v. Parnell, 16 Ark. 506, 63 Am. Dec. 72. FLA.—Groner v. State, 6 Fla. 39; Sharp v. State, 28 Fla. 357, 9 So. 651. GA.—Davis v. State, 22 Ga. 101. IND.—Butler v. State, 5 Blackf. 280; Sowle v. State, 11 Ind. 492; State v. Noland, 29 Ind. 212. OHIO—Davis v. State, 7 Ohio (pt. I) 204; Buck v. State, 1 Ohio St. 61; Roberts v. State, 32 Ohio St. 171.

7 Parrott v. State, 10 Ark. 574; Moffatt v. State, 11 Ark. 169; State v. Parnell, 16 Ark. 506, 63 Am. Dec. 72; Jester v. State, 14 Ark. 552; Davis v. State, 22 Ga. 101.

8 Drew v. State, 10 Ark. 82; State v. Grider, 18 Ark. 300; Medlock v. State, 18 Ark. 363; Orr v. State, 18 Ark. 540; State v. Cadle, 19 Ark. 613.

1 See, supra, § 716.

2 See, supra, § 717.

3 See, supra, § 720.

4 See, supra, § 725.

5 See State v. Cadle, 19 Ark. 613; State v. Pancake, 74 Ind. 14;

statute,[6] or by a general description,[7] as by charging that the accused played, or suffered and permitted to be played, "a game by means of cards[8] then and there used as a gaming device";[9] or charging accused with unlawfully, knowingly, and wilfully permitting a game of "faro" to be dealt and played on his premises,[10] and the like. But in each instance sufficient facts of the offense and the nature of the game played must be set out.[11]

§ 730. —— ALLEGING NAME OF GAME PLAYED. The general rule is that, in the absence of any statutory requirements to the contrary, where the general offense charged is the violation of a general statute forbidding gaming, the indictment or information need not set out the exact name of the prohibited game played,[1] describe the prem-

State v. Gray, 29 Minn. 142, 12 N. W. 455.

Raffle charged as the means of unlawful gaming device, indictment was held to be insufficient, because it failed to describe an offense within the purview of the statute.—Norton v. State, 15 Ark. 71.

"Rondo" not being embraced within the statute prohibiting gaming.—State v. Hawkins, 15 Ark. 259.

6 State v. Grider, 18 Ark. 297; Montee v. Com., 26 Ky. (3 J. J. Marsh.) 132; State v. Wilson, 9 Wash. 16, 36 Pac. 967.

See, also, supra, § 710.

7 State v. Foster, 2 Mo. 210; McGaffey v. State, 4 Tex. 156; State v. Ake, 9 Tex. 322; Horan v. State, 24 Tex. 161; State v. Flores, 33 Tex. 444; Foster v. Territory, 1 Wash. 411, 25 Pac. 459.

8 **As to allegation of playing with cards, see reading paragraph in footnote 1, infra, § 730.**

9 State v. Lewis, 12 Wis. 434.

10 Foster v. Territory, 1 Wash. 411, 25 Pac. 459.

11 State v. Maxwell, 5 Blackf. (Ind.) 230; State v. Ross, 7 Blackf. (Ind.) 322; Webster v. State, 8 Blackf. (Ind.) 400; State v. Burke, 151 Mo. 136, 52 S. W. 226; State v. Gitt Lee, 6 Ore. 425; State v. Catchings, 43 Tex. 654.

1 ALA.—Whatley v. State, 12 Ala. App. 201, 68 So. 491. ARK.—Orr v. State, 18 Ark. 540; Dudney v. State, 22 Ark. 251; State v. Anderson, 30 Ark. 131. CAL.—People v. Carroll, 80 Cal. 153, 22 Pac. 129. GA.—Slade v. State, 125 Ga. 788, 54 S. E. 750; Hicks v. State, 16 Ga. App. 228, 84 S. E. 837. ILL.—Green v. People, 21 Ill. 125. IND.—Webster v. State, 8 Blackf. 400. IOWA—Romp v. State, 3 G. Greene 276. KY.—Perry v. Com., 5 Ky. L. Rep. 611, 6 Ky. L. Rep. 134. MISS.—Johnston v. State, 15 Miss. 58. MO.—State v. Ames, 1 Mo. 524. MONT.—State v. Ross, 38 Mont. 319, 326, 99 Pac. 1056, 1058; State

ises or place where played,[2] or allege that the house at which played was a public one;[3] but where the name of the alleged game is given in the indictment or information, it seems that it must be proved by the prosecution as laid.[4] Thus, it has been said to be sufficient to charge that the game was "a game of chance played with cards";[5] or that accused "did unlawfully play and bet at a certain game" called "poker,"[6] or "faro,"[7] or

v. Radmilovich, 40 Mont. 93, 105 Pac. 91; State v. Duncan, 40 Mont. 531, 107 Pac. 510. N. H.—State v. Prescott, 33 N. H. 212. N. C.—State v. Ritchie, 19 N. C. (2 Dev. & B. L.) 29. OKLA. — State v. Carter, 2 Okla. Cr. 706, 103 Pac. 1042. ORE.—State v. Gitt Lee, 6 Ore. 425. TENN. — State v. McBride, 27 Tenn. (8 Humph.) 65. TEX.—State v. Ake, 9 Tex. 322; Booth v. State, 26 Tex. 203; Davis v. State, 68 Tex. Cr. Rep. 259, 151 S. W. 313. VA.—Windsor v. Com., 31 Va. (4 Leigh) 680.

Compare: State v. Jeffrey, 33 Ark. 136.

"A certain game with cards" without specifying the name of the particular game is sufficient.—Grover v. State, 6 Fla. 39; Montee v. Com., 26 Ky. (3 J. J. Marsh.) 135; Com. v. Cupper, 33 Ky. (3 Dana) 466; Johnson v. State, 15 Miss. (7 Smed. & M.) 58; Dean v. State, 8 Tenn. (Mart. & Y.) 127.

"Game of cards" has been held sufficient. — Holland v. State, 3 Port. (Ala.) 292; State v. Shult, 41 Tex. 548.

See, also, supra, § 725, footnote 5.

2 People v. Saviers, 14 Cal. 29; Davis v. State, 68 Tex. Cr. Rep. 259, 151 S. W. 313.

3 Davis v. State, 68 Tex. Cr. Rep. 259, 151 S. W. 313.

4 See Dudney v. State, 22 Ark. 251; State v. Anderson, 30 Ark. 131; State v. Radmilovich, 40 Mont. 93, 105 Pac. 91; Windsor v. Com., 31 Va. (4 Leigh) 680.

5 State v. Radmilovich, 40 Mont. 93, 105 Pac. 91.

See, also, reading note in footnote 1, this section.

6 ALA.—Ward v. State, 22 Ala. 16. ARK. — Graham v. State, 1 Ark. 171; Brown v. State, 10 Ark. 620; Barkman v. State, 13 Ark. 703. FLA.—Groner v. State, 6 Fla. 39. GA.—Wingard v. State, 13 Ga. 396. IND. — State v. Bougher, 3 Blackf. 307; State v. Maxwell, 5 Blackf. 230. OHIO—Davis v. State, 7 Ohio (pt. I) 204; Carper v. State, 27 Ohio St. 572; Roberts v. State, 32 Ohio St. 171. ORE.—State v. Gitt Lee, 6 Ore. 425. TEX.—McKissick v. State, 2 Tex. 356; Crow v. State, 6 Tex. 334; Randolph v. State, 9 Tex. 521. WASH.—State v. Wilson, 9 Wash. 16, 36 Pac. 967.

7 People v. Beatty, 14 Cal. 566; Blair v. State, 32 Tex. 474; Short v. State, 23 Tex. App. 312.

"monte,"[8] or "rondo,"[9] and the like; but if the name of the game is thus alleged, it must be proved as laid.[10]

Statutory provisions in some states require that the name of the game played shall be set out, or that the indictment shall state that the name is to the grand jury unknown.[11] Where the statute specifically denounces and prohibits a game by name, it is sufficient for the indictment or information to specify the offense charged by the statutory name.[12]

§ 731. —— ALLEGATION AS TO GAME OF CHANCE OR HAZARD. In the absence of statutory provision so requiring, it is not necessary that an indictment or information charging gaming, in any of its branches, should allege that the prohibited game played was one of chance or hazard or skill,[1] or allege in what the playing of such game consisted,[2] or show how it was played.[3] Under some statutes, however, it is necessary that the indictment or information shall allege that the game charged to have been played was one of hazard or skill.[4]

§ 732. DESCRIPTION OF GAMING-DEVICES—IN GENERAL. Under statutes prohibiting gaming and the keeping and

8 "Three card monte."—State v. Gray, 29 Minn. 142, 12 N. W. 455; McKissick v. State, 2 Tex. 356.

9 Estes v. State, 10 Tex. 300.

10 See authorities, footnote 4, this section.

11 State v. Jeffrey, 33 Ark. 139.

12 See. MINN.—State v. Gray, 29 Minn. 142, 12 N. W. 455. OHIO—Carper v. State, 27 Ohio St. 572. TEX.—McKissick v. State, 2 Tex. 356; Estes v. State, 10 Tex. 300; Blair v. State, 32 Tex. 474; Wardlow v. State, 18 Tex. App. 356; Short v. State, 32 Tex. App. 312, 4 S. W. 903.

1 Orr v. State, 18 Ark. 540; State v. Norton, 9 Houst. (Del.) 586; Com. v. Monarch, 66 Ky. (3 Bush) 2; State v. Black, 94 N. C. 809.

2 CAL. — People v. Gasset, 93 Cal. 641, 29 Pac. 246. ORE.—State v. Carr, 6 Ore. 133. WASH.—Foster v. Territory, 1 Wash. 411, 25 Pac. 459; Schilling v. Territory, 2 Wash. Ter. 283, 5 Pac. 926; State v. Wilson, 9 Wash. 16, 36 Pac. 967.

3 State v. Carr, 6 Ore. 133.

Playing with less cards in number than is usually employed, where the prohibited game is played in all other respects in the usual way, is immaterial.—People v. Gasset, 93 Cal. 641, 29 Pac. 246.

4 See Orr v. State, 18 Ark. 541.

exhibiting of gaming-devices, no further allegation or description of the devices is required in the indictment or information than that which is sufficient to show that the devices charged to have been unlawfully set up, kept or used fall within the prohibition of the statute,[1] by showing that they were or are something tangible and adapted, devised, or designed for the purpose of playing games of chance or skill for money or other things of value.[2] Any table or other device necessarily used in carrying on any of the prohibited games of chance or skill, is a gaming-device, and the setting up or using of such tables being prohibited, an indictment or information charging accused with permitting certain tables to be set up and used for gaming purposes in rooms occupied by him, or under his control, charges an offense under the statute.[3] Where the statute prohibits certain tables and devices by name, it is sufficient for the indictment or information to describe them by the statutory name;[4] but where the statute prohibits certain tables and devices by name, and then generally prohibits "tables, machines, and contrivances ordinarily used in betting," or other similar provision, the indictment or information must specifically allege that the table, machinery, or device charged was not one of those specifically named in the statute, and so describe it as to bring it within the class of devices prohibited by such statute other than those specifically named therein.[5] It has been said that the

1 State v. Gitt Lee, 6 Ore. 425.

2 See State v. Hahn, 2 Ore. 238.

3 Jones v. Territory, 5 Okla. 536, 49 Pac. 934; Moore v. State, 9 Okla. Cr. 9, 130 Pac. 517.

4 See, infra, § 733.

5 Com. v. Monarch, 69 Ky. (6 Bush) 298; Com. v. Shaurer, 4 Ky. L. Rep. 342 (where setting up game of "bagatelle" was charged it must be alleged that it was one ordinarily used in gambling); State v. Wade, (Mo.) 183 S. W. 598.

Where the indictment alleged that accused played and bet for money at a game played with cards it was held sufficient to withstand a demurrer. — Simmons v. State, 17 Ga. App. 288, 86 S. E. 657.

Keeping a keno table the offense charged, the indictment must aver that a keno table was

name of the device need not be stated,[6] nor need it be alleged that cards and dice are devices adapted to playing games of chance.[7]

§ 733. —— NAME OF GAME PLAYED. We have already seen that it has been said that the name of the game played need not be set out.[1] Where the statute names a particular table, machine or device and, in express terms, prohibits gaming thereon, an indictment or information which describes such device by the name used in the statute, will be sufficient without other description;[2] but, as already pointed out, where the table, machine, or device is prohibited in the statute without being named, the device charged to have been unlawfully set up or used, or permitted to be set up or used, must be so specifically described as to bring it within the statute.[3]

§ 734. DESCRIPTION OF WAGER LAID. The decisions are not harmonious upon the question as to the necessity for and extent of the description of the bet made or wager laid, in an indictment or information charging gaming. Some of the cases are to the effect that it is sufficient to

a "contrivance ordinarily used in betting." — Com. v. Monarch, 69 Ky. (6 Bush) 298.

Setting up a faro bank being one of the games prohibited by name, there need be no allegation that it was a banking game or a contrivance used for betting. — Com. v. Monarch, 69 Ky. (6 Bush) 301.

6 Jefferson v. State, (Tex.) 22 S. W. 148.

An indictment for exhibiting a gaming bank for the purpose of gaming need not describe it by name.—Jefferson v. State, (Tex.) 22 S. W. 148.

7 State v. Maupin, 71 Mo. App. 54.

An indictment for inducing or procuring another to keep a gambling device sufficiently describes it by alleging it to be a nickel in the slot machine, a more particular description being to the grand jury unknown. — State v. Briggs, 84 Minn. 357, 87 N. W. 935.

An indictment charging betting at a game of tenpins need not allege that the tenpin alley was kept and exhibited for the purpose of gaming.—Rutherford v. State, 39 Tex. Cr. 137, 45 S. W. 579.

1 See, supra, § 732, footnote 6.

2 People v. Carroll, 80 Cal. 153, 22 Pac. 129; Pemberton v. State, 85 Ind. 507.

3 See, supra, § 732, footnote 5.

allege that accused bet or wagered,[1] without any description or allegation as to what was bet, or that it was a thing of value.[2] Other cases hold that the indictment or information must allege, and the proof must show, that "money or other thing of value" was bet upon the game,[3] in the absence of a statute relieving of such allegation;[4] but the amount bet or wagered need not be stated,[5] it being also unnecessary to further specify the thing bet,[6]

1 State v. Hardin, 1 Kan. 474; Long v. State, 22 Tex. App. 194, 2 S. W. 541.

2 ALA.—Collins v. State, 70 Ala. 19. GA.—Hinton v. State, 68 Ga. 322; Grant v. State, 89 Ga. 393, 15 S. E. 488. ILL. — Gibbons v. People, 33 Ill. 443. TEX.—Long v. State, 22 Tex. App. 194, 2 S. W. 541. W. VA.—State v. Griggs, 34 W. Va. 78, 11 S. E. 740.

3 People v. Carroll, 80 Cal. 153, 22 Pac. 129; Buford v. Com., 53 Ky. (14 B. Mon.) 24; Long v. State, 22 Tex. App. 194, 56 Am. Rep. 633, 2 S. W. 541.

An allegation that defendant "bet" at a game necessarily includes the averment that the betting was for something of value.—Long v. State, 22 Tex. App. 194, 56 Am. Rep. 633, 2 S. W. 541.

An allegation that money "and" property were bet is good, although the language of the statute is money "or" property.—State v. Nelson, 19 Mo. 393.

An averment that United States fractional currency was bet is equivalent to an averment that money was bet.—Collins v. State, 70 Ala. 19.

To allege that the defendant bet "goods, wares, and merchandise" is too uncertain a description of the bet. — State v. Kilgore, 25 Tenn. (6 Humph.) 44.

Where the indictment follows the language of the statute it is sufficient to charge the enticing and permitting persons to play upon a gambling device kept by the defendant, and need not allege that money or property was bet, won, or lost.—State v. Fulton, 19 Mo. 680.

4 Jacobson v. State, 55 Ala. 151.

5 Romp v. State, 3 G. Greene (Iowa) 276; State v. Bridges, 24 Mo. 353; State v. Prescott, 33 N. H. 212; State v. McBride, 27 Tenn. (8 Humph.) 66.

In an indictment for setting up a gaming table or bank it need not be alleged how much money was lost or who lost it. — Montee v. Com., 26 Ky. (3 J. J. Marsh.) 132.

6 Collins v. State, 70 Ala. 19; Hinton v. State, 68 Ga. 322; Romp v. State, 3 G. Greene (Iowa) 276; Harrison v. State, 15 Tex. 239; Herrin v. State, 50 Tex. Cr. Rep. 351, 97 S. W. 88.

An indictment for betting on an election need not name the particular candidate on whom the accused bet.—Com. v. Hueser, 8 Ky. L. Rep. 61.

Contra: Where the allegation is made that certain "valuable things" were bet the indictment must set forth and describe them. —Anthony v. State, 23 Tenn. (4 Humph.) 83.

or to state its value.[7] Neither is it essential that it shall be charged that money was lost or won,[8] or state the amount thereof.[9] However, sufficient facts must be set forth to show that something was bet or wagered, and that the act of betting or wagering the same was against the prohibition of the statute.[10]

§ 735. DESCRIPTION OF PLACE—IN GENERAL. Under a statute making the act complained of unlawful only in those cases where it is done at certain places, the indictment or information must allege the nature of the place at which the act is charged to have been done, and bring it within the statute.[1] Thus, where the statute prohibits gaming, and so forth, in a public place,[2] the indictment or information must allege facts which show that the place charged was a public place within the meaning of the statute,[3] unless the place named is made a public place by

[7] State v. Collins, 70 Ala. 19; Grant v. State, 89 Ga. 393, 15 S. E. 488.

[8] Com. v. Crupper, 33 Ky. (3 Dana) 466; Waddell v. Com., 84 Ky. 276, 1 S. W. 480; followed in Pusey v. Com., (Ky.) 1 S. W. 482.

[9] Montee v. Com., 26 Ky. (3 J. J. Marsh.) 132; Com. v. Crupper, 33 Ky. (3 Dana) 466; State v. McBride, 27 Tenn. (8 Humph.) 66.

[10] Carr v. State, 50 Ind. 178; Davis v. State, 7 Ohio (pt. I) 204; Anthony v. State, 23 Tenn. (4 Humph.) 83; State v. Kilgore, 25 Tenn. (6 Humph.) 44.

[1] Chapman v. State, 63 Tex. Cr. Rep. 494, 140 S. W. 442.

A complaint charging that accused played cards or dice "at a place in a pasture made public by meeting for the purpose of playing at a game with cards or dice" is insufficient to charge gambling in a public place.—Russ v. State, 132 Ala. 20, 31 So. 550.

A presentment for unlawful gaming must charge that the playing was at an ordinary or other public place. — Hord v. Com., 31 Va. (4 Leigh) 647, 26 Am. Dec. 340.

An indictment charging that accused at a certain time and place unlawfully bet at a game played with cards is insufficient. — Shelton v. State, 65 Tex. Cr. Rep. 489, 145 S. W. 340.

To charge that defendant did in a certain room in a named hotel, said room being a public place and a place of public resort, play draw poker, is sufficient as charging in a public place, but not for playing at a hotel.—State v. Kyer, 55 W. Va. 46, 46 S. E. 694.

[2] State v. Langford, 25 N. C. 354; Robert v. Com., 37 Va. (10 Leigh) 686; Bishop v. Com., 54 Va. (13 Gratt.) 785.

[3] N. C.—State v. Langford, 25 N. C. (3 Ired. L.) 354. TENN.—

the statute;[4] and where the name of the place charged as the one where the offense occurred, is not such that the name, in and of itself, imports a public place,[5] the indictment or information must show that it was a public place at the time when the alleged offense was committed.[6] A particular description of the house or place is not necessary,[7] and there need be no allegation as to ownership[8] or occupancy,[9] and if alleged, need not be proved.[10]

§ 736. —— PLACE NAMED IN STATUTE. In those cases in which it is charged the alleged offense occurred at or in one of the places specifically named in the statute as a public place at which gaming is prohibited, the offense charged may be pleaded in the language of the statute by naming the house,[1] without further or more particular

State v. Bess, 45 Tenn. (5 Coldw.) 55. TEX. — Shihagan v. State, 9 Tex. 430; State v. Barns, 25 Tex. 654; Millican v. State, 25 Tex. 664; Sheppard v. State, 1 Tex. App. 304; Askey v. State, 15 Tex. App. 558; Jackson v. State, 16 Tex. App. 373; Fossett v. State, 16 Tex. App. 375; Bowman v. State, 16 Tex. App. 513; Tummins v. State, 18 Tex. App. 13; Dailey v. State, 27 Tex. App. 569, 11 S. W. 636; Grant v. State, 33 Tex. Cr. Rep. 527, 27 S. W. 127. VA.— Hord v. Com., 31 Va. (4 Leigh) 674, 26 Am. Dec. 340; Roberts v. Com., 37 Va. (10 Leigh) 720; Bishop v. Com., 54 Va. (13 Gratt.) 785.

4 Metzer v. State, 31 Tex. Cr. Rep. 11, 19 S. W. 254.

5 State v. Coleman, 3 Ala. 14; Windsor v. Com., 31 Va. (4 Leigh) 680; Bishop v. Com., 54 Va. (13 Gratt.) 785.

6 See State v. Norton, 19 Tex. 102; Grant v. State, 33 Tex. Cr. Rep. 527, 27 S. W. 127.

7 State v. Atkyns, 1 Ala. 180; Dohme v. State, 68 Ga. 339; State v. Prescott, 33 N. H. 212; Sublett v. State, 9 Tex. 53.

8 State v. Atkyns, 1 Ala. 180; Prior v. State, 4 Tex. 383; Herrin v. State, 50 Tex. Cr. Rep. 351, 97 S. W. 88.

Where it is alleged it may be treated as surplusage.—Wilson v. State, 5 Tex. 21.

9 State v. Atkyns, 1 Ala. 180; Prior v. State, 4 Tex. 383; Wilson v. State, 5 Tex. 22; Sublett v. State, 9 Tex. 53; Sheppard v. State, 1 Tex. App. 304.

10 Prior v. State, 4 Tex. 383; Wilson v. State, 5 Tex. 22.

1 State v. Alvey, 26 Tex. 155; State v. Stewart, 35 Tex. 499; State v. Arnold, 37 Tex. 409; Elsberry v. State, 41 Tex. 159; Sheppard v. State, 1 Tex. App. 304; Jackson v. State, 16 Tex. App. 373; Fossett v. State, 16 Tex. App. 375; Bowman v. State, 16 Tex. App. 513; Tummins v. State, 18 Tex. App. 13; Bacchus v. State.

description of the same;[2] otherwise where the act complained of occurred at a house or place other than one of those declared by the statute to be a public house or place, in which case the indictment or information must set out all the facts and circumstances which make the same a public house or place, and bring it within the statute,[3] because simply designating the house or place as "a public place" does not make it such,[4] and without the facts and circumstances to show the character of the place being set out, the indictment or information will be insufficient.[5] Thus, where the alleged gaming is charged to have occurred or been carried on in a room of, or connected with, a public house, the indictment or information must charge that the said room was attached to a public house, designating it, and was commonly used for gaming purposes.[6]

18 Tex. App. 15; Metzer v. State, 31 Tex. Cr. Rep. 11, 19 S. W. 254; Miller v. State, 35 Tex. Cr. Rep. 650, 34 S. W. 959; Burke v. State, (Tex.) 35 S. W. 659.

2 State v. Bridgewater, 171 Ind. 1, 139 **Am. St. Rep.** 355, 14 **L. R. A.** (N. S.) 972, 85 N. E. 715; State v. Derry, 171 Ind. 725, 86 N. E. 482; State v. Hogle, 156 Mo. App. 367, 137 S. W. 21.

It is sufficient to charge that accused visited a gambling house in a named county in violation of the statute.—State v. Derry, 171 Ind. 725, 86 N. E. 482.

Where the device was alleged to have been "in a certain building" situate in the county there need be no further allegation as to the location of the building.—State v. Hogle, 156 Mo. App. 367, 137 S. W. 21.

3 State v. Alvey, 26 Tex. 155; Parker v. State, 26 Tex. 204; State v. Fuller, 31 Tex. 559; State v. Arnold, 37 Tex. 409; Elsberry v. State, 41 Tex. 159; Jackson v. State, 16 Tex. App. 373; Fossett v. State, 16 Tex. App. 375; Bowman v. State, 16 Tex. App. 513; Tummins v. State, 18 Tex. App. 13; Bacchus v. State, 18 Tex. App. 15; Dailey v. State, 27 Tex. App. 569, 11 S. W. 636; Metzer v. State, 31 Tex. Cr. Rep. 11, 19 S. W. 254; Miller v. State, 35 Tex. Cr. Rep. 650, 34 S. W. 959; Burke v. State, (Tex.) 35 S. W. 659.

4 **Character of place a mixed** question of law and fact.—Parker v. State, 26 Tex. 204; Elsberry v. State, 41 Tex. 159.

5 **Question for jury to determine**, the character of the place charged.—State v. Alvey, 26 Tex. 155.

6 Tummins v. State, 18 Tex. App. 13; Bacchus v. State, 18 Tex. App. 15; Duffy v. State, (Tex.) 22 S. W. 37; Miller v. State, 35 Tex. Cr. Rep. 650, 34 S. W. 959; Burke v. State, (Tex.) 35 S. W. 659.

§ 737. OPERATING GAME. An indictment or information under a statute prohibiting dealing, playing, conducting as owner or employee, whether for hire or not, any of the prohibited and named games, need not aver that the person charged with conducting a particular game did so for money, checks or other thing of value;[1] neither need it be set out in what capacity the person conducted the same,[2] nor that he received compensation.[3] But it has been held under a statute making it a felony to conduct or carry on as owner, proprietor, employee, or assistant, or in any manner whatever, for hire or not, any of the named and prohibited games, an indictment or information must allege the capacity in which the accused acted;[4] however, under a statute making it a misdemeanor for any person to deal, carry on, operate, and so forth, any prohibited game, the indictment or information need not aver the capacity in which the offense was committed.[5]

§ 738. —— SOME SPECIFIC GAMES. *Book-making* being charged, under the California[1] and similar statutes, the indictment or information must charge that the money alleged to have been bet or wagered upon the outcome of a trial of skill or endurance of men or horses must allege that it was so received "for gain, hire or reward,"[2] and should also allege that accused "who receives, re-

1 Johnson v. State, 10 Okla. Cr. 597, 140 Pac. 622, overruling 18 Okla. 378, 92 Pac. 389.

2 See, supra, § 718, footnotes 6 and 7.

3 State v. Wakely, 43 Mont. 427, 117 Pac. 93; Johnson v. State, 10 Okla. Cr. 597, 140 Pac. 622.

It is sufficient to charge that a prohibited game was conducted, which game was played by other persons for money or other representatives of value. — Johnson v. State, 10 Okla. Cr. 597, 140 Pac. 622.

4 See State v. Preston, 49 Wash. 298, 95 Pac. 82; State v. Gaasch, 56 Wash. 381, 105 Pac. 817; State v. Hardwick, 63 Wash. 35, 114 Pac. 873.

5 Id.

1 Penal Code, § 337a; Cal. Stats. and Amdts., 1909, p. 21; Amended Cal. Stats. and Amdts., 1911, p. 4; Kerr's Cumulative Supplement to Cal. Cyc. Code, p. 2078.

2 In Matter of Roberts, 157 Cal. 472, 108 Pac. 315. But see People v. Schwartz, 14 Cal. App. 9, 110 Pac. 969.

cords, registers or forwards, or purports to receive, record, register or forward" the bet made or wager laid, charged to have been made or laid, was the owner, lessee or occupant of one of the premises enumerated in the statute,[3] and must not charge in the conjunctive the various matters enumerated in the various paragraphs of the statute.[4] An indictment or information under the New York statute[5] and statutes similarly phrased, must allege that there was a writing or recording of the bet or wager,[6] because where one offers to bet, and so announces to others orally, upon a horse about to engage in a race, in which he lays odds, he is said not to be guilty of the offense of book-making.[7]

Bucket-shop keeping being charged, the indictment or information must allege that the accused kept a bucket-shop and therein conducted a business having the characteristics detailed in the statute denouncing that offense,[8] and there must be an averment that the transactions were "on margins."[9] It need not be alleged that the accused

3 Cal. Pen. Code, § 337a, par. 2. See reasoning in In Matter of Roberts, 157 Cal. 472, 108 Pac. 315.

4 People v. Platte, 166 Cal. 227, 135 Pac. 954.

5 N. Y. Pen. Code, § 351.

6 People ex rel. Jones v. Langan, 132 App. Div. 393, 116 N. Y. Supp. 718; affirmed in 196 N. Y. 551, 90 N. E. 1164.

"Received and recorded said bet" states an offense under Cal. Pen. Code, § 337a.—People v. Schwartz, 14 Cal. App. 9, 110 Pac. 969.

7 People ex rel. Lichtenstein v. Langan, 196 N. Y. 260, 17 Ann. Cas. 1081, 25 L. R. A. (N. S.) 479, 25 N. Y. Cr. Rep. 105, 89 N. E. 921.

See, also, In Matter of Roberts, 157 Cal. 472, 108 Pac. 315.

Oral betting not being the evil aimed at by the statute, the clear intent and purpose thereof being to reach the pool-sellers conducting the business in pool-rooms, the receipt of money in payment of an oral bet made between two individuals upon the result of a race then and there run upon a race track, is not within the statute.—People ex rel. Collins v. McLaughlin, 128 App. Div. (N. Y.) 599, 23 N. Y. Cr. Rep. 92, 113 N. Y. Supp. 188, affirming 60 Misc. 306, 113 N. Y. Supp. 306.

8 State v. Corcoran, 73 Vt. 404, 50 Atl. 1110.

9 State v. Corcoran, 73 Vt. 404, 50 Atl. 1110, wherein it was not specifically decided whether the mere employment of the words "on margins" was sufficient.

"knowingly" conducted the business,[10] but the names of the customers with whom the pretended sales or transactions were made must be alleged, or the statement made that their names are unknown.[11]

Faro dealing or conducting being an offense under the code or statute, it is unnecessary that the indictment or information should allege that it is a banking game;[12] hence, an indictment charging that the accused "did deal faro, a certain banking game where money and other property was then and there dependent on the result," is sufficient,[13] an indictment charging that offense being good where all the facts constituting the same are alleged.[14] The particular nature of the game need not be set out, nor the name of the person with whom the bet was made;[15] but it has been said that the indictment or information must aver the faro-bank to be a gaming-table.[16]

Fighting chickens or "cock fighting" unlawfully being charged, the indictment or information will be sufficient where it alleges that the accused on a designated day at a certain place did "unlawfully cause, procure, encourage, aid and abet, certain dumb animals, to-wit, chickens, to fight and engage in combat," does not charge an offense under the Colorado statute unless it is further alleged that the acts were done "for sport or amusement, or upon a wager, or for the purpose of making bets upon the results thereof."[17]

10 State v. Corcoran, 73 Vt. 404, 50 Atl. 1110.

11 State v. Miner, 233 Mo. 312, 135 S. W. 483.

12 People v. Gosset, 93 Cal. 641, 29 Pac. 246; Com. v. Monarch, 69 Ky. (6 Bush) 301.

It is sufficient to allege that the accused set up, kept, etc., a faro bank.—Waddell v. Com., 84 Ky. 276, 1 S. W. 480.

13 State v. Melville, 11 R. I. 417, 3 Am. Cr. Rep. 158.

14 People v. Beatty, 14 Cal. 566.

The omission of the statutory words "for the purpose of gaming" after the description of the offense of exhibiting a faro bank is fatal.—Kramer v. State, 18 Tex. App. 13.

15 State v. Ames, 1 Mo. 524.

16 United States v. Ringgold, 5 Cr. C. C. 378, Fed. Cas. No. 16167.

17 Wolf v. People, 45 Colo. 532, 102 Pac. 20.

Accessory being charged, the

Poker or roulette being charged, an indictment or information alleging accused conducted a prohibited game for value or gain, must also charge that those playing were playing for money or a representative value,[18] otherwise no offense will be stated under the Oklahoma statute and those of similar provisions. But an indictment or information charging one with being a common gambler in that he operates a poker game for money, need not expressly charge that money was bet, wagered or hazarded upon a chance.[19]

Pool-room charged to have been kept in violation of law, an indictment or information alleging a nuisance created thereby must state the facts constituting the offense upon which the prosecution relies to sustain the charge.[20]

Selling futures charged, the indictment or information need not allege a sale to any person;[21] and it need not be charged in a prosecution for a violation of a statute forbidding the operating of such business, that the business engaged in was in violation of law,[22] or that any contracts were made.[23]

Slot-machine charged to have been set up and used in violation of law as a gambling device, the indictment or

facts relied upon to make him an accessory must be fully alleged.—Wolf v. People, supra.

18 Brown v. State, 5 Okla. Cr. 41, 113 Pac. 219 (poker); Morgan v. State, 7 Okla. Cr. 45, 121 Pac. 1088 (poker); Proctor v. State, 9 Okla. Cr. 81, 130 Pac. 819 (roulette).

Compare: Johnson v. State, 10 Okla. Cr. 597, 140 Pac. 622.

19 State v. Robey, 74 Wash. 562, 134 Pac. 174.

A charge that the owner conducted a poker game played with cards for checks representing money would be sufficient as against a demurrer, for playing poker for money is a game of chance.—State v. Robey, 74 Wash. 562, 134 Pac. 174.

20 Ehrlich v. Com., 125 Ky. 742, 128 Am. St. Rep. 269, 10 L. R. A. (N. S.) 995, 102 S. W. 289.

21 Fullerton v. State, (Tex.) 75 S. W. 534, overruling Goldstein v. State, 36 Tex. Cr. 193, 36 S. W. 278, and Cothran v. State, 36 Tex. Cr. 196, 36 S. W. 273; Scales v. State, 46 Tex. Cr. 296, 108 Am. St. Rep. 1014, 66 L. R. A. 730, 81 S. W. 947.

22 State v. Beattie, 103 Miss. 864, 60 So. 1016.

23 Id.

information need not describe the mechanism, or the manner in which a gambling game was played thereon,[24] it being sufficient to describe the machine as a nickel-in-the-slot-machine, a more particular description of which is to the grand jury unknown.[25] Where slot-machines are not particularly mentioned in the statute denouncing and prohibiting gambling, the indictment or information must allege that the machine is one ordinarily used for gambling.[26] The time and place of keeping a slot-machine are sufficiently alleged where it is stated that the accused on a certain day, in a particular county and state, "unlawfully and wilfully did, in a certain room, keep a certain slot-machine," without using the words "then and there" before the words "did keep."[27]

§ 739. —— PERMITTING MINORS TO PLAY. Under a statute providing that persons owning or operating specified gaming-tables and devices, or operating specified games, shall not permit any minor to play thereon or thereat, an indictment or information charging, in due and regular form, that accused allowed designated minors to play on specified prohibited tables or devices, or at designated prohibited games, must specifically charge that a game was played;[1] and in the case of a table-game, that it was played "at" or "upon" said table;[2] and must also allege the name of the person or persons with whom the minor played,[3] or give an excuse for failure to do so by alleging that the name or names are unknown.[4] Gambling not being

24 State v. Howell, 83 Mo. App. 198.

A charge that the machine set up in defendant's saloon "was made, designed and used for the purpose of playing games of chance for money and property" was sufficient.—State v. Howell, 83 Mo. App. 198.

25 State v. Briggs, 84 Minn. 357, 87 N. W. 935.

26 Com. v. Estes, (Ky.) 121 S. W. 423.

27 Robel v. People, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322.

1 Zook v. State, 47 Ind. 463; Russell v. State, 47 Ind. 465.

2 Donniger v. State, 52 Ind. 326.

3 Zook v. State, 47 Ind. 463; Russell v. State, 47 Ind. 465; Donniger v. State, 52 Ind. 326.

4 Zook v. State, 47 Ind. 463; Russell v. State, 47 Ind. 465.

an element in the prohibition of the game charged, it need not be alleged that the game was played for a wager.[5] Where the indictment or information charges accused with having permitted a minor to play two or more games, it charges but one offense, the prohibition in the statute relating to the playing and not to the games played.[6] Special provisions in the statute as to the particular place where such gaming-table or device, or such game, is situated and conducted—e. g., a saloon, a public billiard-hall, and the like—the indictment or information must bring the accused clearly within the provisions and prohibition of the statute.[7] The indictment or information must further allege that the accused was the owner or keeper of the gaming-table, or was the owner or conductor of the game played.[8]

§ 740. JOINDER OF DEFENDANTS. An indictment or information charging gaming in any of its phases may join two or more persons who were jointly interested, or jointly participated, in the commission of the particular offense charged.[1] Thus, persons jointly concerned in unlawfully keeping and exhibiting a gaming-table or de-

5 State v. Ward, 57 Ind. 537; Ready v. State, 61 Ind. 1; Green v. Com., 68 Ky. (5 Bush) 327.

Compare: Williams v. City of Warsaw, 60 Ind. 457, holding "game" a playing upon which a wager is laid, and that it must be charged that the game was one upon which a wager was laid.

6 Kiley v. State, 120 Neb. 65, 22 N. E. 99.

7 Sikes v. State, 67 Ala. 77; Hanrahan v. State, 57 Ind. 527; State v. Ward, 57 Ind. 537; Manheim v. State, 66 Ind. 65; Faber v. State, 66 Ind. 600; Gallagher v. State, 26 Wis. 423.

8 See Hanrahan v. State, 57 Ind. 527; State v. Ward, 57 Ind. 537; Hipy v. State, 73 Ind. 39; Gallagher v. State, 26 Wis. 423.

1 ALA.—Covy v. State, 4 Port. 186; Ward v. State, 22 Ala. 16; Swallow v. State, 22 Ala. 20; Lindsey v. State, 48 Ala. 169. ARK.—Johnson v. State, 13 Ark. 684; Barkman v. State, 13 Ark. 703. MASS.—Com. v. Smith, 166 Mass. 370, 44 N. E. 503. MISS.—Lea v. State, 64 Miss. 294, 1 So. 244. S. C.—State v. Fant, 2 Brev. L. 487. TENN.—Brown v. State, 13 Tenn. (5 Yerg.) 367. TEX.—Lewellen v. State, 18 Tex. 538; Parker v. State, 26 Tex. 204; State v. Roderica, 35 Tex. 507; Galbreath v. State, 36 Tex. 200; Herron v. State, 36 Tex. 285; State v. Ho-

vice,[2] or keeping a gaming-house,[3] may be jointly indicted; so also may persons who bet at a game of faro,[4] and other similar gambling games. Those only who actually participate in the prohibited game can be jointly charged with playing at cards,[5] and the indictment or information should allege, and the proof must show, that they played with each other,[6] or that they severally bet against the conductor of the game.[7] Thus, where A and B are jointly charged and jointly tried on an indictment or information charging gaming, and the evidence shows that A played with C, D and others when B was not present, and that B played with E, F and others when A was not present, no conviction can be had against them.[8] One permitting others to play at prohibited games at his house, or on premises under his control, can not be joined in an indictment or information with the persons participating in the prohibited game,[9] because permitting gaming, and engaging in gaming, are two separate and distinct offenses, the first of which is individual to the

man, 41 Tex. 155. VA.—Com. v. McGuire, 3 Va. (1 Va. Cas.) 119. W. VA.—State v. Griggs, 34 W. Va. 78, 11 S. E. 740; State v. Snider, 34 W. Va. 83, 11 S. E. 742.

2 State v. Johns, 259 Mo. 361, 168 S. W. 587.

3 Com. v. Smith, 166 Mass. 370, 44 N. E. 503.

4 Ward v. State, 22 Ala. 16.

5 Lindsey v. State, 48 Ala. 169.

6 ALA.—Elliott v. State, 26 Ala. 78. MO.—Lewellen v. State, 18 Tex. 538; State v. Homan, 41 Tex. 155; Parker v. State, 26 Tex. 204; State v. Roderica, 35 Tex. 507; Galbreath v. State, 36 Tex. 200; Herron v. State, 36 Tex. 285; State v. Shult, 41 Tex. 548.

Clearly showing separate offenses, indictment has been held good in Texas.—Parker v. State, 26 Tex. 204; Herron v. State, 36 Tex. 285; State v. Homan, 41 Tex. 155.

7 Drew v. State, 10 Ark. 82.

Charged with betting with each other, it may be shown that together they bet against the conductor of the game.—Archer v. State, 69 Ga. 767.

8 Elliott v. State, 26 Ala. 78.

Three jointly indicted for playing cards, where evidence showed two played in a game together but that the third played in a separate game at a different table, they can not be convicted of the charge made.—Lindsey v. State, 48 Ala. 169.

9 State v. Fant, 2 Brev. (S. C.) 487.

Compare: Copely v. Territory, 1 N. M. 571.

party permitting the prohibited game,[10] and the joinder of individual offenses, though of the same character or species of offense, is bad.[11] Where two or more persons are jointly indicted, charged with any phase of gambling, some may be convicted and some acquitted;[12] and where there is a joint conviction under which the jury assesses a joint fine, there may be a joint judgment rendered.[13]

§ 741. JOINDER OF COUNTS—IN GENERAL. Under the general rule of criminal pleading which permits the charging in one indictment or information, in different counts, different offenses of the same family or species of offenses requiring the same kind of trial and judgment, though varying in the severity of punishment authorized to be inflicted on conviction, counts charging the various phases of gambling constituting the same kinds of offenses may be joined in one indictment or information;[1] such as a count charging gaming and a count charging keeping a common gaming-house, which was a nuisance at common law,[2] and no more particularity in charging these various offenses is required than in charging other crimes in general.[3] Thus, an indictment or information may charge the

10 State v. Fant, 2 Brev. L. (S. C.) 487.

11 Howard v. State, 83 Miss. 378, 35 So. 653. See Johnson v. State, 13 Ark. 684.

12 Covy v. State, 4 Port. (Ala.) 186; Ward v. State, 22 Ala. 16; Lea v. State, 64 Miss. 294, 1 So. 244; Brown v. State, 13 Tenn. (5 Yerg.) 367.

13 Lea v. State, 64 Miss. 294, 1 So. 244.

1 IND.—Dormer v. State, 2 Ind. 308. IOWA—State v. Cooster, 10 Iowa 453. KY.—Hinkle v. Com., 34 Ky. (4 Dana) 518. MD.—Wheeler v. State, 42 Md. 563. MO.—State v. Fletcher, 18 Mo. 426. S. C.—State v. Fant, 2 Brev. L. 487. VA.—Com. v. McGuire, 3 Va. (1 Va. Cas.) 119.

2 ARK.—State v. Holland, 22 Ark. 242; State v. Rhea, 38 Ark. 555. IOWA—State v. Cooster, 10 Iowa 453; State v. Bitting, 13 Iowa 600. MD.—Wheeler v. State, 42 Md. 563. N. Y.—People v. Emerson, 53 Hun 437, 7 N. Y. Cr. Rep. 97, 6 N. Y. Supp. 274. N. C.—State v. Morgan, 133 N. C. 743.

3 Burdine v. State, 25 Ala. 60; Clayborne v. State, 103 Ala. 53, 15 So. 842; State v. Hester, 48 Ark. 40, 2 S. W. 339; State v. Gray, 29 Minn. 142, 12 N. W. 455.

As to conjunctive allegations, see, infra, § 742, footnote 6.

accused with keeping a prohibited gaming-house, or with permitting another to keep such a house upon his premises or upon premises under his control;[4] with dealing, carrying on, and conducting a prohibited game;[5] and with exhibiting all the games enumerated and prohibited by statute.[6]

Election will not be required in such cases where the several counts charge offenses of the same general nature and subject to the same judgment, although the penalties authorized to be inflicted upon conviction vary in severity;[7] but where distinct offenses are charged, such as maintaining a gaming-house and playing in the game with others charged jointly,[8] the prosecution will be required to elect upon which count the trial will be had.[9]

§ 742. —— DUPLICITY. The statute prohibiting and punishing gaming designating two or more gaming-tables or devices which are prohibited, an indictment or information charging the keeping of more than one gaming-table or device at the same time and place and as a part of the same transaction, does not render the indictment

4 CONN. — State v. Falk, 66 Conn. 250, 33 Atl. 913. GA.—Bell v. State, 92 Ga. 49, 18 S. E. 186. IND.—State v. Slocum, 8 Blackf. 315; Dormer v. State, 2 Ind. 308; Crawford v. State, 33 Ind. 304; Davis v. State, 100 Ind. 155. IOWA—State v. Cooster, 10 Iowa 453; State v. Bitting, 13 Iowa 600. KY.—Hinkle v. Com., 34 Ky. (4 Dana) 518. MASS. — Com. v. Moody, 143 Mass. 177, 9 N. E. 511. MO.—State v. Ames, 10 Mo. 743.

5 ALA.—Ward v. State, 22 Ala. 16. ARK. — State v. Holland, 22 Ark. 242. CAL.—People v. Gosset, 93 Cal. 641, 29 Pac. 246. ORE.—State v. Carr, 6 Ore. 133, distinguishing State v. Mann, 2 Ore. 238. VA.—Com. v. Tiernan, 45 Va. (4 Gratt.) 545.

6 State v. Atkyns, 1 Ala. 180; McAlpin v. State, 3 Ind. 567; State v. Alsop, 4 Ind. 141; Dougherty v. State, (Tex.) 35 S. W. 666; Leath v. Com., 73 Va. (32 Gratt.) 873.

All games and places mentioned in statute charged in indictment, proof of any place or any game sufficient to warrant conviction.—State v. Atkyns, 1 Ala. 180; McAlpin v. State, 3 Ind. 567; State v. Alsop, 4 Ind. 141.

7 Orr v. State, 18 Ark. 540; Com. v. Edds, 80 Mass. (14 Gray) 406.

8 See, supra, § 740, footnotes 9-11.

9 Nuckols v. State, 109 Ala. 2, 19 So. 504; State v. Morris, 45 Ark. 62.

duplicitous.[1] Thus, the same person may be charged at the same time and place with unlawfully keeping both a gaming-table and gaming apparatus, both offenses being of the same character and calling for the same penalty.[2] Where the statute prescribes different modes of committing the offense, with the same punishment for each mode, all the modes may be set out in an indictment or information without rendering it duplicitous;[3] and this is true whether it be as to the method of keeping the prescribed gaming-device or as to the means of playing prohibited games.[4] Where the statute makes the commission of different prohibited acts a crime, and states such acts disjunctively[5] in the language defining the offense, the in-

1 State v. Jackson, 242 Mo. 410, 146 S. W. 1166.

2 Irvin v. State, 52 Fla. 51, 10 Ann. Cas. 1003, 41 So. 785.

An indictment under Code 1906, ch. 151, § 1, charging that accused "did unlawfully keep and exhibit gaming tables, commonly called slot machines, roulette and other gaming tables . . . of like kind to A. B. C. tables" charges but one offense. — State v. Henaghan, 73 W. Va. 706, 81 S. E. 539.

The indictment is not duplicitous because it charges the use of the gambling device and avers the permission for divers persons to play at and upon it for money and property and that divers persons did play and bet money and property.—State v. Nelson, 19 Mo. 393.

3 Young v. State, (Tex.) 60 S. W. 767.

Under Kirby's Dig., § 2230, an indictment charging in one count that accused bet on a game of craps, in another that he bet on a game of poker, and in still another that he bet on a game of hazard played with cards, the name of which game was unknown to the grand jury, charges but a single offense.—Grayson v. State, 92 Ark. 413, 123 S. W. 388.

That the indictment charges that the accused unlawfully kept and exhibited, for the purpose of gaming, a gaming table and bank, does not make it duplicitous as charging the keeping and exhibiting a gaming table for the purpose of gaming and also the keeping and exhibiting a bank for the same purpose. — Morris v. State, 57 Tex. Cr. Rep. 163, 121 S. W. 1112.

4 ALA.—See Ward v. State, 22 Ala. 16; Johnson v. State, 75 Ala. 7; Clayborne v. State, 103 Ala. 53, 15 So. 842; Wickard v. State, 109 Ala. 45, 19 So. 491. ARK.—State v. Hester, 48 Ark. 40, 2 S. W. 339. IND.—Bickel v. State, 32 Ind. App. 656, 70 N. E. 548. TEX.—Harvell v. State, 53 S. W. 622.

5 Alleging in disjunctive accused "kept or suffered his house to be used for gaming," is bad for duplicity.—Dormer v. State, 2 Ind. 308.

dictment or information may include them all in a single count, using the copulate instead of the disjunctive conjunction, without being open to the charge of duplicity.[6] But where a statute, in the disjunctive, enumerates a series of acts each of which constitutes a distinct offense, an indictment or information which charges the accused, in the language of the statute, with a violation of each and all of the subdivisions of the statute, is bad for duplicity.[7] An indictment or information charging "keeping and exhibiting a gaming-bank" for purposes of gaming,[8] or of frequenting and keeping a gaming-table,[9] is

Charging betting at a game of "hazard or skill," is not open to the objection of duplicity.—State v. Hester, 48 Ark. 40.

Charging place in alternative held not bad for duplicity.—Burdine v. State, 25 Ala. 60.

6 ALA.—Rosson v. State, 92 Ala. 76, 9 So. 357. CAL.—People v. Gosset, 93 Cal. 641, 29 Pac. 246. CONN.—State v. Falk, 66 Conn. 250, 33 Atl. 913. IND.—Dormer v. State, 2 Ind. 308; State v. Ryman, 2 Ind. 370; State v. Alsop, 4 Ind. 141; Crawford v. State, 33 Ind. 304; Davis v. State, 100 Ind. 154; State v. Sarlis, 135 Ind. 195, 34 N. E. 1129; State v. Fidler, 148 Ind. 221, 47 N. E. 464. KY.—Hinkle v. Com., 34 Ky. (4 Dana) 518; Vowells v. Com., 84 Ky. 52. MD.—Stearns v. State, 81 Md. 341, 23 Atl. 282. MASS. — Com. v. Moody, 143 Mass. 177, 9 N. E. 511; Com. v. Ferry, 146 Mass. 203, 15 N. E. 484. MO.—State v. Pate, 67 Mo. 88. N. H.—State v. Prescott, 33 N. H. 212. N. M.—Territory v. Copely, 1 N. M. 571. ORE.—State v. Alfred, 6 Ore. 133. TEX.—Lancaster v. State, 43 Tex. 519. VA.—Com. v. Tiernan, 45 Va. (4 Gratt.) 545.

Playing cards and betting on side on the hands of the players being charged, held not to be bad for duplicity.—Com. v. Tiernan, 45 Va. (4 Gratt.) 545.

The statute made it an offense to "set up or use," while the indictment alleged "set up and use." This was permissible. — State v. Hogle, 156 Mo. App. 367, 137 S. W. 21.

7 People v. Plath, 166 Cal. 227, 135 Pac. 954.

The offenses of occupying a room with devices for registering bets on horse races, and occupying a room with apparatus for communicating information as to races prohibited by R. S. 1909, § 4749, are distinct, and an indictment can not charge both without being duplicitous.—State v. Hall, (Mo.) 181 S. W. 1135.

8 Lancaster v. State, 43 Tex. 519.

9 **Frequenting and keeping** a gaming-table prohibited by law being charged against accused, the further charge that accused did then and there play at a named and prohibited game of cards on said table with various persons, whose names were averred to be unknown, charges

not bad for duplicity. But where the statute provides that each day the offense is carried on shall constitute a separate and distinct offense, the separate occasions charged must be set out in distinct counts, and can not be all joined in one count.[10]

but one offense, that of keeping a gaming-table.—Territory v. Copely, 1 N. M. 571.

10 Scales v. State, 46 Tex. Cr. 296, 108 Am. St. Rep. 1014, 66 L. R. A. 730, 81 S. W. 947.

CHAPTER L.

INDICTMENT—SPECIFIC CRIMES.

Homicide.

§ 743. In general.

§ 743. IN GENERAL.[1] The question of the requisites and sufficiency of indictments charging homicide in its various branches, and with the various kinds of instruments and weapons, while highly important, and the cases very numerous, is thought to have received sufficient treatment in former volumes in this series, and to be found amply elaborated in Kerr's Wharton on Criminal Law,[2] and Bowlby's Wharton on Homicide[3]—to the treatment in which volumes reference is hereby made.

1 As to forms of indictment charging homicide in its various forms and with various kinds of instruments or weapons, see Forms Nos. 241, 250-255, 354-383, 1108-1227.

2 §§ 643-673.

3 §§ 556-583.

CHAPTER LI.

INDICTMENT—SPECIFIC CRIMES.

Incest.

§ 744. Form and sufficiency of indictment—Language of statute.
§ 745. —— "Feloniously."
§ 746. Charging carnal knowledge.
§ 747. —— Description of act.
§ 748. Charging time of offense.
§ 749. Identifying the female.
§ 750. Charging as to intermarriage.
§ 751. Charging incestuous adultery or fornication.
§ 752. Charging relationship.
§ 753. Charging knowledge of relationship.
§ 754. Charging attempt to commit.
§ 755. Joinder of defendants.
§ 756. Joinder of counts.
§ 757. Election.

§ 744. FORM AND SUFFICIENCY OF INDICTMENT[1]—LANGUAGE OF STATUTE. The crime of incest being unknown to the common law,[2] is a purely statutory offense, and an indictment or information charging that crime must follow the statute under which drawn, and charge the offense in its terms.[3] It is sufficient to follow the language of the statute,[4] or substantially the language of the statute;[5]

1 As to form of indictment or information charging incest, see Forms Nos. 1228-1236.

2 State v. Keesler, 78 N. C. 469; Tuberville v. State, 4 Tex. 128. See State v. Slaughter, 70 Mo. 484.

3 Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691, 1 Am. Cr. Rep. 354; State v. Bullinger, 54 Mo. 142.

4 ILL.—Bolen v. People, 184 Ill. 338, 56 N. E. 408. GA.—Cook v. State, 11 Ga. 53, 56 Am. Dec. 410. OHIO—Noble v. State, 22 Ohio St. 541. WASH. — State v. Glindemann, 34 Wash. 221, 101 Am. St. Rep. 1001, 75 Pac. 800. W. VA.—State v. Pennington, 41 W. Va. 599, 23 S. E. 918.

5 ALA.—Baker v. State, 30 Ala. 521. CAL. — People v. Patterson, 102 Cal. 239, 36 Pac. 436; People v. Helvner, 13 Cal. App. 768, 114

and an indictment or information will not be rendered invalid because inartistically drawn,[6] or because of immaterial variances.[7] But the indictment or information thus drawn must meet the requirements that it fully apprise the accused of the charge against him,[8] and set forth all the essential elements of the crime, such as carnal knowledge,[9] relationship,[10] knowledge of such relationship, where such knowledge is an element,[11] and the like.[12] Nothing further than this is required to be set out. Thus, an indictment or information charging incest with a niece, a daughter of a brother of the accused, need not allege the accused and such brother to have been lawful

Cal. 411. GA.—Cook v. State, 11 Ga. 53, 56 Am. Dec. 410. KAN.—State v. Learned, 73 Kan. 328, 85 Pac. 293. VT.—State v. Dana, 59 Vt. 614, 10 Atl. 727. WIS.—Hintz v. State, 58 Wis. 493, 17 N. W. 639.

6 Bolen v. State, 184 Ill. 338, 86 N. E. 408.

Misspelling "incestuous" does not render the indictment bad.—State v. Carville, (Me.) 11 Atl. 601.

7 KY.—Mathis v. Com., 11 Ky. L. Rep. 882, 13 S. W. 360. ME.—State v. Carville, 11 Atl. 601. N. Y.—People v. Lake, 110 N. Y. 61, 6 Am. St. Rep. 344, 17 N. E. 146. W. VA.—State v. Pennington, 41 W. Va. 599, 23 S. E. 918.

Omission of middle name of party immaterial.—People v. Lake, 110 N. Y. 61, 6 Am. St. Rep. 344, 17 N. E. 146.

8 To charge the defendant with willfully, unlawfully, and feloniously having sexual intercourse with his daughter fully apprises the defendant of the crime he is called upon to meet and is sufficient.—People v. Stratton, 141 Cal. 604, 75 Pac. 166. See State v. Kruppa, (Iowa) 158 N. W. 401; People v. Cease, 80 Mich. 576, 45 N. W. 585.

Charging carnal knowledge of niece (Carmen v. State, (Ark.) 179 S. W. 183; Bailey v. State, 63 Tex. Cr. Rep. 584, 141 S. W. 224), or of step-daughter of accused is a charge of incest.—Lipham v. State, 125 Ga. 52, 114 Am. St. Rep. 181, 5 Ann. Cas. 66, 53 S. E. 817.

9 See, infra, § 746.

10 See, infra, § 752.

11 See, infra, § 753.

12 An indictment stating in technical language that adultery was committed by defendant, a married man, with his niece, sufficiently alleged the offense of incest.—Carmen v. State, 120 Ark. 172, 179 S. W. 183.

To charge that the defendant committed the incestuous acts upon a named person, "she then and there being the daughter of him the said" defendant, is a sufficient allegation of the relation of parent and child.—Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672. See People v. Stratton, 141 Cal. 604, 75 Pac. 166; People v. Cease, 80 Mich. 576, 45 N. W. 585.

issue of their parents; that the parents were lawfully married; that the niece was the lawful issue of the brother; and need not set out the name of the mother of the accused or the mother of the niece, or allege that the latter was born in lawful wedlock.[13]

Designating offense by name in indictment or information is unnecessary, hence, it is immaterial by what name the offense is called, if the averments are such as to describe the elements of the crime of incest;[14] and where the indictment or information sets forth, in the words of the statute, all the elements of the offense, it is sufficient, although there is no designation of the offense by name.[15]

§ 745. —— "FELONIOUSLY." Incest being made a felony by statute, it is unnecessary to allege in the indictment or information charging that crime that the act complained of was "feloniously done,"[1] particularly in those jurisdictions in which the statute does not require the elements of knowledge or intent,[2] because scienter not being included in the statutory defining of the crime, it is not an element of the crime and, therefore, need not be alleged in the indictment or information, nor affirmatively proved on the trial to secure conviction.[3] In such case the word "feloniously" amounts to nothing more than saying that the crime charged is a felony, which

13 Bailey v. State, 63 Tex. Cr. Rep. 584, 141 S. W. 224.

14 Lipham v. State, 125 Ga. 52, 114 Am. St. Rep. 181, 53 S. E. 817, where the offense was simply designated as felony when it was incestuous adultery.

15 State v. Spurling, 115 La. 789, 40 So. 167.

1 State v. Judd, 132 Iowa 296, 11 Ann. Cas. 91, 109 N. W. 892.

2 Bolen v. People, 184 Ill. 338, 56 N. E. 408; State v. Rennick, 127 Iowa 294, 4 Ann. Cas. 568, 103 N. W. 159; State v. Judd, 132 Iowa 296, 11 Ann. Cas. 91, 109 N. W. 892; Simon v. State, 31 Tex. Cr. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399.

3 State v. Judd, 132 Iowa 296, 11 Ann. Cas. 91, 109 N. W. 892. See State v. Rennick, 127 Iowa 294, 4 Ann. Cas. 568, 103 N. W. 159; Simon v. State, 31 Tex. Cr. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399; State v. Dana, 59 Vt. 614, 10 Atl. 727; State v. Glindemann, 34 Wash. 225, 101 Am. St. Rep. 1001, 75 Pac. 800.

fact the statute already declares;[4] and where inserted, the word may be rejected as surplusage.[5] In some jurisdictions, however, a contrary rule prevails, and the indictment or information is required to allege that the act charged was feloniously done.[6] This is in accordance with the common-law requirement, under which the use of the word "feloniously," or its equivalent, was indispensable to a valid indictment charging a felony.[7]

§ 746. Charging carnal knowledge. Incest being the carnal copulation of a man and woman related within the prohibited degrees to each other,[1] an indictment or information charging the offense must allege carnal knowledge, but this is sufficiently done by charging that the accused "did commit fornication with" a named party particeps,[2] or similar allegation showing sexual intercourse, it not being necessary to charge carnal knowledge in terms,[3] "incestuous connection" being said to be a sufficient charge of sexual intercourse.[4] However, there are cases holding that the indictment or information need not allege that the parties had carnal knowledge or intercourse with each other.[5] Thus, an Iowa case holds that it is sufficient to charge that defendant had carnal knowledge of his daughter, without further alleging that they had carnal knowledge of each other.[6] It is unneces-

4 State v. Judd, 132 Iowa 296, 11 Ann. Cas. 91, 109 N. W. 892.

5 State v. Judd, supra. See People v. Myers, 20 Cal. 76; State v. Newland, 7 Iowa 242, 71 Am. Dec. 444; State v. Verden, 24 Iowa 126; State v. Hensen, 55 Iowa 494, 8 N. W. 329; State v. Bailey, 31 N. H. 521.

6 Newman v. State, 69 Miss. 393, 10 So. 580.

7 See Mott v. State, 29 Ark. 148; Kaelin v. Com., 84 Ky. 354, 1 S. W. 594; Bowler v. State, 41 Miss. 570; State v. Rechnitz, 20 Mont. 488, 52 Pac. 264.

1 State v. Herges, 55 Minn. 464, 57 N. W. 205.

2 State v. Dana, 59 Vt. 614, 10 Atl. 727.

3 Id.

4 Hintz v. State, 58 Wis. 493, 17 N. W. 639.

5 State v. Ellis, 11 Mo. App. 588.

6 State v. Hurd, 101 Iowa 391, 70 N. W. 613.

sary to aver or prove more than a single sexual act to constitute the crime.[7]

§ 747. —— DESCRIPTION OF ACT. In those jurisdictions in which the concurrent consent of both parties to the act is an essential element of the crime, the indictment or information must specifically allege that the act was the joint act of both parties,[1] because it is only by the concurring assent of both parties that the crime can be committed under a statute reading "with each other."[2] In those jurisdictions in which the statute does not make the concurring assent of the parties an essential element in the offense, such an allegation is unnecessary.[3] It is thought that in all those instances in which the offense is charged to have been accomplished through force, threats, fraud, or undue influence, or where the female was under the age of consent, the charge that the act was a joint act is unnecessary.[4] Some of the cases hold that the indictment or information should contain a particular description of the specific act relied upon as con-

7 State v. Brown, 47 Ohio St. 102, 21 Am. St. Rep. 790, 8 Am. Cr. Rep. 373, 23 N. E. 746. See Barnhouse v. State, 31 Ohio St. 39.

1 Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691, 1 Am. Cr. Rep. 354; State v. Jarvis, 20 Ore. 437, 23 Am. St. Rep. 141, 26 Pac. 302. See Noble v. State, 22 Ohio St. 541, where by way of argument it is declared "the crime of incest is committed by two willing parties."

2 State v. Jarvis, 20 Ore. 437, 23 Am. St. Rep. 141, 26 Pac. 302.

3 State v. Hurd, 101 Iowa 391, 70 N. W. 613; State v. Kimble, 104 Iowa 19, 73 N. W. 348; State v. Freddy, 117 La. 121, 16 Am. St. Rep. 195, 41 So. 436; State v. Ellis, 11 Mo. App. 588; State v. Winslow, 30 Utah 403, 8 Ann. Cas. 908, 85 Pac. 433.

4 Upon such a charge accused may be convicted upon the uncorroborated testimony of the female on the ground that by reason of her failure to consent to the act, she is not an accomplice. See Smith v. State, 108 Ala. 1, 54 Am. St. Rep. 140, 19 So. 306; People v. Stratton, 141 Cal. 604, 75 Pac. 166; Schwartz v. State, 65 Neb. 196, 91 N. W. 190; Shelly v. State, 95 Tenn. 152, 49 Am. St. Rep. 926, 31 S. W. 492; Mercer v. State, 17 Tex. App. 502.

Cohabitation with daughter habitually under compulsion by father, they living in same house, constitutes incest.—State v. Lawrence, 19 Neb. 307, 27 N. W. 126.

stituting the offense charged,[5] including the fact of penetration and emission,[6] while on the other hand, it is said that penetration without emission constitutes the consummated crime.[7]

§ 748. CHARGING TIME OF OFFENSE. An indictment or information charging incest, must fix a day certain upon which the offense charged was committed, but this may be done by charging the offense to have occurred on any day within the period of limitations, and prior to the finding and return of the indictment or the filing of the information.[1] The act should not be alleged as a continuing act throughout the year, or a series of years, because this will constitute a charge of more than one offense in a single count;[2] but where the indictment or information charges the offense to have been committed on a day certain, "and on divers other days and times, before and after that day," the continuando clause quoted may be rejected as surplusage, a day certain having been charged.[3]

§ 749. IDENTIFYING THE FEMALE. An indictment or information charging incest should identify the female in

5 Barnhouse v. State, 31 Ohio St. 39.

6 Id., following Williams v. State, 14 Ohio 222, 45 Am. Dec. 536, the authority of which is denied in Blackburn v. State, 22 Ohio St. 102.

Rule in Ohio as to necessity of emission to constitute rape has been changed by statute, and this it is thought will apply to incest as well.

7 State v. Judd, 132 Iowa 296, 11 Ann. Cas. 91, 109 N. W. 892.

1 Cook v. State, 11 Ga. 53, 56 Am. Dec. 410.

"Any day previous to the finding of the indictment or the filing of the information is sufficient, except in those cases where time enters into the nature of the offense, and the offense may be proved on any day, within the period of limitations, dating back to the filing of the bill."—Cook v. State, 11 Ga. 53, 56 Am. Dec. 410, citing Shelton v. State, 1 Stew. & P. (Ala.) 208; McLane v. State, 4 Ga. 341; State v. G. S., 1 Tyl. (Vt.) 295, 4 Am. Dec. 724.

2 Barnhouse v. State, 31 Ohio St. 39; State v. Temple, 38 Vt. 37.

3 Cook v. State, 11 Ga. 53, 56 Am. Dec. 410. See United States v. La Coste, 2 Mas. C. C. 129, Fed. Cas. No. 15548; R. v. Sadi, 1 Leach C. C. 235; R. v. Redman, 1 Leach C. C. 341.

the crime charged, but this need be done only to the extent of a reasonable certainty, it not being essential that her name shall be set out in full, the omission of the middle name,[1] or of the first of two given names where she is generally known by the second given name,[2] and where sufficiently identified by the evidence on the trial. An indictment charging accused with having sexual intercourse with "a girl" within the prohibited degree of relationship, is good as against the objection that she should have been described as "a woman."[3] An indictment or information alleging accused had carnal knowledge of a daughter of his brother, and further alleging that such brother and accused were children of the same father and mother, sufficiently shows the woman to have been a niece of the accused.[4] An indictment charging that the woman named was the daughter of a brother of the accused, need not give the name of the brother.[5]

§ 750. CHARGING AS TO INTERMARRIAGE. As to whether an indictment or information charging incest should negative a lawful marriage between the parties, the decisions are not harmonious, due principally to the difference in the provisions and phrasing of the various statutes under which they are made. Some of the cases hold that where a marriage may have been contracted in a foreign state, where it was legal, the indictment or information need not negative lawful marriage between the parties, because the fact of such a marriage in another jurisdiction is merely a matter of defense, and not required to be anticipated and denied;[1] other cases, however, hold that a

1 People v. Lake, 110 N. Y. 61, 6 Am. St. Rep. 344, 17 N. E. 146.

2 State v. Peterson, 70 Me. 716.

3 Dixon v. State, 147 Ala. 91, 119 Am. St. Rep. 57, 10 Ann. Cas. 957, 41 So. 734.

4 Bailey v. State, 63 Tex. Cr. Rep. 584, 141 S. W. 224.

5 State v. Pennington, 41 W. Va. 599, 23 S. E. 918.

1 State v. Brown, 47 Ohio St. 102, 21 Am. St. Rep. 790, 8 Am. Cr. Rep. 373, 23 N. E. 746; State v. Nakashima, 62 Wash. 686, Ann. Cas. 1912D 220, 114 Pac. 894.

legal intermarriage should be negatived.[2] In those jurisdictions where the statute, in defining incest as sexual intercourse between persons "nearer of kin than cousins," makes no distinction as to persons who are lawfully intermarried and others, comprehending single and married persons alike, there need be no averment that the man and woman were not husband and wife.[3]

§ 751. CHARGING INCESTUOUS ADULTERY OR FORNICATION. The general rule is that an indictment or information alleging incest need not specifically charge that the act complained of was in addition either adultery or fornication,[1] it being sufficient to charge in proper form the act of sexual intercourse between persons within the prohibited degree of relationship;[2] and where it is averred that adultery and fornication, or either, have been committed by the act complained of, it will not affect the sufficiency of an indictment otherwise good in charging the crime of incest, it being merely a conclusion of law and need not be alleged, and will be treated as surplusage.[3] However, under the statutes in some jurisdictions, it is held that an indictment or information charging adulterous incest must allege that the accused was a married man at the time of the commission of the act charged,[4]

2 State v. Fritts, 48 Ark. 66, 2 S. W. 256.

Charging unlawful intermarriage has been held to be sufficient.—Simon v. State, 31 Tex. Cr. Rep. 186, 37 **Am. St. Rep.** 802, 20 S. W. 399.

3 Brown v. State, 42 Fla. 184, 27 So. 869; State v. Brown, 47 Ohio St. 102, 21 **Am. St. Rep.** 790, 8 **Am. Cr. Rep.** 373, 23 N. E. 747; Simon v. State, 31 Tex. Cr. 186, 20 S. W. 399; State v. Nakashima, 62 Wash. 686, **Ann. Cas.** 1912D 220, 114 Pac. 894.

1 McCaskill v. State, 55 Fla. 117, 45 So. 843.

2 Brown v. State, 42 Fla. 184, 27 So. 869; Territory v. Corbett, 3 Mont. 50.

3 McCaskill v. State, 55 Fla. 117, 45 So. 843.

4 State v. Fritts, 46 Ark. 66, 2 S. W. 256; Martin v. State, 58 Ark. 3, 22 S. W. 840; State v. Ratcliffe, 61 Ark. 62, 31 S. W. 978; Carmen v. State, 120 Ark. 172, 179 S. W. 183.

An indictment for incest which does not allege that accused was a married man when he committed the adultery with his niece is insufficient to sustain a conviction.—Carmen v. State, 120 Ark. 172, 179 S. W. 183.

and it seems that it should be alleged that the woman was not his wife.[5] It has been said that an indictment or information charging incestuous fornication instead of incestuous adultery will not be rendered invalid by the fact that the accused was a married man.[6] Charging, in technical language, adultery was committed by accused, a married man, with his niece, sufficiently alleges the offense of incest.[7]

§ 752. Charging relationship. An indictment or information charging incest must allege the relationship of the parties, but need not do so in the language of the statute.[1] In those cases in which the precise degree of kinship is averred,[2] it is unnecessary to allege in addition the degree prohibited by statute, that being a matter of law,[3] or to aver whether the relationship was by the whole blood or the half blood,[4] or merely by affinity, each being within the prohibition of the statute.[5] Kinship of the parties sufficiently appears by an averment that the sexual act was committed by persons who bore the relation of uncle and niece to each other, and where by the statute that relation is nearer than that between cousins, it is unnecessary to allege that it is so.[6] Legitimacy of relationship

5 See Moore v. Com., 47 Mass. (6 Metc.) 243, 39 Am. Dec. 724.

6 People v. Cease, 80 Mich. 576, 45 N. W. 585.

7 Carmen v. State, 120 Ark. 172, 179 S. W. 183.

1 Charging the crime to have been committed with the daughter of the accused is sufficient.—Hicks v. People, 10 Mich. 395.

2 ARK. — State v. Ratcliffe, 61 Ark. 62, 31 S. W. 978. CAL.—People v. Kaiser, 119 Cal. 456, 51 Pac. 702. ILL.—Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672. LA.—State v. Guiton, 51 La. Ann. 155, 24 So. 784. MICH.—Hicks v. People, 10 Mich. 395. TEX. — Waggoner v. State, 35 Tex. Cr. Rep. 199, 32 S. W. 896.

3 ILL.—Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672. MICH.—Hicks v. People, 10 Mich. 395. OHIO—State v. Brown, 47 Ohio St. 102, 21 Am. St. Rep. 790, 8 Am. Cr. Rep. 373, 23 N. E. 746. TEX.—Waggoner v. State, 35 Tex. Cr. Rep. 199, 32 S. W. 896. UTAH—State v. James, 32 Utah 152, 89 Pac. 460.

4 Cook v. State, 11 Ga. 53, 56 Am. Dec. 410.

5 State v. Brown, 47 Ohio St. 102, 21 Am. St. Rep. 790, 8 Am. Cr. Rep. 373, 23 N. E. 746.

6 Id.

between the parties need not be alleged, because the statute includes illegitimate, as well as legitimate relationship.[7] Charging incest with step-daughter indictment or information sufficiently sets forth the relationship of the parties without averring the marriage of the accused to the mother of the female, or the existence of the marriage relation at the time of the act complained of;[8] but it has been said that on a charge of incest with daughter, there can be no conviction without proof of actual marriage of accused with the mother of the alleged daughter.[9]

§ 753. CHARGING KNOWLEDGE OF RELATIONSHIP. Knowledge of relationship not being included within the statutory definition of the offense of incest, such knowledge is not an element of the crime, and need not be alleged in an indictment or information,[1] nor affirmatively proved on the trial;[2] but where the statute under which prosecution is had, by its provisions or phraseology, makes knowledge an essential element of the offense, such knowledge must be alleged.[3] Thus, an indictment or informa-

7 Baker v. State, 30 Ala. 521; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672; State v. Laurence, 95 N. C. 693.

8 Noble v. State, 22 Ohio St. 541.

9 State v. Roswell, 6 Conn. 446.

1 ALA.—Morgan v. State, 11 Ala. 289. CAL.—People v. Koller, 142 Cal. 621, 76 Pac. 500. FLA.—McCaskill v. State, 55 Fla. 117, 45 So. 843. ILL.—Bolen v. People, 184 Ill. 338, 56 N. E. 408. IOWA—State v. Kimble, 104 Iowa 19, 73 N. W. 348; State v. Rennick, 127 Iowa 294, 4 Ann. Cas. 568, 103 N. W. 159; State v. Judd, 132 Iowa 296, 11 Ann. Cas. 91, 109 N. W. 892. MO.—State v. Bullinger, 54 Mo. 142. TEX.—Simon v. State, 31 Tex. Cr. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399. VT.—State v. Wyman, 59 Vt. 527, 59 Am. Rep. 753, 8 Atl. 900; State v. Dana, 59 Vt. 614, 10 Atl. 727. WASH.—State v. McGilvery, 20 Wash. 240, 55 Pac. 115; State v. Glindemann, 34 Wash. 221, 101 Am. St. Rep. 1001, 75 Pac. 800, distinguishing State v. McGilvery, 20 Wash. 240, 55 Pac. 115. W. VA.—State v. Pennington, 41 W. Va. 599, 23 S. E. 918.

2 State v. Judd, 132 Iowa 296, 11 Ann. Cas. 91, 109 N. W. 892.

3 Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691, 1 Am. Cr. Rep. 354.

An indictment for incest between father and daughter is bad where it does not allege that defendant had intercourse with his

tion charging incest between a step-son and his step-mother, must charge that each had knowledge of the relationship, to be good under the Indiana statute.[4] Charging accused with sexual intercourse with his niece, knowing her to be of such relationship, sufficiently charges the offense under a statute requiring the indictment or information to be direct and certain both as to the person accused and the offense charged.[5] Where the indictment or information alleges that the accused had knowledge of the prohibited relation existing between the parties, it need not also aver knowledge on the part of the other person.[6]

§ 754. Charging attempt to commit. An indictment or information charging an attempt to commit the offense of incest need not directly and certainly charge a purpose or intent on the part of the parties to carnally know each other;[1] neither need it be alleged that the attempt charged failed in consummation because of some inability of the actors to carry out their purpose, or because they were prevented or intercepted in the perpetration thereof,[2] or negative the presumption that the parties did not cease and desist of their own volition or will before the consummation of the attempted act charged.[3]

§ 755. Joinder of defendants. Although the crime of incest is a joint act requiring the concurring consent and active participation of both a man and a woman,[1] and

daughter, "knowing her to be such"; the use of the word "unlawfully" not being equivalent to the latter allegation.—Williams v. State, 2 Ind. 439.

4 Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691, 1 Am. Cr. Rep. 354.

5 State v. James, 32 Utah 152, 89 Pac. 460.

6 State v. McGilvery, 20 Wash. 240, 55 Pac. 115.

1 State v. McGilvery, 20 Wash. 240, 55 Pac. 115.

2 State v. McGilvery, 20 Wash. 240, 55 Pac. 115. See State v. Decker, 36 Kan. 717, 14 Pac. 283.

3 State v. McGilvery, 20 Wash. 240, 55 Pac. 115. See State v. Decker, 36 Kan. 717, 14 Pac. 283.

1 People v. Jenness, 5 Mich. 321; Degroot v. People, 39 Mich. 124. See State v. Jarvis, 20 Ore. 437, 23 Am. St. Rep. 141, 26 Pac. 302.

both are equally guilty of a perpetration of the prohibited act,[2] yet it is not necessary that they shall be indicted jointly,[3] or separately,[4] as one of the parties alone to the offense may be indicted and convicted;[5] and especially is this the case where the other party was ignorant of the relationship.[6] But in those jurisdictions in which the statute makes the crime of incest a joint offense, a contrary rule prevails and the parties must be jointly indicted, although they may be separately tried and punished.[7]

§ 756. JOINDER OF COUNTS. It has been said that the crime of incest and the crime of rape being offenses of a kindred nature, where they arise out of the same transaction, they may be joined in the same indictment in separate counts,[1] and some of the cases go to the extent of holding that there may be a conviction of incest on a charge of rape;[2] however, other cases hold that a count charging incest can not be joined with a count charging

2 See Delany v. People, 10 Mich. 241.

3 People v. Patterson, 102 Cal. 239, 36 Pac. 436; Powers v. State, 44 Ga. 209; Yeoman v. State, 21 Neb. 171, 31 N. W. 669; Lowther v. State, 4 Ohio Cir. Ct. Rep. 522, 2 Ohio Cir. Dec. 685.

4 People v. Patterson, 102 Cal. 239, 36 Pac. 436; Powers v. State, 44 Ga. 209; Lowther v. State, 4 Ohio Cir. Ct. Rep. 522, 2 Ohio Cir. Dec. 685.

5 People v. Patterson, 102 Cal. 239; Yeoman v. State, 21 Neb. 171, 31 N. W. 669; Lowther v. State, 4 Ohio Cir. Ct. Rep. 522, 2 Ohio Cir. Dec. 685.

6 State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321.

7 Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691, 1 Am. Cr. Rep. 354.

1 IOWA — State v. Hurd, 101 Iowa 391, 70 N. W. 613; State v. Kouhns, 103 Iowa 720, 73 N. W. 353. MO.—State v. Goodale, 210 Mo. 275, 109 S. W. 9. TEX. — Owens v. State, 35 Tex. Cr. 345, 33 S. W. 875; Wiggins v. State, 47 Tex. Cr. 538, 84 S. W. 821. WIS. — Porath v. State, 90 Wis. 527, 48 Am. St. Rep. 954, 63 N. W. 1061.

Both joined in one count, the indictment or information will be bad.—State v. Thomas, 53 Iowa 214, 4 N. W. 908.

2 Com. v. Goodhue, 43 Mass. (2 Metc.) 193. See State v. Hurd, 101 Iowa 391, 70 N. W. 613; State v. Kouhns, 103 Iowa 720, 73 N. W. 353.

rape in the same indictment,[3] on the ground that the two offenses can not be committed by the same act, as incest is accomplished by the concurring assent of two persons,[4] while the offense of rape is committed through the impelling will of one alone.[5] In those jurisdictions where the two offenses growing out of the same transaction are separate and distinct offenses, requiring a different character of proof, an acquittal on the charge of rape will not be a bar to a prosecution for incest, and vice versa.[6] However, in those jurisdictions in which the crime of incest may be committed by force, a count for incest may be joined with a count for rape, the same act constituting either offense under the statute.[7]

§ 757. ELECTION. It has been held under some statutes that the prosecution has the right to elect to proceed either for incest or fornication.[1] In those cases where more than one act of intercourse is proved to have occurred, it is the duty of the court, at the close of the prosecution's case, on motion of the accused, to require the prosecution to elect upon which act it will rely for conviction.[2] Thus, where the indictment or information charges the crime to have been committed on a specified day of a designated month, and the evidence on the trial shows two acts, one on the day and month alleged and another on a later date, the trial court should compel

3 State v. Thomas, 53 Iowa 214, 4 N. W. 908; State v. Jarvis, 20 Ore. 437, 23 Am. St. Rep. 141, 26 Pac. 302.

4 See, supra, § 755, footnote 1.

5 State v. Jarvis, 20 Ore. 437, 23 Am. St. Rep. 141, 26 Pac. 302.

6 Stewart v. State, 35 Tex. Cr. Rep. 174, 60 Am. St. Rep. 35, 32 S. W. 766.

If accused could have been lawfully found guilty and sentenced under the first indictment, it will be otherwise in some jurisdictions.—Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542.

7 Wadkins v. State, 58 Tex. Cr. Rep. 110, 137 Am. St. Rep. 922, 21 Ann. Cas. 556, 124 S. W. 959.

1 State v. Pruitt, 202 Mo. 49, 10 Ann. Cas. 654, 100 S. W. 431.

2 IOWA — State v. Price, 127 Iowa 301, 103 N. W. 195. MO.— State v. Pruitt, 202 Mo. 49, 10 Ann. Cas. 654, 100 S. W. 431. NEB.— State v. Lawrence, 19 Neb. 307, 27 N. W. 126. VT. — State v. Temple, 38 Vt. 37.

the prosecution to elect on which of the two acts it will rely for conviction.[3] Several counts founded on the same transaction, to meet the different legal aspects which the evidence may develop, the court, in its discretion, may decline to require the prosecution to elect on which count it will proceed.[4] In those jurisdictions in which the crime of incest may be committed by force or fraud, where the indictment joins a count charging incest with a count charging rape, the prosecution will not be required to elect between the counts.[5] And it has been said that where the same act constitutes both rape and incest, there need be no election between counts by the prosecution,[6] it being discretionary with the court to compel it.[7]

[3] IOWA — State v. Hurd, 101 Iowa 391, 70 N. W. 613. KY.—Smith v. Com., 109 Ky. 685, 60 S. W. 531. MICH.—People v. Jenness, 5 Mich. 305. MO.—State v. Pruitt, 202 Mo. 49, 10 Ann. Cas. 654, 100 S. W. 431. NEB.—Yeoman v. State, 21 Neb. 171, 31 N. W. 669.

[4] Porath v. State, 90 Wis. 527, 48 Am. St. Rep. 954, 63 N. W. 1061.

[5] Wadkins v. State, 58 Tex. Cr. Rep. 110, 137 Am. St. Rep. 922, 21 Ann. Cas. 556, 124 S. W. 959.

[6] State v. Goodale, 210 Mo. 275, 109 S. W. 9; Wadkins v. State, 58 Tex. Cr. 110, 137 Am. St. Rep. 922, 21 Ann. Cas. 556, 124 S. W. 959.

[7] Porath v. State, 90 Wis. 527, 48 Am. St. Rep. 954, 63 N. W. 1061.

CHAPTER LII.

INDICTMENT—SPECIFIC CRIMES.

Intoxicating Liquors.

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§ 771. —— Place of sale—In general.
§ 772. —— —— At social club.
§ 773. —— —— In prohibition or "dry" territory.
§ 774. —— —— Near church or school.
§ 775. —— —— On vessel in navigable waters.
§ 776. —— Purpose of sale.
§ 777. Allegation as to liquor—In general.
§ 778. —— Averment as to kind or quality.
§ 779. —— Averment as to quantity.
§ 780. —— Mode of sale—Gift.
§ 781. —— Price of consideration.
§ 782. Allegations as to accused.
§ 783. Allegations as to purchaser—In general.
§ 784. —— Alleging name of purchaser.
§ 785. —— —— Sufficiency of—Initials and "unknown."
§ 786. —— —— On sale to agent.
§ 787. —— —— On sale to prohibited person.
§ 788. Negative averments—Authority in general.
§ 789. —— Special authority.
§ 790. —— License—In general.

§ 791. ——— Particular licenses—Place, kinds of liquor, and quantities.
§ 792. —— Exceptions in statute.
§ 793. —— Legal purpose.
§ 794. —— Home-made liquors, etc.
§ 795. —— Original packages.
§ 796. —— Prescriptions, physicians and druggists.
§ 797. Unnecessary averments—Miscellaneous.
§ 798. Joinder—Of defendants, judgment.
§ 799. —— Of counts.
§ 800. —— Election, counts and offenses.

§ 758. FORM AND SUFFICIENCY OF INDICTMENT[1]—LANGUAGE OF STATUTE. The offense of violating the liquor laws —state, federal or municipal—is one purely statutory. The statutes regarding the matter are as various as the different jurisdictions, and it would be idle to attempt, in a general work, to give rules applicable, alike, in all jurisdictions; but there are certain underlying fundamental general principles applicable in all jurisdictions. It may be said to be a general rule, applicable in all jurisdictions, that an indictment or information, charging a violation of the liquor laws, in the language, or substantially in the language,[2] of the state statute or mu-

1 As to forms of indictment for violations of the liquor laws in the various phases, see Forms Nos. 693, 697, 1043-1045, 1246-1417.

2 ALA.—Bryan v. State, 45 Ala. 86; Harris v. State, 50 Ala. 127; Weed v. State, 55 Ala. 13, overruling Bryan v. State, 45 Ala. 86; Fitzpatrick v. State, 169 Ala. 1, 53 So. 1021. CONN.—Rawson v. State, 19 Conn. 292. FLA.—Roberts v. State, 26 Fla. 360, 7 So. 861. IND.—Howell v. State, 4 Ind. App. 148, 31 N. E. 88; Dolan v. State, 122 Ind. 141, sub nom. State v. Dolan, 23 N. E. 761. IOWA—Zumhoff v. State, 4 G. Greene 526. KAN.—State v. Looker, 54 Kan. 227, 38 Pac. 288. KY.—Mays v. Com., 3 Ky. L. Rep. 350. LA.—State v. Crudupt, 136 La. 555, 67 So. 364. ME.—State v. Casey, 45 Me. 435; State v. Collins, 48 Me. 217. MINN.—Mankato (City of) v. Arnold, 36 Minn. 62, 30 N. W. 305. MO.—State v. Baskett, 52 Mo. App. 389. PA.—Com. v. Sellers, 130 Pa. St. 32, 18 Atl. 54, 542. TEX.—Rutherford v. State, 49 Tex. Cr. Rep. 21, 90 S. W. 172. VA.—Com. v. Young, 56 Va. (15 Gratt.) 664.

Where the words of the statute are not used, words of equal or

nicipal ordinance under which the prosecution is had, will be sufficient,[3] provided the act charged as constituting the offense alleged is so designated as to time,[4] and place,[5] and the other essential characteristics,[6] as to enable the accused to know just what he is charged with and enable him to prepare his defense,[7] and the indictment or information is broad enough and specific enough to bring the offense clearly within the prohibition of the

greater import than those of the statute must be used to charge the offense.—Rutherford v. State, 49 Tex. Cr. Rep. 21, 90 S. W. 172.

All statutory terms need not be employed, but only that portion of them which is sufficient to set forth plainly the nature of the offense charged.—Loeb v. State, 75 Ga. 258.

"In the habit of becoming intoxicated" instead of the statutory phrase "in the habit of being intoxicated" does not vitiate the indictment. — Dolan v. State, 122 Ind. 141, sub nom. State v. Dolan, 23 N. E. 761.

"Whisky" used instead of the statutory term "distilled liquor," is sufficient.—State v. Dengolensky, 82 Mo. 44, following State v. Williams, 21 Mo. 496.

3 ARK.—State v. Adams, 16 Ark. 497. GA.—Sharp v. State, 17 Ga. 290. ILL.—McCutcheon v. People, 69 Ill. 601. IND.—Shilling v. State, 5 Ind. 443; Skinner v. State, 120 Ind. 127, 22 N. E. 115; State v. Hoard, 123 Ind. 34, 23 N. E. 972. IOWA—State v. Devine, 4 Iowa 443. KAN.—State v. Schweiter, 27 Kan. 499; State v. Tanner, 50 Kan. 365, 31 Pac. 1096; State v. Looker, 54 Kan. 227, 38 Pac. 288; Lincoln Center v. Linker, 6 Kan. App. 369, 51 Pac. 807. LA.—State v. Porte, 9 La. Ann. 105. MD.—Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522; Cearfoss v. State, 42 Md. 403. MASS.—Com. v. Wood, 70 Mass. (4 Gray) 11. MICH.—People v. Telford, 56 Mich. 541, 23 N. W. 213; People v. Paquin, 74 Mich. 34, 41 N. W. 852. MINN.—Mankato (City of) v. Arnold, 36 Minn. 62, 30 N. W. 305. MO. — State v. Roehm, 61 Mo. 82; State v. Kock, 61 Mo. 117; State v. Crooker, 95 Mo. 389, 8 S. W. 422; State v. Houts, 36 Mo. App. 265; State v. Atkins, 40 Mo. App. 344; State v. Meagher, 49 Mo. App. 571. N. H.—State v. Rust, 35 N. H. 438. TENN.—State v. Odam, 70 Tenn. (2 Lea) 220. W. VA.—State v. Boggess, 36 W. Va. 713, 15 S. E. 423. WIS.—Boldt v. State, 72 Wis. 7, 38 N. W. 177.

4 See, infra, § 769.

5 See, infra, §§ 771-775.

6 See, infra, §§ 766 et seq.

7 KY.—Com. v. White, 57 Ky. (18 B. Mon.) 492. MO.—State v. Cox, 29 Mo. 475. NEB.—State v. Pischel, 16 Neb. 490, 20 N. W. 848; Smith v. State, 32 Neb. 105, 48 N. W. 823. S. C. — State v. Steedman, 8 Rich. L. 312. S. D.— State v. Burchard, 4 S. D. 548, 57 N. W. 491. TEX.—Burch v. Republic, 1 Tex. 608. VA. — Arrington v. Com., 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224.

statute.[8] In those cases in which the statute does not create or describe the offense, but merely prescribes as to the form of the indictment or information, on a charge of selling intoxicating liquors contrary to the statute or an ordinance, it will not be sufficient to follow the language, or substantially the language, of the statute or ordinance.[9]

Statutory form prescribed, an indictment or information following that form will be sufficient[10] where it meets the requirements of properly and sufficiently notifying the accused of the exact charge against him,[11] although it would be bad for uncertainty at common law.[12]

8 State v. Martin, 34 Ark. 340; State v. Heitsch, 29 Minn. 134, 12 N. W. 353; Woodworth v. State, 4 Ohio St. 487.

9 State v. Schmid, 57 N. J. L. 625, 31 Atl. 280.

10 Spigener v. State, 11 Ala. App. 296, 66 So. 896; Whaley v. State, (Ala. App.) 69 So. 384; Arrington v. State, (Ala. App.) 69 So. 385; State v. Sixo, (W. Va.) 87 S. E. 267.

11 State v. Learned, 47 Me. 426.

12 State v. Murphy, 15 R. I. 543, 10 Atl. 585; State v. Comstock, 27 Vt. 553. See, also:

ARIZ.—Cluff v. State, 16 Ariz. 179, 142 Pac. 644. ARK. — Wolfe v. State, 107 Ark. 33, 153 S. W. 1102; McNeil v. State, 187 S. W. 1060. CAL. — Golden v. Justice's Court, 23 Cal. App. 778, 140 Pac. 49; People v. Perry, 25 Cal. App. 337, 143 Pac. 798. ILL. — McCutcheon v. People, 69 Ill. 601, 1 Am. Cr. Rep. 471. IND.—Skinner v. State, 120 Ind. 127, 22 N. E. 115; State v. Hoard, 123 Ind. 34, 23 N. E. 972. KAN.—State v. Looker, 54 Kan. 227, 31 Pac. 1096. LA.—State v. Lawson, 136 La. 172, 66 So. 769. MASS.—Com. v. Wood, 70 Mass. (4 Gray) 11. MICH.—People v. Telford, 56 Mich. 541, 23 N. W. 213; People v. Possing, 137 Mich. 303, 100 N. W. 396. MINN.—Mankato (City of) v. Arnold, 36 Minn. 62, 30 N. W. 305. MO.—State v. Crooker, 95 Mo. 389, 8 S. W. 422. ORE.—State v. Runyon, 62 Ore. 246, 124 Pac. 259; State v. Billups, 63 Ore. 277, 48 L. R. A. (N. S.) 308, 127 Pac. 686. OKLA.—Utsler v. Terr., 10 Okla. 463, 62 Pac. 287. TEX.—Rutherford v. State, 49 Tex. Cr. Rep. 21, 90 S. W. 172; Winterman v. State, 179 S. W. 704. VT.—State v. Paige, 78 Vt. 286, 6 Ann. Cas. 725, 62 Atl. 1017. VA.—Ferrimer v. Com., 112 Va. 897, 72 S. E. 699. WIS.—Boldt v. State, 72 Wis. 7, 38 N. W. 177.

A complaint for the violation of an ordinance prohibiting the soliciting or taking orders for the sale of liquors within the corporate limits may charge the offense in the language of the ordinance. —Ex parte Anixter, 166 Cal. 762, 138 Pac. 353.

But the description of the offense must be accompanied by a statement of the particulars essential to constitute the crime or

Conclusion of indictment or information charging the sale of intoxicating liquors in prohibited territory need not be that the sale was in violation of the local-option law.[13]

§ 759. CERTAINTY. An indictment or information charging a violation of the liquor laws, either state or municipal,[1] must be certain as to common intent,[2] describing the offense charged with such precision and certainty as to identify the particular transaction complained of and in such language as will suffice to apprise the accused of

offense and acquaint the accused with what he must meet upon the trial.—Fletcher v. State, 2 Okla. Cr. 300, 23 L. R. A. (N. S.) 581, 101 Pac. 599.

Where the indictment follows the language of the statute it is not subject to special demurrer for failure to specify with sufficient definiteness the kind of drinks sold.—Howe v. State, (Ga. App.) 73 S. E. 46.

13 State v. Runyon, 62 Ore. 246, 124 Pac. 259.

An information charging the unlawful sale of liquor which concludes with the clause "contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the state of Idaho" is a sufficient allegation that the liquor was sold or disposed of contrary to law, whether a local option law or any other public statute.—State v. Schmitz, 19 Idaho 566, 114 Pac. 1.

1 **A municipal ordinance** regulating the sale of intoxicating liquors charged to have been violated, the same certainty is required in the indictment or information that is required in a charge of having violated a state statute.—Bridgeford v. City of Lexington, 46 Ky. (7 B. Mon.) 47; Cunningham v. Berry, Recorder, 17 Ore. 622, 22 Pac. 115.

Complaint charging selling of whisky by accused within a named city, in less quantities than those prescribed by the ordinance of said city, and containing a statement that the selling was contrary to the force and effect of a designated section of the specified ordinance alleged to have been approved by the board of trustees, but which does not contain any allegation or charge that the accused sold the whisky without having first obtained a license, agreeably to the provisions of said ordinance, the complaint fails to state facts sufficient to constitute an offense.—Cunningham v. Berry, Recorder, 17 Ore. 622, 22 Pac. 115.

2 IND.—McCool v. State, 23 Ind. 127. MO.—State v. Wishorn, 15 Mo. 504. TENN.—Martin v. State, 25 Tenn. (6 Humph.) 204; Bilbro v. State, 26 Tenn. (7 Humph.) 534; State v. Odam, 70 Tenn. (2 Lea) 220.

the exact offense with which he is charged;[3] will enable the court to judge (1) whether the facts alleged are sufficient to constitute the offense charged and support a conviction,[4] and (2) whether the accused is tried upon the charge presented by the indictment or information;[5] and also to enable the accused to plead a judgment of acquittal or conviction in bar of a subsequent prosecution for the same offense.[6] The particular facts consti-

3 ILL. — Cannady v. People, 17 Ill. 158; Mapes v. People, 69 Ill. 523. ME.—State v. Moran, 40 Me. 129. MASS.—Com. v. Intoxicating Liquors, 138 Mass. 506. N. Y.—People v. Olmsted, 74 Hun 323, 9 N. Y. Cr. Rep. 54, 26 N. Y. Supp. 818. S. D.—State v. Burchard, 4 S. D. 548, 57 N. W. 491; State v. Boughner, 5 S. D. 461, 59 N. W. 736. TEX.—Alexander v. State, 29 Tex. 495. VA.—Arrington v. Com., 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224; Harding v. Com., 105 Va. 860, 52 S. E. 832. WASH.—State v. Muller, 80 Wash. 368, 141 Pac. 910.

Charge of selling intoxicating liquors in certain city, in violation of statute, which does not state a definite place in the city at which the alleged sale was made, and which does not state whether the sale was made at wholesale or retail, or whether the liquor was to be drunk on the place where sold or elsewhere, is insufficient.—Arrington v. Com., 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224.

4 Fehringer v. People, 59 Colo. 3, 147 Pac. 361; Arrington v. Com., 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224; State v. Muller, 80 Wash. 368, 141 Pac. 910.

An indictment charging an accused with the offense of "furnishing" intoxicating liquor should set out the specific acts necessary to constitute the offense, the term "furnishing" being too indefinite. —Scott v. State, 6 Okla. Cr. 492, 119 Pac. 1023.

Simply stating that the accused person did give away intoxicating liquor in violation of law is not sufficient. — Findley v. State, 11 Okla. Cr. 275, 145 Pac. 1107.

Where the statute prohibits the bringing into a certain district more than a certain amount of named liquors it is better that the indictment specify the prohibited liquor. — State v. Williams, 146 N. C. 618, 14 Ann. Cas. 562, 61 S. E. 61.

5 Mapes v. People, 69 Ill. 523; State v. Burchard, 4 S. D. 548, 57 N. W. 491.

6 DEL.—State v. Solio, 4 Penn. 138, 54 Atl. 684. GA. — Loeb v. State, 75 Ga. 258; O'Neil v. State, 116 Ga. 839, 43 S. E. 248; Baker v. State, 117 Ga. 428, 43 S. E. 744; Maddox v. State, 118 Ga. 32, 44 S. E. 806. IOWA—Hintermeister v. State, 1 Iowa 101. KAN.—State v. Ratner, 44 Kan. 429, 24 Pac. 953; State v. Brannon, 6 Kan. App. 765, 50 Pac. 986. KY.—Bridgeford v. Lexington (City of), 46 Ky. (7 B. Mon.) 47; Com. v. White, 57 Ky. (18 B. Mon.) 492; Com. v. Riley, 77 Ky. (14 Bush) 44; Com. v. Middleton, 8 Ky. L. Rep. 264; Com. v. Traylor, 20 Ky. L. Rep.

tuting the alleged offense,[7] and facts showing the act to have been unlawful,[8] must be fully set out; and in those cases in which the acts charged may constitute either of two offenses under the statute, and which offense has been committed depends upon the presence or absence

97, 45 S. W. 356. ME.—State v. Lane, 33 Me. 536; State v. Moran, 40 Me. 129. MD.—State v. Kiefer, 90 Md. 165, 44 Atl. 1043. MICH.—Benalleck v. People, 31 Mich. 200; People v. Minnock, 52 Mich. 628, 18 N. W. 390; Andrews v. Van Buren, Circuit Judge, 130 Mich. 695, 90 N. W. 694. MO.—State v. Cox, 29 Mo. 475; State v. Anthony, 52 Mo. App. 507; State v. Manning, 87 Mo. App. 78. N. J.—Roberson v. Lambertville (City of), 38 N. J. L. (9 Vr.) 69. N. Y.—People v. Bates, 61 App. Div. 559, 15 N. Y. Cr. Rep. 469, 71 N. Y. Supp. 123; People v. Olmsted, 74 Hun 323, 9 N. Y. Cr. Rep. 54, 26 N. Y. Supp. 818. N. C.—State v. Farmer, 104 N. C. 887, 10 S. E. 563. ORE.—Cunningham v. Berry, Recorder, 17 Ore. 622, 22 Pac. 115. PA.—Seifried v. Com., 101 Pa. St. 200. S. D.—State v. Brennan, 2 S. D. 384, 50 N. W. 625; State v. Burchard, 4 S. D. 548, 57 N. W. 491. TEX.—Burch v. Republic, 1 Tex. 608; Alexander v. State, 29 Tex. 495; State v. Smith, 35 Tex. 132. VT.—State v. Wooley, 50 Vt. 357, 10 Atl. 84. VA.—Com. v. Hatcher, 47 Va. (6 Gratt.) 667; Arrington v. Com., 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224. WASH.—State v. Muller, 80 Wash. 368, 141 Pac. 910.

General terms in an indictment or information, used to state the offense charged, will not be sufficient on a motion to quash, but will usually not be held bad after verdict and judgment.—State v. Ratner, 44 Kan. 429, 24 Pac. 953, citing Kingman (City of) v. Berry, 40 Kan. 625, 20 Pac. 527; State v. Knowles, 34 Kan. 393, 8 Pac. 861.

Information charging that on or about a day named, in a stated month and year, in a designated county of the state, accused did, then and there unlawfully sell, barter, and give away spirituous, malt, vinous and fermented intoxicating liquors, without taking out and having a permit therefor as provided by law, and then and there not being lawfully and in good faith engaged in the business of a druggist, was held not direct and certain as to the offense charged, it leaving the accused uncertain as to which of the two offenses he would be required to meet, that is to say, whether he was charged "without taking out a permit therefor," or whether he should meet the charge that the sale was made by him having a permit, and "not then and there being lawfully and in good faith engaged in the business of a druggist."—State v. Knoby, 6 Kan. App. 334, 51 Pac. 53.

[7] State v. Cox, 29 Mo. 475; People v. Olmsted, 74 Hun (N. Y.) 323, 9 N. Y. Cr. Rep. 54, 26 N. Y. Supp. 818; State v. Butcher, 1 S. Dak. 401, 47 N. W. 406; State v. Benjamin, 49 Vt. 101.

[8] People v. Olmsted, 74 Hun (N. Y.) 323, 9 N. Y. Cr. Rep. 54, 26 N. Y. Supp. 818.

of a certain fact, the indictment or information must allege or negative, as the case may be, that particular fact.[9] The indictment or information must clearly charge the offense named in the ordinance[10] or statute;[11] must allege that the liquors sold were those prohibited by the ordinance or statute,[12] and must set out facts bringing the alleged offense within the purview and prohibition of such ordinance or statute.[13] But the indictment or information need not refer to any specific section, chap-

9 Roberson v. State, 100 Ala. 123, 14 So. 869; State v. Auberry, 7 Mo. 304.

10 **As to ordinance,** see footnote 1, this section.

11 Ex parte McKenna, 97 Kan. 153, 154 Pac. 226; People v. Hinchman, 75 Mich. 587, 9 L. R. A. 707, 42 N. W. 1006; Wortman v. State, 9 Okla. Cr. 440, 132 Pac. 358; Tracy v. State, 9 Okla. Cr. 532, 132 Pac. 692.

An information charging that the accused did sell, give away, and otherwise furnish intoxicating liquor only charges a sale; the giving away and otherwise furnishing part being surplusage.—Tracy v. State, 9 Okla. Cr. 532, 132 Pac. 692.

Where the statute prohibits the sale of liquor "to be used as a beverage" an information charging the sale of whisky "as a beverage" without the words "to be used" charges the statutory offense. — People v. Hinchman, 75 Mich. 587, 9 L. R. A. 707, 42 N. W. 1006.

12 Ex parte McKenna, 97 Kan. 153, 154 Pac. 226.

A charge of unlawfully selling "certain liquids" without in any way charging that the liquids sold were spirituous, malt, vinous, fermented, or intoxicating, states no offense. — Ex parte McKenna, 97 Kan. 153, 154 Pac. 226.

13 IDA. — State v. Caldwell, 21 Ida. 663, 123 Pac. 299. OKLA.—Ex parte Hunnicut, 7 Okla. Cr. 213, 123 Pac. 179; Wortman v. State, 9 Okla. Cr. 440, 132 Pac. 358. TEX.—Trezevant v. State, 66 Tex. Cr. Rep. 172, 145 S. W. 1191; Rhodes v. State, 75 Tex. Cr. Rep. 659, 172 S. W. 252. VA.—Jeffries v. Com., 113 Va. 773, 75 S. E. 90.

An information charging that the defendant committed the crime of selling intoxicating liquor, without a license, in a prohibition district, "contrary to the form of the statute in such cases made and provided" is sufficient to charge the offense.—State v. Caldwell, 21 Ida. 663, 123 Pac. 299.

An indictment for selling intoxicating liquors in certain quantities without a license need not allege that defendant was pursuing the occupation of a retail liquor dealer.—Trezevant v. State, 66 Tex. Cr. Rep. 172, 145 S. W. 1191.

Charging accused with selling liquor between midnight of Saturday and sunrise of the succeeding Monday does not charge a sale on Sunday, in violation of the Laws

ter or article of any statute or code or ordinance,[14] except in those cases where the different sections impose different penalties, and it is desired by the prosecution to secure the infliction of a specific penalty;[15] and where the charge is that of the violation of a local-option law, the indictment or information need not refer to the latest revision of that law, where the original law has been revised.[16] It has been held that where a single sale of intoxicating liquors, in violation of an ordinance or statute, is charged, the indictment or information should specify the particular kind of intoxicating liquor sold.[17] In the case of a sale charged to have been made by an unlicensed person to an agent of an undisclosed principal, the sale must be alleged to have been made to the agent;[18] but in those cases in which the principal is disclosed, the sale must be alleged to have been made to the principal.[19]

Disjunctive allegations affecting the certainty of the charge and the sufficiency of the indictment or information, are treated in another section.[20]

of 1908, ch. 189.—Jeffries v. Com., 113 Va. 773, 75 S. E. 90.

In a prosecution for carrying on the business of selling intoxicating liquors, the indictment must allege two sales within the specified time, and the proof must show two sales to persons named in the indictment.—Rhodes v. State, 75 Tex. Cr. Rep. 659, 172 S. W. 252.

14 State v. Freeman, 27 Iowa 333; State v. Allen, 32 Iowa 248; Adams Express Co. v. Com., 154 Ky. 462, 48 L. R. A. (N. S.) 342, 157 S. W. 908; Walker v. State, 7 Okla. Cr. 494, 124 Pac. 87.

Where the offense is prosecuted under a statute the indictment should charge in appropriate language the violation of the state law and need not set out or refer to any federal statute applicable to the transaction. — Adams Express Co. v. Com., 154 Ky. 462, 48 L. R. A. (N. S.) 342, 157 S. W. 908.

15 Benalleck v. People, 31 Mich. 200; State v. Leavitt, 63 N. H. 381.

16 State v. Wright, 161 Mo. App. 597, 144 S. W. 175.

17 State v. Dorr, 82 Me. 341, 19 Atl. 861.

18 Com. v. Fowler, 145 Mass. 398, 14 N. E. 457.

Charging unlawful acting by A as the agent of B the purchaser, in effecting the sale of certain intoxicating liquors the sale of which without a license is prohibited, sufficiently identifies the offense charged. — State v. Caldwell, (Miss.) 17 So. 372.

19 Com. v. Fowler, 145 Mass. 398, 14 N. E. 457.

20 See, infra, § 761.

Grammatical errors not affecting the certainty of the indictment or information, will not vitiate it;[21] neither will the use of the phrase "then and there" instead of repeating in extenso the charge as to time and place before second and subsequent material averments.[22]

§ 760. —— CONJUNCTIVE ALLEGATIONS. The general rule is that where the statute enumerates, in the disjunctive, a series of acts or things, any one or all of which may constitute the offense denounced and punished by the statute, they may be pleaded in the conjunctive, substituting "and" for the "or" in the statutory language.[1] Hence, where a statute regulating keeping and selling intoxicating liquors makes it illegal to do any one of several things, which are enumerated in the disjunctive, an indictment or information charging the accused with a violation of the statute, may charge the doing of two or more or of all the things thus prohibited, joining them in the conjunctive form in one count, where the same punishment is prescribed for the violation of the prohibitions in the statute.[2]

761. —— DISJUNCTIVE ALLEGATIONS. In those cases in which the statute regulating the keeping and selling of intoxicating liquors enumerates two or more things of which it prohibits the doing, and affixes a penalty for their doing, enumerating these prohibited things in the disjunctive, an indictment or information, although in the language of the statute,[1] which pleads a violation of two or more of the prohibited things in the disjunctive,

21 State v. Whitney, 15 Vt. 298.

22 State v. Hopkins, 5 R. I. 53.

1 General rule discussed, supra, § 278.

2 IOWA — State v. Finan, 10 Iowa 119. KAN.—State v. Schweiter, 27 Kan. 499. MISS.—Lea v. State, 64 Miss. 201, 1 So. 51. MO.—State v. Nations, 75 Mo. 53; State v. Pittman, 76 Mo. 56; State v. Fairgrieve, 29 Mo. App. 641. N. D.—State v. Kerr, 3 N. D. 523, 58 N. W. 27. R. I.—State v. Colwell, 3 R. I. 284; State v. Nolan, 15 R. I. 529, 10 Atl. 481. WIS.—Boldt v. State, 72 Wis. 7, 38 N. W. 177.

1 As to indictment in language of statute, see, supra, § 758.

will be insufficient wherever the offense sought to be charged is thereby rendered indefinite and uncertain as to the particular act or thing intended,[2] except in those jurisdictions in which the statute authorizes the charge to be made in the alternative.[3] Where the several things or terms thus pleaded disjunctively are merely synonyms,[4] or merely explicative of each other,[5] such disjunctive pleading will not render the indictment or information vulnerable to the objection that it is insufficient because of uncertainty;[6] as where in the statute the word "or," connecting the different terms, is used in the sense of "to wit" and in explanation of that which precedes;[7] neither will it be duplicitous.[8] Thus, it has been said that an indictment or information is insufficient for uncertainty which charges the commission of two or more offenses in the alternative, as by charging that accused did "sell or give away," where both acts are made an offense under the statute,[9] but in such case each disjunc-

2 MASS.—Com. v. Grey, 68 Mass. (2 Gray) 501, 61 **Am. Dec.** 476. R. I.—State v. Carver, 12 R. I. 285. W. VA. — State v. Charlton, 11 W. Va. 332, 27 **Am. Rep.** 603. WIS.—Clifford v. State, 29 Wis. 327. ENG.—See Ex parte Pain, 5 Barn. & C. 251, 29 **Rev. Rep.** 231, 15 **Eng. Rul. Cas.** 208, sub nom. R. v. Pain, 7 Dowl. & Ry. 678.

Charge not rendered uncertain by the use of the disjunctive allegation, the indictment or information will be sufficient.—People v. Gilkinson, 4 Park. Cr. Rep. (N. Y.) 26.

3 Smith v. Warrior, 99 Ala. 481, 12 So. 418; McClellan v. State, 118 Ala. 122, 23 So. 732.

4 **"Building" and "place"** are synonymous in a charge that accused used "a certain building or place" for the illegal sale of intoxicating liquors. See State v. Dixon, 104 Iowa 741, 74 N. W. 692.

"Dealer" and "keeper" are synonymous in the charge that accused was a "liquor dealer or keeper of a bar-room."—Hofheintz v. State, 45 Tex. Cr. Rep. 117, 74 S. W. 310.

"Shop" and "store" in a charge that accused did keep "a certain store or shop for the purpose of selling wine or spirituous liquors," are synonymous.—Broth v. State, 18 Conn. 439.

5 State v. Boucher, 59 Wis. 477, 18 N. W. 335. See Blemer v. People, 76 Ill. 265.

6 State v. Nerbowig, 33 Minn. 480, 24 N. W. 321.

7 See Blemer v. People, 76 Ill. 265; Clifford v. State, 29 Wis. 327; State v. Boucher, 59 Wis. 477, 18 N. W. 335.

8 **As to duplicity,** see, infra, § 762.

9 ALA.—Raisler v. State, 55 Ala. 64. ARK.—Thompson v. State, 37

tive averment in its alternative phrases must charge an indictable offense under the statute to render it insufficient;[10] charging the place of sale in the disjunctive;[11] charging the person to whom the sale was made in the disjunctive, as "principal or agent";[12] charging as to character of the liquor sold in the disjunctive,[13] although there are authorities to the contrary,[14] it being said that the indictment or information should charge the accused with selling spirituous liquor, or with selling intoxicating liquor, or with selling spirituous liquor and intoxicating liquor.[15]

Ark. 408. MO. — State v. Fairgrieve, 29 Mo. App. 641. N. J.—State v. Froehlich, (1887) 6 Cent. Rep. 537. N. Y.—People ex rel. Lotz v. Norton, 76 Hun 7, 27 N. Y. Supp. 851. R. I.—State v. Colwell, 3 R. I. 284.

10 See Raisler v. State, 55 Ala. 64.

11 State v. Charlton, 11 W. Va. 332, 27 Am. Rep. 603.

12 State v. Moran, 40 Me. 129.

13 ALA. — Powell v. State, 69 Ala. 10; Boon v. State, 69 Ala. 226; Cost v. State, 96 Ala. 60, 11 So. 435. ARK.—Thompson v. State, 37 Ark. 408. CONN.—Smith v. State, 19 Conn. 493. GA.—Grantham v. State, 89 Ga. 121, 14 S. E. 892. KY.—Raubold v. Com., 23 Ky. L. Rep. 735, 63 S. W. 781; Locke v. Com., 23 Ky. L. Rep. 740, 63 S. W. 795. MASS.—Com. v. Grey, 68 Mass. (2 Gray) 501, 61 Am. Dec. 476. VA.—Morgan v. Com., 48 Va. (7 Gratt.) 592; Thomas v. Com., 90 Va. 92, 17 S. E. 788. W. VA.—Cunningham v. State, 5 W. Va. 508. WIS.—Clifford v. State, 29 Wis. 327.

A charge of selling "spirituous, ardent or intoxicating liquors or intoxicating drinks" is bad for uncertainty. — Clifford v. State, 29 Wis. 327.

14 ALA.—Powell v. State, 69 Ala. 10; Cost v. State, 96 Ala. 60, 11 So. 435. GA.—Eaves v. State, 113 Ga. 749, 39 S. E. 318. N. Y.—Osgood v. People, 39 N. Y. 449, 1 Cow. Cr. Rep. 151. S. C.—Florence v. Berry, 61 S. C. 237, 39 S. E. 389. VA.—Morgan v. Com., 48 Va. (7 Gratt.) 592; Thomas v. Com., 90 Va. 92, 17 S. E. 788. W. VA.—Cunningham v. State, 5 W. Va. 508. WIS.—State v. Boucher, 59 Wis. 477, 18 N. W. 335.

Disjunctive clause explanatory of preceding clause, the rule is otherwise; as where the complaint charges selling of "intoxicating or malt liquors," the phrase "or malt" being regarded as showing the kind of intoxicating liquors.—State v. Boucher, 59 Wis. 477, 18 N. W. 335. See, also, footnote 5, this section.

15 State v. Boucher, 59 Wis. 477, 18 N. W. 335. See Thompson v. State, 37 Ark. 408; Com. v. Grey, 68 Mass. (2 Gray) 501, 61 Am. Dec. 476; Clifford v. State, 29 Wis. 327.

§ 762. —— DUPLICITY. An indictment or information charging a violation of the liquor laws which is so phrased as to allege two or more offenses in one count—e. g., as by charging "selling or giving away" intoxicating liquor,[1] or charging the keeping of liquors in less quantities than one gallon and selling the same to be drunk on the premises,[2] both acts being an offense by the statute under which the prosecution is had—is bad for duplicity,[3] except in those cases in which the charge as to all but one offense can properly be rejected as surplusage.[4] But in those cases in which the statute enumerates two or more acts as representing stages in the consummation of the offense, they may be set out in the conjunctive in one count in the same indictment, notwithstanding the fact that each act alone would constitute an offense.[5]

1 See, supra, § 761, footnote 9.

2 Miller v. State, 6 Miss. (5 How.) 250.

3 ILL.—Pope v. People, 26 Ill. App. 44. MISS.—Miller v. State, 6 Miss. (5 How.) 250. NEB.—State v. Ball, 27 Neb. 601, 43 N. W. 398. TEX.—Allen v. State, 13 S. W. 998.

"Did keep, and was concerned, engaged and employed in owning and keeping intoxicating liquors to sell," held not to be bad for duplicity.—Vaughn v. State, 5 Iowa 369.

"Keeping intoxicating liquors for sale, and did then and there sell the same, in a building designated," held not to be bad for duplicity.—State v. Becker, 20 Iowa 438; State v. Baughman, 20 Iowa 497.

4 IND.—State v. Hutzell, 53 Ind. 160; State v. Wickey, 54 Ind. 438, 57 Ind. 596; Hatfield v. State, 9 Ind. App. 296, 36 N. E. 664. S. D.—State v. Bradley, 15 S. D. 148, 87 N. W. 590. TEX.—Jordan v State, 37 Tex. Cr. Rep. 222, 38 S. W. 780, 39 S. W. 110. WIS.—State v. Bielby, 21 Wis. 204.

5 ARK.—Davis v. State, 50 Ark. 17, 6 S. W. 388. CONN.—Barnes v. State, 20 Conn. 232; State v. Burns, 44 Conn. 149. IND.—Henry v. State, 113 Ind. 304, 15 N. E. 593. LA.—State v. Fant, 2 La. Ann. 837. ME.—State v. Cottle, 15 Me. 473; State v. Stinson, 17 Me. 154; State v. Churchill, 25 Me. 306. MASS.—Com. v. Eaton, 32 Mass. (15 Pick.) 273; Com. v. Wilcox, 55 Mass. (1 Cush.) 503; Com. v. Curran, 119 Mass. 206; Com. v. Dolan, 121 Mass. 374; Com. v. Byrnes, 126 Mass. 248. MICH.—Luton v. Newaygo County Circuit Judge, 69 Mich. 610, 37 N. W. 701; People v. Paquin, 74 Mich. 34, 41 N. W. 852; People v. Wade, 101 Mich. 89, 59 N. W. 438. PA.—Com. v. Baird, 4 Serg. & R. 141; Com. v. Schoenhutt, 3 Phila. 20. R. I.—State v. Colwell, 3 R. I. 248; State v. Nolan, 15 R. I. 529, 10 Atl. 481.

And an indictment or information may describe a sale as having been made to several persons at one time,[6] or a number of distinct sales made to different persons,[7] without being void for duplicity, because the offense charged is the general one of the sale of intoxicating liquors unlawfully. Describing the place of sale by using synonymous terms in the conjunctive, such as "house, store, and shop," does not render the indictment or information bad for duplicity.[8] Likewise charging the selling of intoxicating liquors to a person who was intoxicated and in the habit of becoming intoxicated, is said to charge but a single offense.[9] An indictment or information charging unlawful sales of intoxicating liquors to different persons at different times, will be bad for duplicity, on the ground that it charges two offenses,[10] but charging the offense to have been committed on a day certain with a continuando clause "and on divers other days and times," has been held not to be open to the objection of duplicity, because the offense charged is the single offense of unlawfully selling;[11] and the continuando clause

TEX.—Allen v. State, 13 S. W. 998.

Cognate acts disjunctively joined in the statute, the doing of either of which constitutes an offense, may all be charged in one count.—Thompson v. State, 37 Ark. 408; State v. Finan, 10 Iowa 19; People v. Harmon, 49 Hun (N. Y.) 558, 6 N. Y. Cr. Rep. 169, 2 N. Y. Supp. 421; affirmed, 112 N. Y. 666, 20 N. E. 414; State v. Kerr, 3 N. D. 523, 58 N. W. 27.

6 Storrs v. State, 3 Mo. 9; State v. Atkins, 40 Mo. App. 344; People v. Schmidt, 19 Misc. (N. Y.) 458, 12 N. Y. Cr. Rep. 282, 44 N. Y. Supp. 607; Peer's Case, 46 Va. (5 Gratt.) 674.

Sale to minors being made an offense by statute, an indictment charging a sale, at a certain time and place, to "certain minors, the names of whom are to the grand jurors unknown," is not duplicitous.—Morgenstern v. Com., 68 Va. (27 Gratt.) 1018, 2 Am. Cr. Rep. 476.

7 Zumhoff v. State, 4 G. Greene (Iowa) 526; Com. v. Broker, 151 Mass. 355, 23 N. E. 1137; People v. Adams, 17 Wend. (N. Y.) 475.

8 Barth v. State, 18 Conn. 432; Rawson v. State, 19 Conn. 292; Stockwell v. State, 85 Ind. 122; Stout v. State, 93 Ind. 150.

9 State v. Conner, 30 Ohio St. 405.

10 People v. O'Donnell, 46 Hun (N. Y.) 358, 7 N. Y. Cr. Rep. 345, 10 N. Y. Supp. 250.

11 MICH.—People v. Hamilton,

may be omitted as surplusage.[12] An indictment or information following the words of the statute and charging the illegal selling of "spirituous or intoxicating" liquors, the use of the disjunctive does not make the indictment duplicitous;[13] an averment that defendant sold "malt liquor or beer" is not bad;[14] and charging the "bringing" and "introducing" liquor into the state is not duplicitous.[15] To charge accused with having in his possession intoxicating liquor with intent to sell the same, and with intent to convey same from one place to another, has been said not to charge two offenses.[16] And charging selling intoxicating liquor and having possession of intoxicating liquor with intent to sell, constitutes separate offenses and can not be joined in the same indictment.[17]

§ 763. —— SURPLUSAGE. In an indictment or information charging a violation of the liquor laws, as we have already seen,[1] surplusage will not vitiate in those cases where a good charge of the offense alleged is left after excluding such surplusage,[2] as where an unlawful sale of intoxicating liquors is alleged on a day certain, with a continuando clause;[3] hence, a defect in the manner of pleading surplus matter will not affect the validity of an indictment or information in which there is a good

101 Mich. 87, 59 N. W. 401. MINN.—State v. Kobe, 26 Minn. 148, 1 N. W. 1054. NEB.—State v. Pischel, 16 Neb. 490, 608, 20 N. W. 848, 21 N. W. 468. N. Y.—Osgood v. People, 39 N. Y. 449, 1 Cow. Cr. Rep. 151; People v. Adams, 17 Wend. 475. VT.—State v. Temple, 38 Vt. 37.

12 As to surplusage, see, infra, § 763.

13 State v. George, (La.) 51 L. R. A. (N. S.) 133, 63 So. 866.

14 Figueroa v. State, (Tex.) 159 S. W. 1188.

15 Sturgeon v. State, 17 Ariz. 513, 154 Pac. 1050.

16 Childs v. State, 4 Okla. Cr. 474, 33 L. R. A. (N. S.) 563, 113 Pac. 545.

17 Shuford v. State, 4 Okla. Cr. 513, 113 Pac. 211.

1 See, supra, § 762, footnote 4.

2 Feigel v. State, 85 Ind. 580; State v. Staples, 45 Me. 320; Com. v. Penniman, 49 Mass. (8 Metc.) 519; State v. Nations, 75 Mo. 53.

3 See, supra, § 762, footnote 11, and text going therewith; also Com. v. Pray, 30 Mass. (13 Pick.) 359; Com. v. Bryden, 50 Mass. (9 Metc.) 137; People v. Adams, 17 Wend. (N. Y.) 475.

charge of the offense alleged, aside from such surplus matter,[4] because the matter thus pleaded has nothing to do with the offense charged. This rule prevails in all cases of a sufficient charge of unlawful sale of intoxicating liquors followed by an allegation as to gift, or sale, or barter,[5] description of the place where sold,[6] or where to be drunk,[7] or an allegation as to license,[8] or the purchaser,[9] or knowledge on the part of the accused.[10]

§ 764. —— SOURCE OF INFORMATION AND BELIEF. In different jurisdictions there are provisions requiring that in a prosecution for the violation of the liquor laws, the source of the information must be given and the pleading verified. Where the source of the information is required to be set out, it is not necessary that the prosecutor have actual personal knowledge of the transaction charged,[1] knowledge by information and belief being sufficient,[2] as is also an averment that he has just ground to suspect, and does suspect,[3] the person accused is guilty as charged; but, it seems, there must be an averment of guilt.[4] The

4 Rawlings v. State, 2 Md. 201.

5 Steel v. State, 26 Ind. 92; Leary v. State, 39 Ind. 360; Massey v. State, 74 Ind. 368; Hatfield v. State, 9 Ind. App. 296, 36 N. W. 664; State v. Ball, 27 Neb. 601, 43 N. W. 398.

6 State v. Wickey, 54 Ind. 438, 57 Ind. 596.

7 Com. v. Luddy, 143 Mass. 563, 10 N. E. 448; Com. v. Coe, 36 Va. (9 Leigh) 620.

Both allegations may be rejected as surplusage. — State v. Hornbeak, 15 Mo. 478.

8 State v. Hutzell, 53 Ind. 160; Com. v. Baker, 64 Mass. (10 Cush.) 405.

9 United States v. Warwick, 51 Fed. 280.

Indian purchaser need not be alleged, and being alleged is surplusage.—Id. See Nelson v. United States, 12 Sawy. 285, 30 Fed. 112.

10 State v. Cain, 9 W. Va. 559.

1 State v. Etzel, 2 Kan. App. 673, 43 Pac. 798.

2 Com. v. Crawford, 75 Mass. (9 Gray) 129; State v. Becker, 3 S. D. 29, 51 N. W. 1018; State v. Tall, 56 Wis. 577, 14 N. W. 596.

Compare: State v. Butcher, 1 S. D. 401, 47 N. W. 406.

Good reason to believe, need not be alleged.—State v. Tall, 56 Wis. 577, 14 N. W. 596.

3 Roberson v. Lambertville (City of), 38 N. J. L. (9 Vr.) 69.

Compare: Mowery v. Camden (City of), 49 N. J. L. (20 Vr.) 106, 6 Atl. 438.

4 Roberson v. Lambertville (City of), 38 N. J. L. (9 Vr.) 69.

verification required must be in accordance with the provisions of the statute under which the prosecution is had and such verification required,[5] and where made on information and belief, has been held sufficient.[6]

§ 765. ALLEGATION AS TO ESSENTIAL ELEMENTS. In the various jurisdictions, the essential elements entering into the offense of a violation of the liquor laws, in its different phases, are as variant, almost, as the jurisdictions themselves. An indictment or information charging a violation of the liquor laws in relation to the manufacture, keeping and exposing for sale, and selling and the like, must set out all the essential elements entering into the offense sought to be charged under the particular statute under which the prosecution is had, and no more.[1] For instance, an indictment or information charging accused with engaging in the sale of intoxicating liquors without a license,[2] or with persistent violation of the prohibitory law,[3] need not allege that any particular kind of liquor was sold. Under a statute providing that no person shall, within the limits of the state, sell or offer for sale, by sample, or representation or otherwise, any intoxicating liquors, naming them, either by wholesale, retail or to be drunk on the premises where sold, or in any other way, without first procuring a license, an indictment or information charging an unlawful sale of such liquors must allege whether the sale alleged was made at wholesale or retail,[4] and whether the liquor was to be drunk on the

5 State v. Blackman, 32 Kan. 615, 5 Pac. 173; State v. Ladenberger, 44 Kan. 261, 24 Pac. 347; State v. Moseli, 49 Kan. 142, 30 Pac. 189; State. v. Huffman, 51 Kan. 541, 33 Pac. 377; State v. Etzel, 2 Kan. App. 673, 43 Pac. 798; State v. Brennan, 2 S. D. 384, 50 N. W. 625.

6 State v. Huffman, 51 Kan. 541, 33 Pac. 377; State v. Brennan, 2 S. D. 384, 50 N. W. 625.

1 As to unnecessary allegations, see, infra, § 796.

2 State v. Brooks, 33 Kan. 708, 6 Am. Cr. Rep. 299, 7 Pac. 591; Booth v. United States, 116 C. C. A. 645, 197 Fed. 283.

3 State v. Schmidt, 92 Kan. 457, 140 Pac. 843.

4 Arrington v. State, 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224. See Com. v. Head, 52 Va. (11 Gratt.) 819; Boyle v. Com., 55 Va.

premises where sold, or otherwise,[5] but it need not state whether the alleged sale was made by sample, representation or otherwise, this not being an essential ingredient of the offense.[6] An indictment or information charging the sale of intoxicating liquors to a minor, the minority must be specifically set out;[7] but there need be no allegation that the accused knew that the purchaser was a minor,[8] unless the offense consists in knowingly selling to a minor.[9]

§ 766. —— INTENT. Unless intent on the part of the accused is made a material element in the offense charged by the particular statute under which the prosecution is had, an indictment or information need not specifically allege an intent on the part of the accused to commit the offense, it being sufficient to aver that he "knowingly and wilfully" did the act complained of,[1] but it has been said that it need not be alleged that the act was "wilfully" done, that term not being contained in the statute.[2] Thus, an indictment or information, in the language of the statute, charging accused with keeping open or allowing his place for the sale of intoxicating liquors to remain open on Sunday, need not allege the accused's intent or pur-

(14 Gratt.) 674; Com. v. Young, 56 Va. (15 Gratt.) 664.

5 Arrington v. State, 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224.

6 Id.

7 Com. v. Fowler, 145 Mass. 398, 14 N. E. 457.

8 McCutcheon v. People, 69 Ill. 601, 1 Am. Crim. Rep. 471.

Compare: Miller v. People, 3 Ohio St. 475.

9 Williams v. State, 23 Tex. App. 70, 3 S. W. 661; Jones v. State, 46 Tex. Cr. Rep. 517, 81 S. W. 49.

Charging that the defendant unlawfully and knowingly sold liquor to R, a person under 21, sufficiently charges that the defendant knew that R was under age.—Jones v. State, 46 Tex. Cr. Rep. 517, 81 S. W. 49.

1 State v. Abbott, 31 N. H. 434; State v. Prescott, 67 N. H. 203, 30 Atl. 342; Lederer v. State, 11 Ohio Dec. Repr. 31, 24 Wkly. L. Bul. 153; Bilbro v. State, 26 Tenn. (7 Humph.) 534; State v. Pearis, 35 W. Va. 320, 13 S. E. 1006.

Intent being an element, and not being charged, objection for its omission comes too late after judgment.—Com. v. Blanchard, 105 Mass. 173; Com. v. Sheehan, 105 Mass. 174.

2 State v. Abbott, 31 N. H. 434.

pose in so doing.[3] However, it has been said that, while the courts have sustained indictments and informations charging the possession of intoxicating liquors with intent to violate the prohibition laws,[4] it is the better practice to specifically charge an intent to sell the same,[5] without a reference to any specific section, chapter or article of the statute.[6]

§ 767. —— KNOWLEDGE. A person engaged in keeping for sale and selling intoxicating liquors is not liable, at common law, for any improper use thereof, unless he has knowledge of the intended improper use,[1] but under the various liquor laws of the country, a sale is generally made at the peril of the liquor dealer;[2] e. g., where he sells to a minor,[3] to an intoxicated person,[4] or to a person in the habit of becoming intoxicated.[5] The accused is presumed to have knowledge of the intoxicating qualities

3 Lederer v. State, 11 Ohio Dec. Repr. 31, 24 Wkly. L. Bul. 153.

4 See State v. Freebock, 3 Okla. Cr. 508, 107 Pac. 442; Childers v. State, 4 Okla. Cr. 237, 111 Pac. 958; Ex parte Spencer, 7 Okla. Cr. 113, 122 Pac. 557.

5 Flower v. State, 8 Okla. Cr. 503, 129 Pac. 81.

An information alleging the possession of liquors "with the intention of then and there violating the law" is demurrable because there must be a general allegation of an intention to violate the provisions of the prohibitory law and a specific allegation of an intention to sell, barter, give away and otherwise furnish or to unlawfully convey. — Park v. State, (Okla.) 155 Pac. 494.

6 Walker v. State, 7 Okla. Cr. 494, 124 Pac. 87.

1 Struble v. Nodwift, 11 Ind. 64.

2 See Mapes v. People, 69 Ill. 523.

3 GA.—Loeb v. State, 75 Ga. 258. IND.—Ward v. State, 48 Ind. 289, 294, 295. PA.—Com. v. Sellers, 130 Pa. St. 32, 18 Atl. 541. TEX.—Woods v. State, 20 S. W. 915. W. VA.—State v. Cain, 9 W. Va. 559.

"Knowing the said" purchaser "to be a minor," where inserted, will be regarded as surplusage.—State v. Cain, 9 W. Va. 559.

Ohio rule, under provisions of statute, requires knowledge of minority to be alleged. — Miller v. State, 3 Ohio St. 475; Aultfather v. State, 4 Ohio St. 467.

4 Werneke v. State, 50 Ind. 22.

Compare: Miller v. State, 3 Ohio St. 475.

5 Mapes v. People, 69 Ill. 523; Werneke v. State, 49 Ind. 210, 50 Ind. 22; State v. Carson, 2 Ohio Dec. Repr. 81, 1 West. L. Month. 33.

Kentucky rule, under statute, requires knowledge to be averred.

of the liquor sold,[6] and of the fact that the sale is made at a prohibited place.[7] An indictment or information charging the keeping of a place for unlawful sale, or keeping of liquors as a common nuisance, need not allege knowledge of the fact on the part of the accused.[8] Charging selling liquor without a license need not allege a scienter or criminal intent, unless the statute expressly includes knowledge or intent as an ingredient of the offense;[9] and a charge of bringing intoxicating liquors into dry territory sufficiently alleges guilty knowledge when it charges that accused did "unlawfully and wilfully" bring, and so forth,[10] wrongful intent being thus sufficiently charged.[11] An indictment charging an unlawful sale need not aver that it was for the purpose of evading the prohibitory law;[12] but in a charge of "giving away" intoxicating liquors, that intent must be averred.[13] An indictment or information in the language of the statute, for permitting a minor to loiter in the saloon of the accused, need not allege that the offense was "unlawfully" committed,[14] and a charge of a sale in violation of a local

—Com. v. Bell, 77 Ky. (14 Bush) 433.

6 State v. Carson, 2 Ohio Dec. Repr. 81, 1 West. L. Month. 33.

7 State v. Former, 6 Ohio S. & C. Pl. Dec. 374, 8 Ohio N. P. 172.

8 Hinkle v. Com., 25 Ky. L. Rep. 313, 75 S. W. 231; State v. Ryan, 81 Me. 107, 16 Atl. 406; State v. Stanley, 84 Me. 555, 24 Atl. 983; State v. McGough, 14 R. I. 63.

9 State v. Runyon, 62 Ore. 246, 124 Pac. 259; Booth v. United States, 116 C. C. A. 645, 197 Fed. 283.

An affidavit charging a violation of the local option law need not allege that the sale of liquor was unlawful.—Giles v. State, 70 Tex. Cr. Rep. 561, 157 S. W. 943.

"Unlawfully" need not be used in the indictment or information. —State v. Johnson, 26 W. Va. 154, 11 L. R. A. (N. S.) 872, 57 S. E. 371.

10 State v. Muller, 80 Wash. 368, 141 Pac. 910.

11 Ex parte Ahart, 172 Cal. 762, 159 Pac. 161.

12 State v. Runyon, 62 Ore. 246, 124 Pac. 259; McMillan v. State, 18 Tex. App. 375.

13 State v. Runyon, 62 Ore. 246, 124 Pac. 259.

14 Walbert v. State, 17 Ind. App. 350, 46 N. E. 827.

law, need not allege that the sale was "unlawfully" made, in naming the offense.[15]

Knowledge an essential element, under the statute, of the offense charged, the indictment or information must specifically allege that the accused had knowledge of the special facts making the act unlawful.[16] Thus, an indictment charging accused with aiding a person to procure intoxicating liquors to be disposed of unlawfully, must allege knowledge on the part of the accused that the liquors were to be disposed for an unlawful purpose, and allege what that purpose was.[17]

§ 768. —— ADOPTION OF LOCAL-OPTION LAW. As to whether an indictment or information charging the violation of a local-option law is required to aver the adoption of such law, and to set out the steps necessary to make the statute operative where observed,[1] is one upon which the courts are hopelessly divided. In some jurisdictions it is held that an allegation of the adoption of the local-option law is indispensable,[2] while in a majority

15 Farris v. Com., 111 Ky. 236, 23 Ky. L. Rep. 580, 63 S. W. 615.

It is sufficient where in stating the acts of the offense it is charged that the liquor was unlawfully sold.—Farris v. Com., 111 Ky. 236, 23 Ky. L. Rep. 580, 63 S. W. 615.

16 See Struble v. Nodwift, 11 Ind. 64; Jones v. State, 46 Tex. Cr. Rep. 517, 81 S. W. 49; State v. Benjamin, 49 Vt. 101.

17 State v. Benjamin, 49 Vt. 101.

1 **Necessity of setting out steps fully** required in Missouri (State v. Dugan, 110 Mo. 138, 19 S. W. 195; State v. Searcy, 111 Mo. 236, 39 Mo. App. 393, 20 S. W. 186; State v. Houts, 30 Mo. App. 265), but in all other states it seems to be sufficient simply to set out the essential steps in the process of submission and adoption.

2 FLA.—Cook v. State, 25 Fla. 698, 6 So. 451; Randall v. Tillis, 43 Fla. 43, 29 So. 540. KY.—Com. v. Cope, 107 Ky. 173, 53 S. W. 272; Locke v. Com., 113 Ky. 864, 69 S. W. 763; Com. v. McCarthy, 25 Ky. L. Rep. 585, 76 S. W. 173. N. Y.—People v. Bates, 61 App. Div. 559, 15 N. Y. Cr. Rep. 469, 71 N. Y. Supp. 123; People v. Seeley, 105 App. Div. 149, 19 N. Y. Cr. Rep. 399, 93 N. Y. Supp. 982; affirmed, 183 N. Y. 544, 76 N. E. 1102. N. C.—State v. Chambers, 93 N. C. 600. ORE.—State v. Townsend, 60 Ore. 223, 118 Pac. 1020; State v. Kennedy, 60 Ore. 232, 118 Pac. 1023. TEX.—Stewart v. State, 35 Tex. Cr. Rep. 391, 33 S. W. 1081; Alford v. State, 37 Tex. Cr. Rep. 386, 35 S. W. 657; Stephens v. State, 97 S. W. 483.

It need not be alleged that the

of the jurisdictions it seems to be held that no such allegation is required,[3] while in yet other jurisdictions, the court decisions requiring such an allegation have been nullified by statutes providing that it shall not be neces-

local option law was not repealed. —Hodge v. Com., 3 Ky. L. Rep. 822.

3 GA.—Combs v. State, 81 Ga. 780, 8 S. E. 318; Barker v. State, 117 Ga. 428, 43 S. E. 744. MD.—Slymer v. State, 62 Md. 244; Jones v. State, 67 Md. 256, 7 Am. Crim. Rep. 294, 10 Atl. 216. MISS.—State v. Bertrand, 72 Miss. 516, 17 So. 235. MONT.—State v. O'Brien, 35 Mont. 482, 10 Ann. Cas. 1006, 90 Pac. 514. PA.—Rauch v. Com., 78 Pa. St. 490. VA.—Savage v. Com., 84 Va. 582, 5 S. E. 563; Thomas v. Com., 90 Va. 92, 17 S. E. 788; Hargrave v. Com., 22 S. E. 314.

Compare: Whitman v. State, 80 Md. 418, 31 Atl. 325, where the court held that the indictment must show that the law became operative by reason of a majority of the votes cast against the sale of liquor in the county where the offense is charged to have been committed.

In Alabama it is sufficient to allege the sale without a license and contrary to law. — Ulmer v. State, 61 Ala. 208; Bogan v. State, 84 Ala. 449, 4 So. 435; Mitchell v. State, 141 Ala. 90, 37 So. 407; Guarreno v. State, 148 Ala. 637, 42 So. 833.

In Colorado an information for selling intoxicating liquors in local option territory need not allege the filing of the petition for election.—Moffitt v. People, 59 Colo. 406, 149 Pac. 104.

In Michigan it is a sufficient allegation that the act was operative to aver that the sale was contrary to the provisions of a resolution adopted by the board of supervisors pursuant to the provisions of the local option act.—People v. Adams, 95 Mich. 541, 55 N. W. 461; People v. Whitney, 105 Mich. 622, 63 N. W. 765.

In Minnesota there must be an allegation that the liquor was sold "after a vote against license."—State v. Hanley, 25 Minn. 429.

An allegation that the defendant "sold liquor without a license" is a sufficient allegation under a general law.—State v. Funk, 27 Minn. 318, 7 N. W. 359.

In Missouri a simple allegation that the local option law had been adopted and was in force is sufficient.—State v. Searcy, 111 Mo. 236, 20 S. W. 186, overruling State v. Mackin, 41 Mo. App. 99, and State v. Prather, 41 Mo. App. 451; State v. Hitchcock, 124 Mo. App. 101, 101 S. W. 117.

In North Carolina in a prosecution for the unlawful sale of intoxicating liquors in violation of a local option law, a judgment will not be arrested because the indictment failed to allege that the election provided for by statute had been held and resulted in favor of prohibition. — State v. Swink, 151 N. C. 726, 19 Ann. Cas. 422, 66 S. E. 448.

The reason being that courts take judicial notice of general elections.—State v. Swink, 151 N. C. 726, 19 Ann. Cas. 422, 66 S. E. 448.

sary.[4] The statute under which the pleading is drawn must control. The ground upon which the reason for the rule that the adoption of the local-option law need not be averred is the fact that the laws are public laws, although of but local operation, and that courts are bound to take judicial notice of them.[5]

§ 769. —— DATE OF SALE. An indictment or information charging a violation of the liquor laws must, as a general rule, fix the date on which the alleged offense occurred,[1] but the precise time need not be specified;[2] and

[4] See Crigler v. Com., 120 Ky. 512, 83 S. W. 587; Dowdy v. Com., 31 Ky. L. Rep. 33, 101 S. W. 338; Combs v. Com., 31 Ky. L. Rep. 822, 104 S. W. 270.

[5] ALA.—Bogan v. State, 84 Ala. 449; Combs v. State, 81 Ga. 780, 8 S. E. 318. MD.—Sylmer v. State, 62 Md. 237; Jones v. State, 67 Md. 256, 10 Atl. 216. MISS.—State v. Bertrand, 72 Miss. 516, 17 So. 235. N. C.—State v. Swink, 151 N. C. 726, 19 Ann. Cas. 422, 66 S. E. 448. VA.—Thomas v. Com., 90 Va. 92, 17 S. E. 788; Savage's Case, 84 Va. 582, 2 S. E. 563.

[1] ALA.—Olmstead v. State, 92 Ala. 64, 9 So. 737. GA.—Phillips v. State, 86 Ga. 427, 12 S. E. 650. Norris v. Town of Thomson, 15 Ga. App. 511, 83 S. E. 866. IND.—State v. Zeitter, 63 Ind. 441. MASS. — Com. v. Kingman, 80 Mass. (14 Gray) 85. MO.—Louisiana v. Anderson, 100 Mo. App. 341, 73 S. W. 875. N. H.—State v. Havey, 58 N. H. 377. TEX.—Thurman v. State, 45 Tex. Cr. Rep. 569, 78 S. W. 937. VT. — State v. O'Keefe, 41 Vt. 691. W. VA. — State v. Bruce, 26 W. Va. 153.

The complaint must allege the year, month and day. — State v. Kennedy, 36 Vt. 563.

Where an impossible date is alleged, such as June 11, 18184, the indictment should be quashed on motion.—Murphy v. State, 106 Ind. 96, 5 N. E. 767.

Whereas conviction or acquittal of maintaining a liquor nuisance during a given period bars subsequent prosecution based upon the same period, the time relied upon must be alleged in the indictment with certainty.—State v. Peloquin, 106 Me. 358, 76 Atl. 888.

Where an impossible date, except for the days named in the continuando, from which the erroneous date was stricken, is fatally defective on demurrer. — State v. O'Donnell, 81 Me. 271, 17 Atl. 66.

[2] ALA.—Atkins v. State, 60 Ala. 45. GA.—Norris v. Town of Thomson, 15 Ga. App. 511, 83 S. E. 866. ILL. — People v. Rudorf, 149 Ill. App. 215. IOWA—State v. Wambold, 72 Iowa 468, 34 N. W. 213. KAN. — State v. Nagley, 8 Kan. App. 812, 57 Pac. 554. KY.—Smithers v. Com., 12 Ky. L. Rep. 636. MISS.—DeMarco v. State, 59 Miss. 355. MO.—State v. Findley, 77 Mo. 338. N. Y.—People v. Polhamus, 8 App. Div. 133, 11 N. Y. Cr. Rep. 372, 40 N. Y. Supp. 491. N. D.—State v. Lesh, 27 N. D. 165, 145

we have already seen that the addition of a continuando clause averring "and on other days and times," does not render the indictment either uncertain[3] or duplicitous.[4] Where the time on which a sale is made is an indispensable ingredient of the offense, it must be directly averred,[5] but where it is immaterial, it need not be alleged;[6] however, it must appear from the indictment or

N. W. 829 (a charge of keeping intoxicating liquors for sale where the date was omitted). S. C.—State v. Anderson, 3 Rich. L. 172. VA.—Arrington v. Com., 87 Va. 96, 10 **L. R. A.** 242, 12 S. E. 224; Shiflett v. State, 114 Va. 876, 77 S. E. 606.

Dram-shop kept open on Sunday charged, the day of the month being incorrectly stated, is immaterial. — Marquardt v. State, 52 Ark. 269, 12 S. W. 562.

Impossible date alleged, e. g., June 11, 181814, is bad, and will be quashed on motion.—Murphy v. State, 106 Ind. 96, 55 **Am. Rep.** 722, 5 N. E. 767, 107 Ind. 598, 600, 8 N. E. 158, 176; State v. O'Donnell, 81 Me. 271, 17 Atl. 66.

Laying the time "on or about a certain day" is sufficient.—Keith v. State, 38 Tex. Cr. Rep. 678, 44 S. W. 847.

The time of day need not be stated.—People v. McDonnell, 108 N. Y. Supp. 749.

3 As to requisites of certainty, see, supra, § 759.

4 See, supra, § 762, footnote 11; also, footnotes 8 and 9, this section.

5 Effinger v. State, 47 Ind. 235, 1 **Am. Cr. Rep.** 486; Ruge v. State, 62 Ind. 388, 3 **Am. Cr. Rep.** 280; State v. Schell, 22 S. D. 340, 117 N. W. 505.

A complaint for selling on Sunday alleging the sale as "on or about the 2nd day of November, 1873, the said day being Sunday" is bad on a motion to quash.—Effinger v. State, 47 Ind. 235, 1 **Am. Cr. Rep.** 486.

An indictment under the prohibitory liquor law stating that the offense was committed on the —— day of ——, 1884, is not defective.—State v. Brooks, 33 Kan. 708, 6 **Am. Cr. Rep.** 299, 7 Pac. 591.

Where the prosecution was for unlawfully selling intoxicating liquor on a legal holiday an allegation that defendant "on or about the fourth day of July, A. D., 1876," etc., is insufficient.—Ruge v. State, 62 Ind. 388, 3 **Am. Cr. Rep.** 280.

Where the time is specifically stated, followed by an allegation that the defendant being "then and there" the proprietor, etc., did do certain things, the word "did" refers to the same time as referred to by the words "then and there."—State v. Johnson, 22 S. D. 293, 22 **L. R. A.** (N. S.) 1007, 121 N. W. 785.

6 LA.—State v. Conega, 121 La. 522, 46 So. 614. NEB.—Brown v. State, 16 Neb. 658, 21 N. W. 454. N. C.—State v. Burton, 138 N. C. 575, 50 S. E. 214. VA.—Arrington v. Com., 87 Va. 96, 10 **L. R. A.** 242, 12 S. E. 224.

In an indictment for selling intoxicants without a license it is

information that the date of the alleged offense was within the statute of limitations.[7] It has been said that the offense of keeping for sale may be alleged with a continuando clause,[8] but that the offense of selling can not be thus alleged.[9] The offense of keeping a place where intoxicating liquors are received and kept for distribution among the members of a club, may be charged with a continuando.[10] An indictment or information charging the unlawful sale of intoxicating liquors on Sunday, without alleging accused was a "trader in lawful business," or a "retail liquor dealer," is insufficient under the Texas statute.[11]

§ 770. —— SALE ON PROHIBITED DAYS AND HOURS. An indictment or information charging accused with a violation of the liquor laws by making a sale or sales on prohibited days, or on prohibited hours, must specifically charge as to the day or the hour of the alleged sale, or it will be insufficient. Thus, where the charge is one of selling on an election day, it must be alleged that an elec-

unnecessary under Code § 5077 to allege the particular time at which the liquor was sold.—Coleman v. State, 150 Ala. 64, 43 So. 715.

7 ILL.—People v. Rudorf, 149 Ill. App. 215. KY.—Com. v. Neason, 20 Ky. L. Rep. 1825, 50 S. W. 66. VA.—Shiflett v. State, 114 Va. 876, 77 S. E. 606. W. VA.—State v. Davis, 68 W. Va. 184, 69 S. E. 644.

An indictment found Oct. 17, 1910, charging that since August, 1909, accused unlawfully sold liquors is not demurrable as showing that the offense was committed more than one year before finding of the indictment.—Gresham v. State, 1 Ala. App. 220, 55 So. 447.

Date of sales is immaterial provided the averments and proof bring the offense within the statute of limitations.—People v. Carter, 188 Ill. App. 22.

8 Com. v. Chisholm, 103 Mass. 213; Com. v. Kerrissey, 141 Mass. 110, 4 N. E. 820; Com. v. Sheehan, 143 Mass. 468, 9 N. E. 839; Com. v. Hersey, 144 Mass. 297, 11 N. E. 116; Com. v. Purdy, 146 Mass. 138, 15 N. E. 364; Com. v. Rhodes, 148 Mass. 123, 19 N. E. 29.

Proof of act or acts within the time specified, will be sufficient.—Com. v. Kerrissey, 141 Mass. 110, 4 N. E. 820; Com. v. Purdy, 146 Mass. 138, 15 N. E. 364.

9 State v. Pischel, 16 Neb. 490, 20 N. W. 848.

10 State v. Brown, 10 Okla. Cr. 52, 133 Pac. 1143.

11 Day v. State, 21 Tex. App. 213, 17 S. W. 262.

tion was held on that day,[1] together with an allegation of such other and further matters as the particular statute under which the indictment or information is drawn may require as to its being a general, a special, or a local election, or the purpose of the election,[2] the place where the election was held, and where the offense was committed,[3] and the like. Where the charge is that of selling intoxicating liquors on Sunday, it is not sufficient merely to set out the day of the month;[4] it must be specifically alleged that the sale was made on such day by describing it as "Sunday," "the Sabbath day," "the Lord's day," or "the first day of the week, commonly called Sunday," according to the phraseology of the particular statute,[5] although the court may know judicially that the day charged was Sunday.[6] Neither the hour of the sale,[7] nor the day of the month need be alleged, because the par-

1 State v. Stamey, 71 N. C. 202; Prather v. State, 12 Tex. App. 401; Janks v. State, 29 Tex. App. 233, 15 S. W. 815; Gieb v. State, 31 Tex. Cr. Rep. 514, 21 S. W. 190.

Tennessee rule seems to be different. See State v. Irvine, 50 Tenn. (3 Heisk.) 155; State v. Powell, 71 Tenn. (3 Lea) 164.

2 Newman v. State, 101 Ga. 534, 28 S. E. 1005; Janks v. State, 29 Tex. App. 233, 15 S. W. 815; Borches v. State, 33 Tex. Cr. Rep. 96, 25 S. W. 423; Steinberger v. State, 35 Tex. Cr. Rep. 492, 34 S. W. 617; Reuter v. State, 43 Tex. Cr. Rep. 572, 67 S. W. 505.

3 State v. Weaver, 83 Ind. 542.

4 Robinson v. State, 38 Ark. 548; Gilbert v. State, 81 Ind. 565.

5 Kroer v. People, 76 Ill. 294; Henry v. State, 113 Ind. 304, 15 N. E. 593; Shepler v. State, 114 Ind. 194, 16 N. E. 521; Com. v. McKiernan, 128 Mass. 414; State v. Peterson, 38 Minn. 143, 36 N. W. 443; State v. Roehm, 61 Mo. 82; State v. Kock, 61 Mo. 117; State v. Braun, 83 Mo. 480.

Compare: People v. Lavin, 4 N. Y. Cr. Rep. 547, in which it is decided that in an indictment charging sale of intoxicating liquors on Sunday, May 18, 1884, that day being Friday, a conviction of having sold the liquors on Sunday, April 20, 1884, was improper, that the date was a material ingredient in the offense, and the variance in the proof was fatal.

6 Shepler v. State, 114 Ind. 194, 16 N. E. 521.

Conviction can not be had on proof of sales on other prohibited days, on a charge of selling on Sunday.—Shepler v. State, 114 Ind. 194, 16 N. E. 521.

7 State v. Heard, 107 La. Ann. 60, 31 So. 384.

ticular Sunday is immaterial,[8] and proof of a sale made on any Sunday within the statute of limitations will be sufficient;[9] but if the date of the month and year is given, that fact will not invalidate the indictment or information,[10] and such allegation as to day of the month will be treated as surplusage,[11] even though the date alleged falls on a day of the week other than Sunday,[12] although there is authority to the contrary.[13] An indictment or information charging that accused sold a specified quantity of beer, or other intoxicating liquor, to a customer on a Saturday evening and received payment therefor, with the understanding that the liquor was to be kept on ice and delivered on Sunday, the liquor having been selected and put on ice, and delivered on the following Sunday, charges a violation of the Sunday laws;[14] for even though it be a fact that the sale was completed and the title to the liquor passed on Saturday,[15] the delivery being an

8 Robinson v. State, 38 Ark. 548; State v. Effinger, 44 Mo. App. 81.

9 Robinson v. State, 38 Ark. 548; Roy v. State, 91 Ind. 417; Frasier v. State, 5 Mo. 536.

10 Roy v. State, 91 Ind. 417.

11 ARK.—Marquardt v. State, 52 Ark. 269, 12 S. W. 562. KY.—Megowan v. Com., 59 Ky. (2 Metc.) 3. MD.—Hoover v. State, 56 Md. 584. N. Y.—People v. Ball, 42 Barb. 324. TENN. — State v. Eskridge, 31 Tenn. (1 Swan) 413.

12 ARK.—Marquardt v. State, 52 Ark. 269, 12 S. W. 562. IND.—Roy v. State, 91 Ind. 417. KY.—Megowan v. Com., 59 Ky. (2 Metc.) 3. MD.—Hoover v. State, 56 Md. 584. MASS.—Com. v. Kingsbury, 5 Mass. 106; Com. v. Newton, 25 Mass. (8 Pick.) 234. MO.—Frasier v. State, 5 Mo. 536. N. Y.—People v. Ball, 42 Barb. 324. N. C.—State v. Drake, 64 N. C. 589. TENN.—State v. Eskridge, 31 Tenn. (1 Swan) 413.

13 Werner v. State, 51 Ga. 426.

14 Wallis v. State, (Tex.) 78 S. W. 231; R. v. Clark, 27 Ont. L. Rep. 525, Ann. Cas. 1914A, 637.

15 Within the rule that where the vendor appropriates to the vendee a specific chattel and the latter thereby agrees to take that specific chattel and pass the stipulated price, the parties are in the same situation they would be after the delivery of the goods in pursuance of the contract.—Dixon v. Yeates, 4 Barn & Ad. 313, 340, 27 Eng. C. L. 86.

However, Kennedy, J., in Saunders v. Thomey, 78 L. T. (N. S.) 627, says that "if the purchaser on Saturday points out a bottle of liquor in a row of bottles in the bar of a public house, and says that he wanted that particular bot-

essential part of the transaction,[16] such delivery on Sunday was an infraction of the Sunday law,[17] even though the delivery was made through a broken glass in a rear door.[18]

§ 771. —— Place of sale—In general. An indictment or information charging the unlawful sale of intoxicating liquors need not allege the precise location of the place of the commission of the act charged and the illegal sale made, in those cases in which the place of sale is not an essential element of the offense charged,[1] providing enough is set out to show that the offense was committed within the jurisdiction of the court;[2] as where it is charged that the liquor was sold, or kept to be sold, in violation

tle and would pay for it now, but that it must be delivered tomorrow during prohibited hours, the so delivering it would be carrying out an essential part of the transaction, and the case would be within the section" of the statute preventing the sale of liquors or of keeping the place open on Sundays.

16 Noblett v. Hopkinson [1905], 2 K. B. (Eng.) 214.

17 Wallis v. State, (Tex.) 78 S. W. 231; Noblett v. Hopkinson [1905], 2 K. B. (Eng.) 214; Saunders v. Thomey, 78 L. T. (N. S.) 627.

18 Wallis v. State, (Tex.) 78 S. W. 231.

1 FLA.—Dansey v. State, 23 Fla. 316, 2 So. 692. KY.—Magowan v. Com., 59 Ky. (2 Metc.) 3. MICH.—People v. Ringsted, 90 Mich. 371, 50 N. W. 519; People v. Aldrich, 104 Mich. 455, 62 N. W. 570. MO.—State v. Jaques, 68 Mo. 260; State v. Kurtz, 64 Mo. App. 123. VA.—White v. Com., 107 Va. 903, 59 S. E. 1101. W. VA.—State v. Cottrill, 31 W. Va. 162, 6 S. E. 428; State v. Boggess, 36 W. Va. 713, 15 S. E. 423. WIS.—State v. Hickok, 90 Wis. 161, 62 N. W. 934.

2 GA.—Pines v. State, 15 Ga. App. 348, 83 S. E. 198; Norris v. Town of Thomson, 15 Ga. App. 511, 83 S. E. 866. UTAH—Bruce v. East, 43 Utah 327, 134 Pac. 1175. WYO.—Vines v. State, 19 Wyo. 255, 116 Pac. 1013.

Where a local option law had been adopted by a vote of the people in the undivided district and afterwards a portion of the district is cut off and receives together with other territory a new name, an indictment for a violation of the law in the portion of the district remaining need not specifically allege that the offense was not committed in the part of the district cut off.—Jones v. State, 67 Md. 256, 7 Am. Crim. Rep. 294, 10 Atl. 216.

of law in the county,[3] or within the state,[4] under some statutes, and is sufficient to inform the accused of the particular transaction with which he is charged.[5] In those cases, however, in which the place of sale is an essential element for any purpose—either as relates to commission of the offense, the severity of the punishment, or the disposition to be made of the fine imposed, and the like—the precise place of sale must be designated with particularity.[6] Where the place is required to be charged, a description of the place or house in which the alleged act was committed, where in a city or town, may be designated by lot and block in the town plat,[7] or by describing the place as a certain building occupied by the accused as a saloon, situated at a designated place in the town.[8] It has been said that it is sufficient to charge the keeping and maintaining of a certain building for the sale of and selling intoxicating liquors, sufficiently describes the place;[9] also the keeping of a building, to-wit, a tenement in a building, as the latter designation controls;[10] and charging the place to be a room in a building, the location of which is designated, is sufficient.[11]

Conveyance of intoxicating liquors unlawfully, being charged, the indictment or information must allege the

3 Hall v. State, 8 Ga. App. 747, 70 S. E. 211; State v. Jacobs, 75 Iowa 247, 39 N. W. 393; Green v. State, 62 Tex. Cr. Rep. 345, 137 S. W. 126; State v. Paige, 78 Vt. 286, 6 Ann. Cas. 725, 62 Atl. 1017.

4 Com. v. Gillon, 148 Mass. 15, 18 N. E. 584; State v. Murphy, 15 R. I. 543, 10 Atl. 585.

Intent to sell at place where kept not necessary.—Com. v. Gillon, 148 Mass. 15, 18 N. E. 584.

5 State v. Miller, 24 Conn. 519; State v. Tall, 56 Wis. 577, 14 N. W. 596.

6 MISS.—Legori v. State, 16 Miss. (8 Smed. & M.) 697; Ragan v. State, 67 Miss. 332, 7 So. 280. VT.—State v. O'Keefe, 41 Vt. 691. VA.—Com. v. Head, 52 Va. (11 Gratt.) 819; Arrington v. Com., 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224.

7 State v. Knoby, 6 Kan. App. 334, 51 Pac. 53.

8 State v. Hall, 79 Me. 501, 11 Atl. 181.

9 State v. Price, 75 Iowa 243, 39 N. W. 291; Com. v. Gallagher, 145 Mass. 104, 13 N. E. 359.

10 Com. v. Lee, 148 Mass. 8, 18 N. E. 586.

11 State v. Cox, 82 Me. 417, 19 Atl. 857.

place or point in the county from which and to which such conveyance was made, where the same is known, and if unknown, that fact should be alleged;[12] but where the charge is the offense of bringing intoxicating liquors into dry territory, the indictment or information need not allege from where the liquors were brought.[13]

Public place being designated in a statute as a place at which intoxicating liquors are prohibited from being given away, the statute relates to the giving, and not to the sale, of intoxicating liquors, and an indictment or information charging unlawful sale need not allege the place of the act charged as a "public place."[14]

§ 772. ——— AT SOCIAL CLUB. An indictment or information charging the violation of the liquor laws by an unlawful sale at a social club, the decisions are at variance as to the liability, and no reliable basis for harmonizing them can be found. An incorporated social club,[1] being a "person" within the statute,[2] and being, under some decisions, a "bar-room,"[3] or a "dram-shop,"[4] and

12 Robbins v. State, — Okl. Cr. —, 157 Pac. 1027.

An allegation as to the conveyance "from some point in Beaver County to your informant unknown to the K. of P. lodge hall, a place then and there in Beaver County." —Robbins v. State, — Okl. Cr. —, 157 Pac. 1027.

13 State v. Muller, 80 Wash. 368, 141 Pac. 910.

In the prosecution for the maintenance of a liquor nuisance, an error in the information describing the place is immaterial, where rejecting the erroneous portion, there still remains an accurate and definite description, and no actual prejudice results to the defendant.—State v. Butler, 85 Kan. 802, 118 Pac. 877.

14 King v. State, 66 Miss. 502, 6 So. 188.

1 Unincorporated social club serving or distributing intoxicating liquors to its members, who pay therefor, shipments of money to be used in replenishing the stock and in running the club, the transaction constitutes an unlawful sale on the premises.—Manning v. Canon City, 45 Colo. 571, 23 L. R. A. (N. S.) 192, 101 Pac. 978.

2 State v. Minnesota Club, 106 Minn. 515, 20 L. R. A. (N. S.) 1101, 119 N. W. 494.

3 Spokane (City of) v. Baughman, 54 Wash. 315, 103 Pac. 14.

4 South Shore Country Club v. People, 228 Ill. 74, 10 Ann. Cas. 383, 119 Am. St. Rep. 417, 12 L. R. A. (N. S.) 519, 81 N. E. 805.

a "retail dealer" of intoxicating liquors,[5] and the like, within the liquor laws; and as a transfer of personal property from one person to another, for a price or consideration, constitutes a "sale,"[6] it follows that furnishing by such club of intoxicating liquors to a member thereof, to be drunk on the premises, payment being made or promised therefor by such member, this constitutes a sale within the club to such member, within the prohibition of the liquor laws, although such furnishing and delivery of the intoxicating liquors are mere incidents in the main purpose of the club.[7] And it has been said that where an incorporated social club provides lockers in which the members of such club may safely keep intoxicating liquors belonging to them, even though the club is a bailee without hire, this constitutes a violation of the prohibitory law against the keeping and storing of intoxicating liquors.[8] On the other hand, it has been said that where an incorporated club, located in dry territory accepts an order from a member for the purchase of intoxicating liquors outside of the dry territory, and receives the money from such member with which to pay therefor, procures the liquors and keeps them in the refrigerator mingled with those of other members, issuing them to such member on his written order, the club deriving no

5 State v. Mudie, 22 S. D. 41, 115 N. W. 107.

6 State v. Colonial Club, 154 N. C. 177, Ann. Cas. 1912A, 1079, 31 L. R. A. (N. S.) 387, 69 S. E. 771.

7 South Shore Country Club v. People, 228 Ill. 74, 10 Ann. Cas. 383, 119 Am. St. Rep. 417, 12 L. R. A. (N. S.) 519, 81 N. E. 805; State ex information Harvey v. Missouri Athletic Club, 261 Mo. 576, Ann. Cas. 1916D, 931, L. R. A. 1915C, 876, 170 S. W. 904. See In re Bond, 12 Cal. App. 255, 107 Pac. 143; Manning v. Canon City, 45 Colo. 571, 23 L. R. A. (N. S.) 192, 101 Pac. 978; Lloyd v. Canon City, 46 Colo. 195, 103 Pac. 288; State v. Johns, 140 Iowa 125, 118 N. W. 295; Taber v. Barton, 108 Me. 338, 80 Atl. 836; State v. Minnesota Club, 106 Minn. 515, 20 L. R. A. (N. S.) 1101, 119 N. W. 494; State v. Kline, 50 Ore. 426, 93 Pac. 237; State v. Mudie, 22 S. D. 41, 115 N. W. 107; Adkins v. State, 49 Tex. Cr. Rep. 524, 95 S. W. 506; Spokane (City of) v. Baughman, 54 Wash. 315, 103 Pac. 14.

8 State v. Topeka Club, 82 Kan. 756, 20 Ann. Cas. 320, 29 L. R. A. (N. S.) 722, 109 Pac. 183.

profit from the transaction, that this does not constitute a sale by the club of such liquor on its premises.[9] But where a social club is a mere device for the evasion of the prohibitory liquor laws, and the real purpose of its existence is to provide its members with intoxicating liquors, and such liquors are delivered and paid for on the premises of the club, or agreed to be paid for, the transaction constitutes a sale on the premises, of intoxicating liquors within the prohibition of the liquor laws.[10]

§ 773. ——— IN PROHIBITION OR "DRY" TERRITORY. An indictment or information charging accused with a violation of a local-option law by sale of intoxicating liquor in "dry" territory, describing the act and designating the particular locality of the state, in compliance with the requirements above pointed out, will be sufficient, where the whole transaction was located within the dry territory, or was unquestionably consummated there; but in those cases in which the sale was made, in whole or in part, in another state, in which state the transaction was valid, a grave question is presented, regarding the proper solution of which the decisions are not harmonious; but their discussion in extenso is beyond the scope of the present treatment, and we must be contented with merely indicating a few fundamental principles. It may be premised that the courts of the state where the sale was made will not enforce the prohibition laws of the state where the intoxicating liquors were delivered, and that the courts of the latter state will enforce the payment of the contract price for the liquors[1] in those cases in which the

9 State v. Colonial Club, 154 N. C. 177, Ann. Cas. 1912A, 1079, 31 L. R. A. (N. S.) 387, 69 S. E. 771 (by a divided court); Moriarity v. State, 122 Tenn. 440, 124 S. W. 1016; State v. Duke, (Tex.) 137 S. W. 654.

10 CONN.—State v. Kelsey, 83 Conn. 717, 76 Atl. 1007. ILL.—People v. Craig, 155 Ill. App. 73. S. C.—State v. City Club, 83 S. C. 509, 65 S. E. 730. TEX.—Beckham v. State, 54 Tex. Cr. Rep. 28, 111 S. W. 1017. WYO.—Russell v. State, 19 Wyo. 272, 116 Pac. 451.

1 IOWA—Brown v. Wieland, 116 Iowa 711, 61 L. R. A. 417, 89 N. W. 17. KAN.—Bowman Distilling Co.

initial steps in the transaction were not taken within the dry territory,[2] and the seller did not have knowledge[3] that the liquors were to be resold in violation of law in the state where delivered, and did not entertain an unlawful purpose in making the sale,[4] or did not do anything to aid in such unlawful sale.[5] It has been held that where an order is sent from dry territory to another state for the shipment of intoxicating liquors, which are delivered to a carrier in the latter state for transportation to the purchaser, the vendor making delivery conditional upon

v. Nutt, 34 Kan. 724, 10 Pac. 163. ME. — Torrey v. Corliss, 33 Me. 333; Banchor v. Cilley, 38 Me. 553; Barnard v. Field, 46 Me. 526. N. H.—Corning v. Abbott, 54 N. H. 469; Durkee v. Moses, 67 N. H. 115, 23 Atl. 793. FED.—Sortwell v. Hughes, 1 Curt. C. C. 244, Fed. Cas. No. 13177.

Compare: Dearborn v. Holt, 41 Me. 120 (this case turned upon the sweeping terms of a drastic statute); Starace v. Rossi, 69 Vt. 303, 37 Atl. 1109; Beverick Brewing Co. v. Oliver, 69 Vt. 323, 37 Atl. 1110; Bacon v. Hunt, 72 Vt. 98, 47 Atl. 394.

2 See "Soliciting and Taking Orders," this section.

3 Blight v. James, 83 Mass. (6 Allen) 750; Gassett v. Godfrey, 26 N. H. 215.

Compare: Corning v. Abbott, 54 N. H. 469.

Inference of reasonable cause to believe applied in Charlton v. Donnell, 100 Mass. 229.

Knowledge not necessary on part of vendor, under some statutes. See Meservey v. Gray, 55 Me. 540; Pollard v. Allen, 96 Me. 455, 52 Atl. 924.

Knowledge of agent employed to negotiate the sale, or if he had reasonable cause to believe purchaser intended to make unlawful sale or sales in the territory where the liquors were delivered, this knowledge or reasonable cause to believe affects the seller, and the sale is illegal although perfected in another state.—Knowlton v. Doherty, 87 Me. 518, 33 Atl. 18; Suit v. Woodhall, 113 Mass. 391.

4 Savage v. Mallory, 86 Mass. (4 Allen) 492; Finch v. Mansfield, 97 Mass. 89; Ely v. Webster, 102 Mass. 304.

Reasonable cause to believe that purchaser intended to resell unlawfully within the prohibition territory not enough to make the sale illegal at common law.—Adams v. Coulliard, 102 Mass. 167; Ely v. Webster, 102 Mass. 304; Hotchkiss v. Finan, 105 Mass. 85; Lindsay v. Stone, 123 Mass. 332.

5 Corbin v. Houlehan, 100 Me. 246, 70 L. R. A. 568; 61 Atl. 131; Graves v. Johnson, 156 Mass. 211, 32 Am. St. Rep. 446, 15 L. R. A. 834, 30 N. E. 818.

Participation by vendor in doing something to enable vendee to violate the law, held to be necessary in some cases. See note, 15 L. R. A. 834.

the purchaser complying with specified conditions, and obtains a bill of lading which the vendor takes in his own name,[6] or in the name of his agent,[7] and transmits to a bank in the dry territory for delivery when the purchaser complies with the contract, this constitutes a sale within the dry district—that is, the place of delivery to the purchaser is the place of sale;[8] but the vendor, in such a transaction, is not liable to a criminal prosecution in such state for the unlawful sale and delivery of liquors therein, in the absence of a showing that he agreed to deliver the liquors at the purchaser's residence, and that the carrier was the agent of such vendor.[9] But by the weight of the authorities, the general rule is that in an order for liquor not specifically identified or appropriated, which the accused delivers to a common carrier in another state, consigned to the purchaser in dry territory, the sale takes place at the point of shipment and not at the point where the order was given and the liquors delivered,[10] notwithstanding a provision in a statute in the local-option territory providing that where shipments of intoxicating liquor are made C. O. D. the sale shall be regarded as having been made in the prohibition territory.[11]

Soliciting and taking orders in dry territory by vendors of intoxicating liquors, residing outside of the terri-

6 Brown v. Wieland, 116 Iowa 711, 61 L. R. A. 417, 89 N. W. 17.

7 Hamilton v. Jos. Schlitz Brewing Co., 129 Iowa 181, 2 L. R. A. (N. S.) 1078, 105 N. W. 438 (holding, however, the transaction not constituting a sale within state).

8 Brown v. Wieland, 116 Iowa 711, 61 L. R. A. 417, 89 N. W. 17.

9 Fisher v. Com., 147 Ky. 821, 44 L. R. A. (N. S.) 435, 145 S. W. 737.

10 People v. C. Kern Brewing Co., 166 Mich. 292, Ann. Cas. 1912D, 981, 44 L. R. A. (N. S.) 447, 131 N. W. 557; State v. Rosenberger, 212 Mo. 648, 126 Am. St. Rep. 580, 20 L. R. A. (N. S.) 284, 111 S. W. 509.

11 People v. C. Kern Brewing Co., 166 Mich. 292, Ann. Cas. 1912D, 981, 44 L. R. A. (N. S.) 447, 131 N. W. 557, and cases cited in notes in Ann. Cas. and L. R. A.

Bank collecting the money on draft attached to a C. O. D. as shipment of liquors, and delivering the bill of lading to the consignee, does not subject the bank to criminal prosecution for a violation of the liquor laws.—First National Bank v. United States, 206 Fed. 374, 46 L. R. A. (N. S.) 1139.

tory, the cases are not in harmony as to the point or place at which such sale is made. However, the better doctrine and the weight of decision seem to be to the effect that a charge of a sale of intoxicating liquors within prohibited territory is good notwithstanding the fact that the order sent from such territory is subject to acceptance or rejection at the place where the vendor does business in another state.[12] On a charge of soliciting orders for the sale of intoxicating liquors within prohibited territory, it is not necessary that the indictment or information should allege that an order was obtained or that any liquors were sold in order to charge the offense alleged.[13] Sending into prohibition territory from without that territory letters, circulars, or price lists, containing a solicitation for orders of intoxicating liquors, is within the prohibition of the state in some jurisdictions,[14] and not in others;[15] consequently, the question whether an indictment or information charging the soliciting of orders for intoxicating liquors, in such manner, will constitute a crime, depends upon the particular statute under which the prosecution is had.

§ 774. ——— NEAR CHURCH OR SCHOOL. Under the various statutes of the different jurisdictions prohibiting

12 State v. Delamater, 20 S. D. 23, 129 Am. St. Rep. 907, 8 L. R. A. 774, 104 N. W. 537.

13 Levy v. State, 133 Ala. 190, 31 So. 805; Sandefur-Julian Co. v. State, 72 Ark. 11, 77 S. W. 596; State v. Ascher, 55 Conn. 299, 7 Atl. 822.

Soliciting or procuring orders for intoxicating liquors in a town in which licenses are prohibited, being made a misdemeanor, any order to deliver to another residing in such town any liquors, to be an offense under the statute, the order must have been solicited by the accused or by one personally authorized by him to do so.—People v. Weinger, 211 N. Y. 469, Ann. Cas. 1915D, 733, 105 N. E. 658.

14 See Golden v. Justices' Court, 23 Cal. App. 788, 104 Pac. 49; Hayner v. State, 83 Ohio St. 178, 93 N. E. 900; State v. Holmes, 68 Wash. 7, 122 Pac. 345.

15 R. M. Rose Co. v. State, 133 Ga. 353, 36 L. R. A. (N. S.) 43, 65 S. E. 770; State v. Wheat, 48 W. Va. 259, 37 S. E. 544; West Virginia v. Adams Express Co., 219 Fed. 331; James Clark Distilling Co. v. Western Maryland R. Co., 219 Fed. 333.

the sale of intoxicating liquors within a designated distance of any church or school, an indictment or information must particularly describe the alleged church or school, both as to character and location, so as to bring it within the purview and the prohibition of the statute. Thus, where the charge is of selling within the prohibited distance of a church, it must be alleged and proved that the building was actually used for church purposes at the time of the sale complained of, or at the time of the granting of the license to the person accused; the fact that the building was under lease at the time, but not yet occupied for church purposes when the license was granted, the sale complained of will not constitute an offense within the prohibition of the statute.[1]

Schoolhouse or building, or educational institution, and the like, described in the statute as a place near which intoxicating liquors may not be sold within a prescribed distance, an indictment or information charging an offense against the statutory prohibition, must describe the building or institution with the same particularity, as to character and location, as in the case of a church. The law prohibiting the sale of intoxicating liquors within a designated distance of a school or schoolhouse, applies primarily to common schools devoted to such elementary education and intermediate instruction as is adapted to the education of children and youth, and

1 Starks v. Presque Isle Circuit Judge, 173 Mich. 464, Ann. Cas. 1914D, 773, 43 L. R. A. (N. S.) 1142, 139 N. W. 29.

As to what constitutes a church within the meaning of such statute. See: N. J.—George v. Board of Excise, 73 N. J. L. 366, 9 Ann. Cas. 112, 63 Atl. 870. N. Y.—In re McCusker, 47 App. Div. 111, 62 N. Y. Supp. 210; People ex rel. Deutsch v. Dalton, 9 Misc. 249, 30 N. Y. Supp. 407; In re Vail, 38 Misc. 392, 77 N. Y. Supp. 903; In re Rupp, 55 Misc. 313, 106 N. Y. Supp. 483; People ex rel. Sweeney v. Lammerts, 118 Misc. 343, 40 N. Y. Supp. 1107; affirmed, 14 App. Div. 628, 43 N. Y. Supp. 1161; In re Zinzow, 18 Misc. 653, 43 N. Y. Supp. 714; In re Korndorfer, 49 N. Y. Supp. 559; affirmed in Re Lyman, 29 App. Div. 390, 52 N. Y. Supp. 1145. N. C.—State v. Midgett, 85 N. C. 538; Jones v. Moore County, 106 N. C. 436, 11 S. E. 513.

secondarily to semi-public and private schools conducted for the same purpose;[2] but the fact that religious or temperance societies occasionally meet within the school building does not deprive it of its character as a school building within the liquor laws;[3] and the fact that teachers reside within the school building does not deprive it of its character as a schoolhouse within such laws.[4] But it has been said that under a statute making it unlawful to sell intoxicating liquors within a prescribed distance of an incorporated institution of learning, a sale during vacation of school in such institution does not constitute a violation of the prohibition.[5]

§ 775. ——— ON VESSEL IN NAVIGABLE WATERS. Under the established rules of law, a vessel plying between local ports and those of a foreign country is within the operation of the liquor laws,[1] while it is within waters under the jurisdiction of the court in which the prosecution is instituted, and in which an unlawful sale of intoxicating liquors thereon is charged to have been made;[2] consequently, a vessel at anchor in waters over which the court has jurisdiction is within the jurisdiction of such court

2 Matter of Townsend, 195 N. Y. 214, 16 Ann. Cas. 921, 22 L. R. A. (N. S.) 194, 88 N. E. 41; In re Hering, 133 App. Div. 293, 117 N. Y. Supp. 747.

Commercial school is not a "private school" within the meaning of a law prohibiting traffic in liquor within a designated distance of the grounds.—Granger v. Lorenzen, 28 S. D. 295, 133 N. W. 259.

School for boxing or to give instruction in dancing or physical culture not included (obiter).—In re Hering, 133 App. Div. 293, 117 N. Y. Supp. 747.

School for nurses not within the meaning of the statute.—Matter of Townsend, 195 N. Y. 214, 16 Ann. Cas. 921, 22 L. R. A. (N. S.) 194, 88 N. E. 41.

3 Matter of Lyman, 48 App. Div. 275, 62 N. Y. Supp. 846.

4 People v. Murray, 148 N. Y. 171, 42 N. E. 584; People ex rel. Clausen v. Murray, 16 Misc. 398, 38 N. Y. Supp. 609; affirmed, 5 App. Div. 441, 39 N. Y. Supp. 1130.

5 Tillery v. State, 78 Tenn. (10 Lea) 35.

1 State v. Southern Pac. Co., 137 La. 435, L. R. A. 1915F, 1040, 68 So. 819; see R. v. Meikelham, 11 Ont. L. Rep. 366, 10 Can. Cr. Cas. 382.

2 Kinnanne v. State, 106 Ark. 286, 153 S. W. 262.

on a charge of unlawful sale of intoxicating liquors;[3] and an unlawful sale of such liquors on such vessel while anchored at a wharf is within the prohibition of the liquor laws, and is a sale within the jurisdiction of the court and amenable to prosecution.[4]

§ 776. —— PURPOSE OF SALE. The purpose for which the intoxicating liquors are purchased and the use to which they are to be put, not being elements in the offense under the statute under which prosecution is had, the indictment or information need not allege the purpose or use it was intended to put the liquors to, whether as a beverage or otherwise;[1] but where the statute merely forbids the sale for particular purposes and uses, the indictment or information must allege the purpose or use for which the liquor was intended,[2] e. g., as that it was intended to be drunk on the premises where sold, such use being prohibited by the statute;[3] although it has been

3 Com. v. Louisville & E. Packet Co., 117 Ky. 936, 80 S. W. 154; State v. Savors, 33 Ohio C. C. 224.

4 State v. Blands, 101 Mo. App. 618, 74 S. W. 3.

1 ILL.—Anderson v. People, 63 Ill. 53. IND.—Stapf v. State, 33 Ind. App. 255, 71 N. E. 165. MASS.—Com. v. O'Leary, 143 Mass. 95, 8 N. E. 887; Com. v. Murphy, 155 Mass. 284, 29 N. E. 469. MO.—Louisiana (City of) v. Anderson, 100 Mo. App. 341, 73 S. W. 875.

2 IND.—Dowdell v. State, 58 Ind. 333; Allman v. State, 69 Ind. 387. KAN.—State v. Shinn, 63 Kan. 638, 66 Pac. 650. ME.—State v. Dunlap, 81 Me. 389, 17 Atl. 313. MICH.—People v. Quinn, 74 Mich. 632, 42 N. W. 604; People v. Hinchman, 75 Mich. 587, 4 L. R. A. 707, 42 N. W. 1006; People v. Hamilton, 101 Mich. 87, 59 N. W. 401. MO.—State v. Buckner, 20 Mo. App. 420. N. H.—State v. Abbott, 31 N. H. 434. S. D.—State v. Hafsoos, 1 S. D. 382, 47 N. W. 400.

"As a beverage" alleged to be the purpose of the sale, is equivalent to alleging that the liquor was sold "to be used as a beverage."—People v. Hinchman, 75 Mich. 587, 4 L. R. A. 707, 42 N. W. 1006.

3 IND. — State v. Freeman, 6 Blackf. 248; State v. Shearer, 8 Blackf. 262; Layton v. State, 49 Ind. 229; Vanderwood v. State, 50 Ind. 26; State v. Woolsey, 92 Ind. 131; Blough v. State, 121 Ind. 365, 23 N. E. 153; Wood v. State, 9 Ind. App. 42, 36 N. E. 158. IOWA—Hintermeister v. State, 1 Iowa 101; Wrocklege v. State, 1 Iowa 167. MASS. — Com. v. Dean, 38 Mass. (21 Pick.) 334; Com. v. Moulton, 64 Mass. (10 Cush.) 404. MO.—State v. Williamson, 19 Mo. 384. N. Y.—Schwab v. People, 4 Hun 520, 2 Cow. Cr. Rep. 354. OHIO—Pickett v. State, 20 Ohio

said that such allegation as to use is sufficiently met by negativing the fact that it was for a lawful use.[4] It has been said that where the statute prohibits selling as a beverage on Sunday, an indictment or information must allege that the liquor was sold as a beverage;[5] and where the statute prohibits the unlawful selling "to be drunk in, upon or about the building or premises where sold," the indictment or information must specifically charge as to the place where the liquors were to be drunk.[6]

Intent of seller as to the use to be made of the liquor by the purchaser has been held not to be an element entering into the transaction, in one line of cases,[7] while another line of cases holds that the accused is bound and his criminal liability to be measured by his intent and good faith in the transaction[8]—a doctrine potent to nullify the prohibitory laws in many, if not most, instances.

St. 405. TENN.—Bilbro v. State, 26 Tenn. (7 Humph.) 534.

4 As to negative averments generally, see, infra, §§ 788-795.

5 Morris v. State, 47 Ind. 503; Layton v. State, 49 Ind. 229; Dowdell v. State, 58 Ind. 333; Morel v. State, 89 Ind. 275.

6 Com. v. Young, 54 Va. (13 Gratt.) 664, 70 Am. Dec. 438; State v. Charlton, 11 W. Va. 332, 27 Am. Rep. 603; Allen v. State, 5 Wis. 329.

Disjunctive allegation charging purpose of sale was "to be drunk upon or about the building or premises," held bad for uncertainty. — State v. Charlton, 11 W. Va. 332, 27 Am. Rep. 603.

7 Ryan v. State, 174 Ind. 468, Ann. Cas. 1912D, 1341, 92 N. E. 340. IOWA—Taylor v. Pickett, 52 Iowa, 467, 3 N. W. 514; State v. Knowles, 57 Iowa 669, 11 N. W. 620; State v. Harris, 64 Iowa 287, 20 N. W. 439; State v. Hoagland, 77 Iowa 135, 41 N. W. 597; State v. Harris, 122 Iowa 78, 97 N. W. 1093; Peak v. Bidinger, 133 Iowa 127, 111 N. W. 292. MASS.—Com. v. Perry, 148 Mass. 160, 19 N. E. 212; Com. v. Gould, 158 Mass. 499, 33 N. E. 659. TEX. — White v. State, 45 Tex. Cr. Rep. 604, 79 S. W. 523.

8 ILL.—Owens v. People, 56 Ill. App. 569. MICH.—People v. Hinchman, 75 Mich. 587, 4 L. R. A. 707, 42 N. W. 1006; People v. Thompson, 147 Mich. 444, 111 N. W. 96. MISS.—Haynie v. State, 32 Miss. 400; King v. State, 58 Miss. 737, 38 Am. Rep. 344; Goode v. State, 87 Miss. 495, 40 So. 12. MO.—State v. Mitchell, 28 Mo. 562; State v. Clinkenbeard, 142 Mo. App. 146, 125 S. W. 827; State v. Farrar, 146 Mo. App. 282, 129 S. W. 1029. N. C.—State v. Wray, 72 N. C. 253. PA.—Com. v. Patterson, 16 W. N. C. 193. S. C.—State v. May, 33 S. C.

Personal consumption on own premises, being the purpose for which intoxicating liquors are brought within the state in violation of a constitutional prohibition against bringing such liquors into the state, an indictment or information charging accused with bringing and introducing into the state from outside the limits thereof, intoxicating liquors in violation of the provisions of the constitution, will not be sufficient to sustain a conviction, in the absence of any statute making the possession or personal use of such liquors within the state unlawful.[9]

§ 777. Allegation as to liquor—In general. An indictment or information charging the unlawful sale of intoxicating liquors must describe, and the proof must show, that the liquors sold were such as come within the prohibition of the statute.[1] The description of such liquors, in the language of the statute under which the prosecution is had, is usually sufficient;[2] and where the statute enumerates in the disjunctive several classes of liquor, the sale of any and all of which is prohibited, an unlawful sale of all of these classes may be charged in the same count in the conjunctive.[3]

§ 778. —— Averment as to kind or quality. An indictment or information charging the unlawful keeping or

39, 11 S. E. 440. FED.—United States v. White, 42 Fed. 138.

Good faith on the part of the vendor will not relieve him from criminal liability.—White v. State, 45 Tex. Cr. Rep. 604, 79 S. W. 523.

Knowingly selling to a drunkard, accused is not relieved of liability by his reliance upon purchaser's statement that the liquors were to be used for medicine.—McDonald v. Casey, 84 Mich. 508, 47 N. W. 1104.

Mere entertainment of belief by druggist that the liquors were to be used unlawfully would not make him liable, if, as a matter of fact, they were being purchased for a lawful use. — State v. Shinn, 63 Kan. 638, 66 Pac. 650; Com. v. Joslin, 158 Mass. 482, 21 L. R. A. 449, 33 N. E. 653.

9 Sturgeon v. State, 17 Ariz. 513, L. R. A. 1917B, 1230, 154 Pac. 1050.

1 Brantly v. State, 91 Ala. 47, 8 So. 816; Barker v. State, 117 Ga. 428, 43 S. E. 744.

2 Com. v. Morgan, 149 Mass. 314, 21 N. E. 369; State v. Spaulding, 61 Vt. 505, 17 Atl. 844.

As to allegations in language of statute, see, supra, § 758.

3 See, supra, § 760.

sale of intoxicating liquors is not required to state the particular kind or quality of the liquors kept or sold, it being sufficient to describe the liquors as "intoxicating liquors" or "spirituous liquors,"[1] without setting out the name of the particular liquor.[2] Where the statute pro-

[1] ALA.—Ulmer v. State, 61 Ala. 208. ARK.—State v. Witt, 39 Ark. 216. CONN.—Whiting v. State, 14 Conn. 487, 36 Am. Dec. 499; Brath v. State, 18 Conn. 432; State v. Cady, 47 Conn. 44; State v. Teahan, 50 Conn. 92. GA.—Williams v. State, 89 Ga. 483, 15 S. E. 552. ILL.—Cannady v. People, 17 Ill. 158. IND.—State v. Graeter, 6 Blackf. 105; State v. Mullinix, 6 Blackf. 554; Simpson v. State, 17 Ind. 444; Downey v. State, 20 Ind. 37; Joseph Daffer v. State, 32 Ind. 402; Leary v. State, 39 Ind. 360; Connell v. State, 46 Ind. 446; Hooper v. State, 56 Ind. 153; Willis v. State, 69 Ind. 286; Buell v. State, 72 Ind. 523; Callahan v. State, 2 Ind. App. 417, 28 N. E. 717. IOWA—State v. Whalen, 54 Iowa 735, 6 N. W. 552; Foreman v. Hunter, 59 Iowa 550, 13 N. W. 659. KAN.—State v. Brooks, 33 Kan. 708, 7 Pac. 591. ME.—State v. Dorr, 82 Me. 341, 19 Atl. 861. MASS.—Com. v. Odlin, 40 Mass. (23 Pick.) 275; Com. v. Wilcox, 55 Mass. (1 Cush.) 503; Com. v. Conant, 72 Mass. (6 Gray) 483; Com. v. Timothy, 74 Mass. (8 Gray) 480; Com. v. Grady, 108 Mass. 412; Com. v. Henderson, 140 Mass. 303; Com. v. Morgan, 149 Mass. 314, 21 N. E. 369. MINN.—State v. McGinnis, 30 Minn. 52, 14 N. W. 258. MO.—State v. Rogers, 39 Mo. 432; State v. Houts, 36 Mo. App. 265; State v. Krutz, 64 Mo. App. 123. N. J.—State v. American Forcite Powder Mfg. Co., 50 N. J. L. 75, 11 Atl. 127. N. C.—State v. Packer, 80 N. C. 439; State v. Downs, 116 N. C. 1064, 21 S. E. 689.

Mixed liquor, a part of which is intoxicating, charged to have been unlawfully sold, is sufficient to sustain a conviction.—Com. v. Morgan, 149 Mass. 314, 91 N. E. 369.

[2] Id. See, also: ALA.—Powell v. State, 69 Ala. 10. DAK.—People v. Sweetser, 1 Dak. 308, 46 N. W. 452. FLA.—Dansey v. State, 23 Fla. 316, 2 So. 692; Brass v. State, 45 Fla. 1, 34 So. 307. GA.—Williams v. State, 89 Ga. 483, 15 S. E. 552; Maddox v. State, 118 Ga. 32, 44 S. E. 808. IND.—Fetterer v. State, 18 Ind. 388; Downey v. State, 20 Ind. 82; State v. Carpenter, 20 Ind. 219; State v. Mondy, 24 Ind. 268; Hammond v. State, 48 Ind. 393; State v. Hannum, 53 Ind. 335; Hooper v. State, 56 Ind. 153; Plunkett v. State, 69 Ind. 68. KAN.—State v. Sterns, 28 Kan. 154; State v. Whisner, 35 Kan. 271, 10 Pac. 852; Lincoln Center v. Linker, 7 Kan. App. 282, 53 Pac. 787. KY.—Cockerell v. Com., 114 Ky. 296, 73 S. W. 760. ME.—State v. Dorr, 82 Me. 341, 19 Atl. 861. MASS.—Com. v. Ryan, 75 Mass. (9 Gray) 137; Com. v. Clark, 80 Mass. (14 Gray) 367; Com. v. Bennett, 108 Mass. 30, 11 Am. Rep. 304. MINN.—State v. Heck, 23 Minn. 549. MO.—State v. Blands, 101 Mo. App. 618, 74 S. W. 3. N. H.—State v. Blaisdell, 33 N. H. 388. N. J.—State v. Furnam, 66 N. J. L. 397, 52 Atl. 956.

hibits the keeping or sale of a particular kind of liquor by name, it is sufficient to describe it by the name given in the statute;[3] but where the particular kind of liquor named in the indictment or information—e. g., as beer, wine, whisky, and the like—is not specifically named and prohibited in the statute, the intoxicating quality thereof should be specifically alleged,[4] except in those instances in which the liquor is of a kind the intoxicating character of which will be taken judicial notice of by the court.[5]

N. Y.—People v. Wheelock, 3 Park. Cr. Rep. 9. ORE.—Frisbie v. State, 1 Ore. 248. TEX.—Cochran v. State, 26 Tex. 678; Frickie v. State, 39 Tex. Cr. Rep. 254, 45 S. W. 810. VT.—State v. Reynolds, 47 Vt. 497. VA.—Savage's Case, 84 Va. 582, 5 S. E. 563.

3 State v. Thornton, 63 N. H. 114; State v. Jenkins, 64 N. H. 375, 10 Atl. 699.

4 Butler v. State, 25 Fla. 347, 6 So. 67; Welsh v. State, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883; State v. Jones, 3 Ind. App. 121, 29 N. E. 274.

"Beer" proved to have been sold, held to be sufficient to warrant a conviction without showing its intoxicating quality.—People v. Anderson, 159 Mich. 186, 25 L. R. A. (N. S.) 447, 123 N. W. 605.

"Intoxicating liquors, to wit, beer" sufficient to support conviction.—Douglas v. State, 21 Ind. App. 304, 52 N. E. 238.

5 CONN.—State v. Brown, 51 Conn. 1. FLA.—Butler v. State, 25 Fla. 347, 6 So. 67. IND.—Carmon v. State, 18 Ind. 450; Eagan v. State, 53 Ind. 162; Schlicht v. State, 56 Ind. 173. MD.—State v. Camper, 91 Md. 672, 47 Atl. 1027. MICH.—People v. Webster, 2 Doug. 92. MO.—State v. Dengolensky, 82 Mo. 44; State v. Houts, 36 Mo. App. 265. TEX.—Daniels v. Grayson College, 20 Tex. Civ. App. 562, 50 S. W. 205. VT.—State v. Munger, 15 Vt. 290. VA.—Tefft v. Com., 35 Va. (8 Leigh) 72.

Alcohol judicially known to be spirituous and intoxicating.—Cureton v. State, 135 Ga. 660, 49 L. R. A. (N. S.) 182. See Snider v. State, 81 Ga. 753, 12 Am. St. Rep. 350, 7 S. E. 630; Sebastian v. State, 44 Tex. Cr. Rep. 508, 72 S. W. 849.

Ale, judicial notice that it is a malt liquor.—Wiles v. State, 33 Ind. 206.

Beer, judicial notice taken of its intoxicating quality: MO.—State v. Mitchell, 134 Mo. App. 540, 114 S. W. 1113. N. Y.—Killip v. McKay, 13 N. Y. St. Rep. 5. OKLA.—Markinson v. State, 2 Okla. Cr. 323, 101 Pac. 353; Cox v. State, 3 Okla. Cr. 129, 104 Pac. 1074. ORE.—State v. Billups, 63 Ore. 277, 48 L. R. A. (N. S.) 308, 127 Pac. 686. S. C.—State ex rel. Lyon v. City Club, 83 S. C. 509, 65 S. E. 730. S. D.—State v. Church, 6 S. D. 89, 60 N. W. 143. FED.—Hoagland v. Canfield, 160 Fed. 146.

Brandy, judicial notice that it is intoxicating.—Fenton v. State, 100 Ind. 598; Intoxicating Liquor Cases, 25 Kan. 751, 35 Am. Rep. 284.

A nonintoxicating liquor being declared by statute to be intoxicating, it may be described in the indictment or information as an intoxicating liquor;[6] and where the statute prohibits the keeping or sale of specified kinds of liquors under such generic terms as "alcoholic," "ferment," "malt," "spirituous," "vinous," and the like, a nonintoxicating liquor which falls within any of such general designations is included within the prohibition of the statute and may be described by the class under

Cider, judicial notice that "hard cider" is a fermented liquor.—State v. Schaefer, 44 Kan. 90, 24 Pac. 92; State v. McLafferty, 47 Kan. 140, 27 Pac. 843; Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 570.

Gin, judicial notice that it is intoxicating.—Hoagland v. Canfield, 160 Fed. 146. See Com. v. White, 51 Mass. (10 Metc.) 14; Com. v. Peckham, 68 Mass. (2 Gray) 514; State v. Munger, 15 Vt. 290.

Lager beer, judicial notice of intoxicating character thereof.—Crippe v. State, 4 Ga. App. 832, 62 S. E. 267; Lahey v. Crist, 130 Ill. App. 152; Chicago (City of) v. Everleigh, 162 Ill. App. 456.

New beverage, judicial notice of its intoxicating character not taken until it becomes so well known as to have a reputation as to such character.—Gourley v. Com., 140 Ky. 221, 48 L. R. A. (N. S.) 315, 131 S. W. 34.

Porter, as to character as an intoxicant and judicial notice taken thereof. See State v. Barr, 84 Vt. 38, 48 L. R. A. (N. S.) 302, 77 Atl. 914.

Whisky, judicial notice taken that it is an intoxicating liquor: FLA.—Purcell v. State, 61 Fla. 43, 55 So. 847. GA.—Tompkins v. State, 2 Ga. App. 639, 58 S. E. 1111; Donaldson v. State, 3 Ga. App. 451, 60 S. E. 115; Brown v. State, 4 Ga. App. 73, 60 S. E. 805; Maddox v. Eatonton (City of), 8 Ga. App. 817, 70 S. E. 214; Benton v. State, 9 Ga. App. 422, 71 S. E. 498. IND.—Carmon v. State, 18 Ind. 450; Eagan v. State, 53 Ind. 162. TEX.—Aston v. State, 49 S. W. 385; Loveless v. State, 49 S. W. 602; Wilcoxen v. State, 91 S. W. 581; Smith v. State, 56 Tex. Cr. Rep. 501, 120 S. W. 881. VT.—State v. Barr, 84 Vt. 38, 48 L. R. A. (N. S.) 302, 77 Atl. 914. FED.—United States v. Ash, 75 Fed. 651.

Wine, judicial notice that it is intoxicating.—Wolf v. State, 59 Ark. 297, 43 Am. St. Rep. 34, 27 S. W. 77; Caldwell v. State, 43 Fla. 545, 30 So. 814; Nussbaumer v. State, 54 Fla. 87, 44 So. 712.

6 Com. v. Timothy, 74 Mass. (8 Gray) 480; State v. McKenna, 16 R. I. 398, 17 Atl. 51.

which it falls.[7] Thus, "near beer" designed to be used as a beverage, is in reality a "malt" liquor.[8]

§ 779. —— AVERMENT AS TO QUANTITY. The statutes in some of the states require an indictment or information charging the unlawful sale of intoxicating liquors to specify the quantity sold,[1] while other statutes make such an allegation unnecessary.[2] An allegation as to the quantity is unnecessary where the amount is immaterial to the

7 See Howard v. Acme Brewing Co., 143 Ga. 1, 83 S. E. 1096, Ann. Cas. 1917A, 91, and notes citing: ALA.—Feibelman v. State, 130 Ala. 122, 30 So. 384; Dinkins v. State, 149 Ala. 49, 43 So. 114; Lambie v. State, 151 Ala. 86, 44 So. 51. ARK.—Bradshaw v. State, 76 Ark. 562, 89 S. W. 1051. IDA.—In re Lockman, 18 Ida. 465, 46 L. R. A. (N. S.) 759, 110 Pac. 253. IOWA—Sawyer v. Botti, 147 Iowa 453, 27 L. R. A. (N. S.) 1007, 124 N. W. 787; State v. Stickle, 151 Iowa 303, 131 N. W. 5. ME.—State v. O'Connell, 99 Me. 61, 58 Atl. 59; State v. Frederickson, 101 Me. 37, 115 Am. St. Rep. 295, 8 Ann. Cas. 48, 6 L. R. A. (N. S.) 186, 63 Atl. 535. MASS.—Com. v. Timothy, 74 Mass. (8 Gray) 480; Com. v. Dean, 80 Mass. (14 Gray) 99. MINN.—State v. Gill, 89 Minn. 502, 95 N. W. 449. MISS.—Fuller v. Jackson, 97 Miss. 237, 30 L. R. A. (N. S.) 1078, 52 So. 873; Purity Extract & Tonic Co. v. Lynch, 100 Miss. 650, 56 So. 316. NEB. — Luther v. State, 83 Neb. 455, 20 L. R. A. (N. S.) 1146, 120 N. W. 125. N. H.—State v. York, 74 N. H. 125, 13 Ann. Cas. 116, 65 Atl. 685; State v. Lebrecque, (N. H.) 97 Atl. 747. N. D. — State v. Fargo Bottling Works Co., 19 N. D. 396, 26 L. R. A. (N. S.) 872, 124 N. W. 387. OHIO—State v. Kauffman, 68 Ohio St. 635, 67 N. E. 1062; LaFollette v. Murray, 81 Ohio St. 474, 91 N. E. 294; State v. Walder, 83 Ohio St. 68, 93 N. E. 531. PA.—Hatfield v. Com., 120 Pa. St. 395, 14 Atl. 151. VT. — State v. Spaulding, 61 Vt. 505, 17 Atl. 844. VA. — Com. v. Goodwin, 109 Va. 828, 64 S. E. 54; Com. v. Henry, 110 Va. 879, 26 L. R. A. (N. S.) 883, 65 S. E. 570. WIS.—Pennell v. State, 141 Wis. 35, 123 N. W. 115.

8 See Howard v. Acme Brewing Co., 143 Ga. 1, Ann. Cas. 1917A, 91, 83 S. E. 1096; Ex parte Lockman, 18 Ida. 465, 110 Pac. 253, 46 L. R. A. (N. S.) 759 and note; Gourley v. Com., 140 Ky. 221, 131 S. W. 34, 48 L. R. A. (N. S.) 315 and note.

1 IND.—Walter v. State, 105 Ind. 589, 5 N. E. 735. MASS.—Com. v. Dean, 38 Mass. (21 Pick.) 334. MO.—State v. Arbogast, 24 Mo. 363; State v. Clinkenbeard, 135 Mo. App. 189, 115 S. W. 1059. TEX.—Cousins v. State, 46 Tex. Cr. Rep. 87, 79 S. W. 549.

2 KY.—Com. v. Greenwell, 8 Ky. L. Rep. 609. LA.—State v. Kuhn, 24 La. Ann. 474. TEX.—White v. State, 11 Tex. App. 476. WIS.—Allen v. State, 5 Wis. 329.

offense charged.[3] Thus, a charge of unlawful selling in prohibited territory need not specify the quantity of liquor sold.[4] In a prosecution for selling spirituous liquors in quantities "less than five gallons," an indictment or information charging the selling of "one pint of brandy" is valid;[5] that is, where less quantity is averred

3 ALA.—Block v. State, 66 Ala. 493. ARK.—McCuen v. State, 19 Ark. 636. CONN.—State v. Teahan, 50 Conn. 92. IND.—Brow v. State, 103 Ind. 133, 2 N. E. 296. MASS.—Com. v. Brown, 53 Mass. (12 Metc.) 522; Com. v. Clark, 80 Mass. (14 Gray) 367. MINN.—State v. Budworth, 104 Minn. 257, 116 N. W. 486. MO.—State v. Russell, 189 Mo. App. 677. N. Y.—People v. McDonnell, 108 N. Y. Supp. 749. FED.—Booth v. United States, 116 C. C. A. 645, 197 Fed. 283.

Where unlawful sale and illegal keeping are charged it need not be set out how much was sold.—Hall v. State, 8 Ga. App. 747, 70 S. E. 211.

4 State v. Foster, 130 La. 219, 57 So. 895.

5 State v. Lavoke, 26 Minn. 526, 37 Am. Rep. 415, 6 N. W. 339 (a pint is necessarily less than five gallons); State v. Wyman, 42 Minn. 182, 43 N. W. 1116 (a gill is less than five gallons).

Contra: Arhintrade v. State, 67 Ind. 267, 33 Am. Rep. 86, holding that under a statute preventing sale of intoxicating liquors to a minor in less quantity than a quart, an indictment alleging the sale of "one gill" is bad, because it does not allege that no more was sold. The court say: "The question is not whether the courts will take notice of the standards of measure, and therefore that a gill is less than a quart; but whether the courts will or can legally assume that because the appellant sold a gill, he did not sell any more at the same time, and therefore that he committed an offense. This would be assuming what is not charged in the indictment, and making out an offense by an unauthorized inference. If all the facts charged in the indictment may be true, and yet the defendant be guilty of no offense, the indictment must be insufficient." The reasoning of the court is not in conformity with recognized rules, and is not supported by well-recognized principles of criminal pleading. Yet it seems to have been followed in Grupe v. State, 67 Ind. 327, holding that an indictment charging a sale of intoxicating liquors to a minor must specifically allege that quantity sold was less than a quart.

—Why an invidious distinction is drawn in cases of a minor is beyond legal comprehension. In case of charging unlawful sale to be drunk on premises, the same court holds that an allegation that the quantity sold was less than a quart need not be made. See State v. Corll, 73 Ind. 535; Payne v. State, 74 Ind. 203.

"One bottle of wine" charged to have been sold unlawfully, without alleging that one bottle, only, was sold, or that the quantity thus sold was less than five gallons,

than that fixed by the statute, the indictment or information will be sufficient.[6] It has been held that under some statutes a charge of unlawfully selling intoxicating liquors must allege whether the sale was made at wholesale or retail;[7] but an indictment or information charging a violation of a statute requiring saloons where liquors are sold "either at wholesale or retail" to be closed on Sunday, need not allege whether the liquors were kept for sale at "wholesale or retail."[8]

§ 780. —— MODE OF SALE—GIFT. An indictment or information charging an unlawful gift or sale of intoxicating liquors need not specify the mode of such sale or gift, unless the mode is made an essential element by the statute under which prosecution is had;[1] but it is otherwise where the mode of gift or sale is an element. Thus, where the law makes it an offense to give away liquors upon pretext, to evade the liquor laws, the indictment or information must allege such pretext, and the allegation must be proved on the trial.[2]

Mode of sale in the regular barter and sale of intoxi-

is insufficient to charge the selling of a quantity less than five gallons.—People v. Brandt, 46 Hun (N. Y.) 445; affirmed, 110 N. Y. 657.

"One gill of whiskey" sufficiently defines the quantity and shows that it was less than five gallons.—State v. Wyman, 42 Minn. 182.

Compare: Arbintrade v. State, 67 Ind. 267, 33 Am. Rep. 86.

"One-half pint of intoxicating liquor, the same being less than one quart," a sufficient allegation as to quantity.—Quinn v. State, 123 Ind. 59, 23 N. E. 977.

"One pint" charged to have been sold means that no more than that quantity was sold.—State v. Bach, 36 Minn. 234, 30 N. W. 764.

[6] State v. Langdon, 29 Minn. 393, 13 N. W. 187; State v. Wyman, 42 Minn. 182, 43 N. W. 1116.

[7] Arrington v. Com., 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224.

Sale must be either by wholesale or retail, notwithstanding the fact that the statute may add "or in any other way." There is in reality no other way known to the law in which a licensed sale of liquors can be made.—Arrington v. Com., 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224.

[8] People v. Talbot, 120 Mich. 486, 79 N. W. 688.

[1] State v. Devine, 4 Iowa 443; People ex rel. Lotz v. Norton, 76 Hun (N. Y.) 7, 27 N. Y. Supp. 851.

[2] Wendt v. State, 32 Neb. 182, 49 N. W. 351.

cating liquors, we have already seen,[3] is either by retail or wholesale, and must be made to be drunk on the premises or elsewhere, and, under some statutes, the mode of the sale and the place where to be used are required to be stated by the statute.[4] Distributing liquors to members of a social club, an account of which is kept, and the member receiving the liquors expected to pay therefor, constitutes a sale;[5] furnishing liquors with meals by boarding-house keepers, hotel-keepers, restaurateurs, and the like, charging an extra price therefor, constitutes a sale within the prohibition of the liquor laws;[6] exchanging raw material for manufactured liquors constitutes a sale within the prohibition of the liquor laws;[7] so also does a loan of intoxicating liquors,[8] although there are authorities to

3 See, supra, § 779, footnote 7.

4 Arrington v. Com., 87 Va. 96, 10 L. R. A. 242, 12 S. E. 224.

5 See, supra, § 772, footnote 7; although there are authorities to the contrary. See supra, § 772, footnote 9.

6 ALA.—Nicrosi v. State, 52 Ala. 336. COLO. — Scanlon v. Denver (City of), 38 Colo. 401, 88 Pac. 156; Lendholm v. People, 55 Colo. 467, 136 Pac. 70. KY.—Seelbach Hotel Co. v. Com., 135 Ky. 376, 25 L. R. A. (N. S.) 943, 122 S. W. 190. MASS.—Com. v. Worcester, 126 Mass. 256. MISS.—Skermetta v. State, 107 Miss. 429, 52 L. R. A. (N. S.) 722, 65 So. 502. N. H.—State v. Wenzel, 72 N. H. 396, 56 Atl. 918. N. Y.—Compare: In re Breslin, 45 Hun 210; appeal dismissed 107 N. Y. 607. TEX.—Savage v. State, 50 Tex. Cr. Rep. 199, 88 S. W. 351. VT.—State v. Lotti, 72 Vt. 116, 47 Atl. 392.

Going to saloon outside with customer's money and purchasing the liquor desired by him, without pecuniary gain for himself, the restaurateur, having acted openly and in good faith, held not to have violated the liquor law.—People v. King Chow Lo, 174 Ill. App. 96; People v. Journeau, 147 Mich. 520, 111 N. W. 95.

Contra: Pasquier v. Neale, [1902] 2 K. B. (Eng.) 287.

Served at regular price, without extra consideration in any respect, the act constitutes a violation of the liquor law.—Lauer v. District of Columbia, 11 App. D. C. 453; State v. Wenzel, 72 N. H. 396, 56 Atl. 918.

7 KY.—Com. v. Davis, 75 Ky. (12 Bush) 240; Friedman v. Com., 26 Ky. L. Rep. 1276, 83 S. W. 1040. MASS.—Com. v. Clark, 80 Mass. (14 Gray) 367. TEX.—Keaton v. State, 36 Tex. Cr. Rep. 259, 38 S. W. 522; Stanley v. State, 43 Tex. Cr. Rep. 270, 64 S. W. 1051; Parker v. State, 45 Tex. Cr. Rep. 334, 77 S. W. 783; Barnes v. State, 88 S. W. 805.

8 ALA.—Clark v. State, 167 Ala. 101, 31 L. R. A. (N. S.) 517, 52 So. 893. ARK.—Robinson v. State, 59

the contrary.[9] But where one manufactures liquors on shares, the manufacturer receiving raw material from which to manufacture the liquor, and delivers to the furnisher of such raw material one-half of the liquor made therefrom, and keeps the other half for his labor, this does not constitute a sale within the prohibition laws.[10]

§ 781. —— PRICE OR CONSIDERATION. An indictment or information charging an unlawful sale of intoxicating liquors is not required to allege the price or consideration paid therefor;[1] hence, where an allegation as to price or consideration is made, and it is ambiguous or uncer-

Ark. 341, 27 S. W. 233. MASS.—Com. v. Abrams, 150 Mass. 393, 23 N. E. 53. N. C.—State v. Mitchell, 156 N. C. 659, Ann. Cas. 1913A, 469, 37 L. R. A. (N. S.) 302, 72 S. E. 632. TENN.—Brown v. State, 121 Tenn. 186, 114 S. W. 198. TEX.—Ray v. State, 46 Tex. Cr. Rep. 176, 79 S. W. 535; Tombeaugh v. State, 50 Tex. Cr. Rep. 286, 123 Am. St. Rep. 841, 14 Ann. Cas. 275, 8 L. R. A. (N. S.) 937, 96 S. W. 1054; Daniel v. State, 57 Tex. Cr. Rep. 467, 125 S. W. 37; Morris v. State, 142 S. W. 876.

9 Loaned liquors to be replaced with other liquors of same kind, the transaction has been held not to be a sale within the purview of the statute prohibiting the sale of intoxicating liquors in some cases. See Coker v. State, 91 Ala. 92, 8 So. 874; Taylor v. State, 121 Ala. 39, 25 So. 701; Robinson v. State, 59 Ark. 341, 27 S. W. 233; Skinner v. State, 97 Ga. 690, 25 S. E. 364; Huby v. State, 111 Ga. 842, 36 S. E. 301.

10 Maxwell v. State, 120 Ala. 375, 25 So. 235; Boggs v. Com., 172 Ky. 243, L. R. A. 1917B, 605, 189 S. W. 21; Barnes v. State, (Tex.) 88 S. W. 805.

1 GA.—Howell v. State, 124 Ga. 698, 52 S. E. 649; Shuler v. State, 125 Ga. 778, 54 S. E. 689; Taylor v. State, 126 Ga. 557, 55 S. E. 474. IND.—State v. Allen, 12 Ind. App. 528, 40 N. E. 705 (under a statute making it unnecessary). IOWA—Clare v. State, 5 Iowa 509; State v. King, 37 Iowa 462. KAN.—State v. Muntz, 3 Kan. 383. LA.—State v. John, 120 La. 208, 55 So. 766. MASS.—Com. v. O'Leary, 143 Mass. 95, 8 N. E. 887. MO.—State v. Fanning, 38 Mo. 359; State v. Rogers, 39 Mo. 432. NEB.—State v. Pischel, 16 Neb. 490, 608, 20 N. W. 848, 21 N. W. 468. R. I.—State v. Hines, 13 R. I. 10. WIS.—State v. Downer, 21 Wis. 277. WYO.—Vines v. State, 19 Wyo. 255, 116 Pac. 1013.

Compare: Cannelton (City of) v. Collins, 172 Ind. 193, 19 Ann. Cas. 692, 88 N. E. 66, a civil case in which the court refrained from deciding whether allegation of price necessary under criminal statute.

By statutory provision in Indiana price for which sale made need not be stated.—State v. Allen, 12 Ind. App. 528, 40 N. E. 705.

tain, such allegation will not vitiate the indictment or information, because it may be treated as surplusage.[2] The words "to sell" necessarily mean to transfer for a valuable consideration;[3] hence, an allegation that intoxicating liquors have been unlawfully sold imports payment of a price therefor.[4]

§ 782. ALLEGATIONS AS TO ACCUSED. An indictment or information charging a violation of the liquor laws must describe the person accused with certainty and precision.[1] A statute may prohibit certain described persons from engaging in the business of selling intoxicating liquors,[2] and where accused falls within a class of persons thus prohibited, the indictment or information must specifically describe him so that the court may see that he belongs to one of the prohibited classes.[3] In those cases in which residence of the accused is made material by the statute under which the prosecution is had, such residence must be specifically alleged.[4] In those cases in

2 IOWA—Clare v. State, 5 Iowa 509. KAN.—State v. Muntz, 3 Kan. 383. MO.—State v. Ladd, 15 Mo. 430; State v. Fanning, 38 Mo. 359; State v. Rogers, 39 Mo. 431. NEB.—State v. Pischel, 16 Neb. 409, 20 N. W. 848, 16 Neb. 608, 21 N. W. 468. R. I.—State v. Hines, 13 R. I. 10. WIS.—State v. Downer, 21 Wis. 274.

3 Howell v. State, 124 Ga. 698, 52 S. E. 649.

A sale imports a transfer of property for an equivalent in money, or at least a valuable consideration. — State v. Downer, 21 Wis. 277.

4 Booth v. United States, 116 C. C. A. 645, 197 Fed. 283.

1 See, supra, §§ 758 and 759.

2 See Trageser v. Gray, 73 Md. 250, 25 Am. St. Rep. 587, 9 L. R. A. 780, 20 Atl. 905; Bloomfield v. State, 86 Ohio St. 253, Ann. Cas. 1913D, 629, 41 L. R. A. (N. S.) 726, 99 N. E. 309; State v. Heinemann, 80 Wis. 258, 27 Am. St. Rep. 34, 49 N. W. 88.

3 Bode v. State, 7 Gill (Md.) 326; State v. Heitsch, 29 Minn. 134, 12 N. W. 353; State v. Runyan, 26 Mo. 167; State v. Andrews, 26 Mo. 169; State v. Lisles, 58 Mo. 359; State v. Ryan, 30 Mo. App. 159.

Compare: Brown v. State, 39 Tenn. (2 Head) 180, holding that an indictment or information charging accused with unlawful sale of intoxicating liquors need not allege that he was a licensed grocery keeper in order to enable the court to pronounce judgment of incapacity to obtain a license in the future.

4 State v. Moore, 14 N. H. 451.

which a sale is prohibited, whether made with or without a license, regardless of the occupation in which the seller may be engaged, the indictment or information need not describe his occupation;[5] and it need not be alleged that two persons accused were joint owners and keepers of the barroom or saloon where the intoxicating liquors were sold, or that either of them owned or controlled such barroom or saloon, where the offense of keeping it open was positively prohibited;[6] and neither is it necessary to allege the name of the agent or servant by whom the sale was made.[7] In those cases in which the statute fixes a specified penalty, and then provides for an additional penalty where the accused is a licensed vendor of intoxicating liquors, in order to secure the infliction of the additional penalty thus provided for, the indictment or information must show that the accused was a licensed vendor.[8]

§ 783. ALLEGATIONS AS TO PURCHASER—IN GENERAL. The personality of the purchaser of intoxicating liquors, on a charge of an unlawful sale thereof, enters into the transaction merely as a description of the offense,[1] and for that reason in those prohibition states in which the law makes a person purchasing for another, or aiding another in purchasing, intoxicating liquors in violation of the prohibitory law, guilty of the offense of an unlawful

5 State v. Butcher, 40 Ark. 362; Com. v. Luddy, 143 Mass. 563, 10 N. E. 448; State v. Farmer, 104 N. C. 887, 10 S. E. 563.

6 Janks v. State, 29 Tex. App. 233, 15 S. W. 815.

Where an indictment charges "A and B, a firm," with violating the local option law, both A and B are deemed charged with the offense.—Rawls v. State, 48 Tex. Cr. 622, 89 S. W. 1071.

7 O'Bryan v. State, 48 Ark. 42; Loeb v. State, 75 Ga. 258; State v. Weiss, 63 Ore. 462, 128 Pac. 448.

8 Baer v. Com., 73 Ky. (10 Bush) 8.

1 An indictment is not demurrable because it failed to state whether the purchaser was white or colored.—Pines v. State, 15 Ga. App. 348, 83 S. E. 198.

The facts as to the person to whom the liquor was sold need not be alleged.—Hall v. State, 8 Ga. App. 747, 70 S. E. 211.

sale of intoxicating liquors,[2] where a person wishing to procure such liquors hands to a waiter in a restaurant, or to another, money with which to purchase the desired liquor, which is afterward duly delivered, an indictment or information charging the offense should not allege that such waiter or other person was the agent of the person wishing to procure the liquors unlawfully,[3] because there can be no such thing as agency in the perpetration of such an offense, as all are principals.[4]

§ 784. —— ALLEGING NAME OF PURCHASER. There is an irreconcilable conflict in the decisions respecting the ne-

2 ARIZ.—Mo Yean v. State, 18 Ariz. 491, L. R. A. 1917D, 1014, 163 Pac. 135. DEL.—State v. Russell, 6 Penn. 573, 69 Atl. 839. GA.—Paschal v. State, 84 Ga. 326, 10 S. E. 821; Grant v. State, 87 Ga. 265, 13 S. E. 554; Evans v. State, 107 Ga. 766, 33 S. E. 659; Mack v. State, 116 Ga. 546, 94 Am. St. Rep. 137, 42 S. E. 776; Springfield v. State, 125 Ga. 281, 54 S. E. 172; Gaskins v. State, 127 Ga. 51, 55 S. E. 1085; Meadows v. State, 127 Ga. 283, 56 S. E. 404. KAN.—State v. Smith, 51 Kan. 120, 32 Pac. 927. KY.—Richardson v. Com., 11 Ky. L. Rep. 367. MISS.—Wiley v. State, 74 Miss. 727, 21 So. 797: MO.—State v. Morton, 42 Mo. App. 64. N. C.—State v. Smith, 117 N. C. 809, 23 S. E. 449. TEX.—Sebastian v. State, 44 Tex. Cr. Rep. 508, 72 S. W. 849; Johnson v. State, 77 S. W. 225. W. VA.—State v. Kiger, 63 W. Va. 450, 61 S. E. 362.

In the absence of a statute making such transaction a sale on the part of the waiter, or other person receiving money and procuring the liquors, the seller thereof, where such waiter or agent is not the owner of the liquors procured, and derives no profits from the transaction, he is not liable on the charge of an unlawful sale of the liquors.—State v. Lynch, 81 Ohio St. 336, 90 N. E. 935, 28 L. R. A. (N. S.) 334, and cases cited in note; Reed v. State, 3 Okla. Cr. 16, 103 Pac. 1070, 24 L. R. A. (N. S.) 268, and cases cited in second part of note; also cases cited in L. R. A. 1917D, pp. 1120 et seq.

3 Mo Yean v. State, 18 Ariz. 491, L. R. A. 1917D, 1014, 163 Pac. 135.

4 Mo Yean v. State, 18 Ariz. 491, L. R. A. 1917D, 1014, 163 Pac. 135; Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414; Wiley v. State, 74 Miss. 727, 21 So. 797; Leonard v. Poole, 114 N. Y. 371, 11 Am. St. Rep. 667, 4 L. R. A. 728, 21 N. E. 707, affirming 55 N. Y. Super. (23 J. & S.) 213; State v. Matthis, 1 Hill L. (S. C.) 37; Mexican International Bkg. Co. v. Lichtenstein, 10 Utah 338, 37 Pac. 574.

Not unlawful to purchase intoxicating liquors, the rule is different, and a person may act as an agent for a principal.—Harris v. State, (Miss.) L. R. A. 1917D. 1013, 74 So. 323.

cessity of an indictment or information setting out the name of the purchaser in an unlawful sale of intoxicating liquors, some of the authorities holding that his name must be alleged,[1] or an excuse be made for the failure to

[1] ALA.—Dorman v. State, 34 Ala. 216 (but rule changed by statute in this state, see footnote 5, this section). DEL.—State v. Walker, 3 Harr. 547. IND.—State v. Stucky, 2 Blackf. 289; State v. Jackson, 4 Blackf. 49; Blodget v. State, 3 Ind. 403; State v. Burgess, 4 Ind. 606; McLaughlin v. State, 45 Ind. 338; Wreidt v. State, 48 Ind. 597; Ashley v. State, 92 Ind. 559; Herron v. State, 17 Ind. App. 161, 46 N. E. 540. IOWA — State v. Allen, 32 Iowa 491. KY.—Com. v. Cook, 52 Ky. (13 B. Mon.) 149; Wilson v. Com., 67 Ky. (4 Bush) 159; Com. v. Benge, 13 Ky. L. Rep. 591; Yost v. Com., 6 Ky. L. Rep. 110. ME.—State v. Stinson, 17 Me. 154. MD. — State v. Nutwell, 1 Gill 54; Capritz v. State, 1 Md. 569. MASS. — Com. v. Dean, 38 Mass. (21 Pick.) 334; Com. v. Thurlow, 41 Mass. (24 Pick.) 374; Com. v. Remby, 68 Mass. (2 Gray) 508; Com. v. Blood, 70 Mass. (4 Gray) 31; Com. v. Hitchings, 71 Mass. (5 Gray) 482; Com. v. Crawford, 75 Mass. (9 Gray) 129; Com. v. Griffin, 105 Mass. 175; Com. v. Lattinville, 120 Mass. 385; Com. v. Crossley, 162 Mass. 515, 39 N. E. 278. MICH.—People v. Minnock, 52 Mich. 628, 18 N. W. 390; People v. Heffron, 53 Mich. 527, 19 N. W. 170. MINN.—State v. Schmail, 25 Minn. 368. MO.—Neales v. State, 10 Mo. 498; State v. Cox, 29 Mo. 475; State v. Martin, 108 Mo. 117; State v. Martin, 44 Mo. App. 45; State v. Harris, 17 Mo. App. 558. NEB.—State v. Pischel, 16 Neb. 608, 21 N. W. 468; Martin v. State, 30 Neb. 421, 46 N. W. 618. N. H.—State v. Wentworth, 35 N. H. 442. N. J. — Roberson v. Lambertville (City of), 38 N. J. L. (9 Vr.) 69; State v. Plainfield, 44 N. J. L. (15 Vr.) 118. N. C.—State v. Blythe, 18 N. C. (1 Dev. & B. L.) 199; State v. Faucett, 20 N. C. (3 Dev. & B. L.) 239; State v. Stamey, 71 N. C. 202; State v. Tisdale, 145 N. C. 422, 13 **Ann. Cas.** 125, 58 S. E. 908. OHIO—State v. Ridgway, 73 Ohio St. 31, 4 **Ann. Cas.** 94, 76 N. E. 95; Stewart v. State, 25 Ohio Cir. Ct. Rep. 438. R. I.—State v. Doyle, 11 R. I. 574 (overruling practice theretofore obtaining). S. C.—State v. Schroder, 3 Hill L. 61; State v. Stedman, 8 Rich. L. 312; State v. Jefcoat, 54 S. C. 196, 32 S. E. 298; State v. Couch, 54 S. C. 286, 32 S. E. 808. S. D.—State v. Buchard, 4 S. D. 548, 57 N. W. 491; State v. Boughner, 5 S. D. 461, 59 N. W. 736. TENN.—State v. Carter, 26 Tenn. (7 Humph.) 158. TEX.—Alexander v. State, 29 Tex. 495; Dixon v. State, 21 Tex. App. 517, 1 S. W. 448; Martin v. State, 31 Tex. Cr. Rep. 27, 19 S. W. 434; Dreschel v. State, 35 Tex. Cr. Rep. 580, 34 S. W. 934; Ex parte Campbell, 57 Tex. Cr. Rep. 171, 149 S. W. 193. VT.—State v. Higgins, 53 Vt. 191, overruling State v. Munger, 15 Vt. 295. VA.—Hulstead v. Com., 32 Va. (5 Leigh) 724; Com. v. Smith, 42 Va. (1 Gratt.) 552. WASH.—State v. Bodeckar, 11 Wash. 417, 39 Pac. 645.

Druggist charged with selling without a prescription, the name

do so by stating the name is to the grand jury unknown;[2] but it is thought that by the weight of authority, and by the better reason, it is not necessary that the indictment or information should set out the name of the purchaser of the liquor,[3] or state that the name is to the grand jury

of the purchaser must be alleged. —State v. Martin, 108 Mo. 117, overruling State v. Elam, 21 Mo. App. 290; State v. Harris, 47 Mo. App. 558; State v. Major, 81 Mo. App. 289.

Name must be alleged in a prosecution for the sale of intoxicating liquor in violation of the statute, where name is known.— State v. Allen, 32 Iowa 491.

In an indictment for carrying on the business of selling liquor in violation of the prohibition law there must be alleged the names of at least two persons to whom sales were made. — Whitehead v. State, 66 Tex. Cr. Rep. 482, 147 S. W. 583; Jones v. State, (Tex.) 172 S. W. 349.

The allegation of the name of the purchaser is unnecessary where the prosecution is for selling liquor on Sunday. — State v. Hickerson, 50 Tenn. (3 Heisk.) 375.

2 DEL.—State v. Walker, 3 Harr. 547. IND.—McLaughlin v. State, 45 Ind. 338; Ashley v. State, 92 Ind. 559. IOWA—State v. Allen, 32 Iowa 491. MD. — Capritz v. State, 1 Md. 569. MASS.—Com. v. Griffin, 105 Mass. 175; Com. v. Crossley, 162 Mass. 515, 39 N. E. 278. MINN.—State v. Schmail, 25 Minn. 368. NEB.—State v. Pischel, 16 Neb. 608, 21 N. W. 468; Martin v. State, 30 Neb. 421, 46 N. W. 621. N. J.—Roberson v. Lambertville, 38 N. J. L. (9 Vr.) 69. N. C.—State v. Blythe, 18 N. C. (1 Dev. & B. L.) 199; State v. Faucett, 20 N. C. (3 Dev. & B. L.) 107; State v. Tisdale, 145 N. C. 422, 13 Ann. Cas. 125, 58 S. E. 998; State v. Avery, 159 N. C. 495, 74 S. E. 1016. OHIO—Gordon v. State, 46 Ohio St. 607, 23 N. E. 63; State v. Ridgway, 73 Ohio St. 31, 4 Ann. Cas. 94, 76 N. E. 95. S. C.—State v. Schroeder, 3 Hill L. 63. S. D.— State v. Boughner, 5 S. D. 461, 59 N. W. 736. TENN.—State v. Carter, 26 Tenn. (7 Humph.) 158; State v. Harris, 36 Tenn. (4 Sneed) 224. TEX.—Dixon v. State, 21 Tex. App. 517, 1 S. W. 448; Martin v. State, 31 Tex. Cr. Rep. 27, 19 S. W. 434. VT.—State v. Higgins, 53 Vt. 191. WASH.—State v. Bodeckar, 11 Wash. 417, 39 Pac. 645.

3 Dorman v. State, 34 Ala. 216; Freeman v. State, 4 Ala. App. 193, 59 So. 228; Hall v. State, 12 Ala. App. 210, 67 So. 714. ARK.—State v. Parnell, 16 Ark. 506, 63 Am. Dec. 72; McCuen v. State, 19 Ark. 630; Johnson v. State, 40 Ark. 453; State v. Bailey, 43 Ark. 150. COLO.—Langan v. People, 32 Colo. 414, 76 Pac. 1048. DAK.—People v. Sweetser, 1 Dak. 308, 46 N. W. 452. FLA.—Jordan v. State, 22 Fla. 528; Dansey v. State, 23 Fla. 316, 2 So. 692; Brass v. State, 45 Fla. 1, 34 So. 307. GA.—Newman v. State, 101 Ga. 534, 28 S. E. 1005; Hancock v. State, 114 Ga. 439, 40 S. E. 317; Wells v. State, 118 Ga. 556, 45 S. E. 443; Shuler v. State, 125 Ga. 778, 54 S. E. 689; Daniel v. State, 11 Ga. App. 799, 76 S. E.

162; Pines v. State, 15 Ga. App. 348, 83 S. E. 198. ILL.—Cannady v. People, 17 Ill. 158; Myers v. People, 67 Ill. 503. IND.—Donovan v. State, 170 Ind. 125, 84 N. E. 744 (under Ind. Acts, 1907, pp. 27, 28, ch. 16). KAN.—State v. Schweiter, 27 Kan. 499; State v. Brooks, 33 Kan. 708, 6 Am. Cr. Rep. 299, 7 Pac. 591; State v. Wishner, 35 Kan. 271, 10 Pac. 852; Junction City v. Webb, 44 Kan. 71, 23 Pac. 1073; State v. Moseli, 49 Kan. 142, 30 Pac. 189; State v. Schmidt, 92 Kan. 457, 140 Pac. 843 (a prosecution for a persistent violation of the prohibitory law); State v. King, 92 Kan. 669, 141 Pac. 247; rehearing denied, 92 Kan. 989, 142 Pac. 296; Lincoln Center v. Linker, 5 Kan. App. 242, 47 Pac. 174. LA. — State v. Kuhn, 24 La. Ann. 474; State v. Brown, 41 La. Ann. 771, 6 So. 638; State v. Burkhalter, 118 La. 657, 43 So. 268; State v. Joseph, 137 La. 52, 68 So. 211; State v. Smith, 139 La. 442, 71 So. 734. MISS.—Riley v. State, 43 Miss. 397; Lea v. State, 64 Miss. 201, 1 So. 51; Hudson v. State, 73 Miss. 784, 19 So. 965. MO.—State v. Ladd, 15 Mo. 430; State v. Spain, 29 Mo. 415; State v. Fanning, 38 Mo. 359; State v. Rogers, 39 Mo. 431; State v. Jaques, 68 Mo. 260; State v. Wingfield, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; State v. Elam, 21 Mo. App. 290; State v. Houts, 36 Mo. App. 265; State v. Ford, 47 Mo. App. 601; State v. Gibson, 61 Mo. App. 368; State v. Back, 99 Mo. App. 34, 72 S. W. 466; State v. McAnally, 105 Mo. App. 333, 79 S. W. 990; State v. Wills, 154 Mo. App. 605, 136 S. W. 25; State v. Richie, (Mo. App.) 180 S. W. 2. N. Y.—Osgood v. People, 39 N. Y. 449; People v. Adams, 17 Wend. 475; People v. Polhamus, 8 App. Div. 133, 11 N. Y. Cr. Rep. 372, 40 N. Y. Supp. 491. N. C.—State v. Brown, 170 N. C. 714, 86 S. E. 1042. N. D.—State v. Dellaire, 4 N. D. 312, 60 N. W. 988. PA.—Com. v. Baird, 4 Serg. & R. 141; Com. v. Liebtreu, 1 Pars. 107; Com. v. Schoenhutt, 3 Phila. 20. S. D.—State v. Burchard, 4 S. D. 548, 57 N. W. 491; State v. Boughner, 5 S. D. 461, 59 N. W. 736; State v. Williams, 11 S. D. 64, 75 N. W. 815. TENN.—State v. Carter, 26 Tenn. (7 Humph.) 158; State v. Weaks, 26 Tenn. (7 Humph.) 522; State v. Harris, 34 Tenn. (2 Sneed) 224; State v. Hickerson, 50 Tenn. (3 Heisk.) 375. TEX.—Cochran v. State, 26 Tex. 678; State v. Heldt, 41 Tex. 220. VT.—State v. Munger, 15 Vt. 290. VA.—Com. v. Dove, 4 Va. (2 Va. Cas.) 26; Hulstead v. Com., 32 Va. (5 Leigh) 724; Com. v. Smith, 42 Va. (1 Gratt.) 553; Fletcher v. Com., 106 Va. 846, 56 S. E. 149. WASH.—State v. Bodeckar, 11 Wash. 417, 39 Pac. 645. W. VA.—State v. Pendergast, 20 W. Va. 672; State v. Ferrell, 30 W. Va. 683, 5 S. E. 155; State v. Chisnell, 36 W. Va. 659, 15 S. E. 412. WIS. — State v. Bielby, 21 Wis. 204; State v. Gummer, 22 Wis. 441. FED.—United States v. Gordon, 1 Cr. C. C. 58, Fed. Cas. No. 15233; Nelson v. United States, 30 Fed. 112; Booth v. United States, 116 C. C. A. 645, 197 Fed. 283.

Failure to name the purchaser in the indictment is not cause for reversal.—Nelson v. United States, 30 Fed. 112.

It is unnecessary to even aver

unknown.[4] By statutory enactment, in some states, it is provided that an averment of the name of the purchaser shall be unnecessary.[5]

§ 785. ——— SUFFICIENCY OF—INITIALS AND "UNKNOWN." In those cases in which it is required that the indictment or information shall set out the name of the purchaser of intoxicating liquors, on a charge of an unlawful sale, this may be done by giving the initials merely of the purchaser's Christian name.[1] Where the purchaser is known by two or more names, the name by which he is most generally known may be given, or all the names by which he is known may be set out.[2] Where the name of the purchaser has not been learned by the

that the name is unknown.—State v. Brown, (La.) 71 So. 734.

In Oklahoma the rule is that where a single sale is charged the name of the person to whom it was made should be alleged. If the name is unknown such must be stated. This, however, would not be necessary where the prosecution was for maintaining a nuisance, or for having possession of liquor to be illegally disposed of.—Fletcher v. State, 2 Okla. Cr. 300, 23 L. R. A. (N. S.) 581, 101 Pac. 599.

Only where the prosecution is against a druggist is the averment of the purchaser's name necessary. —State v. Potter, 125 Mo. App. 473, 102 S. W. 668.

Where the offense is selling liquor to minors the names of the minors must be given if known, and where described as unknown and it appears that they were known it is a fatal variance.—Morganstern v. Com., 68 Va. (27 Gratt.) 1018, 2 Am. Crim. Rep. 476.

Where the prosecution is under the "local option" law the purchaser's name need not be alleged.—State v. Wingfield, 115 Mo. 428; State v. Houts, 36 Mo. App. 265.

4 ILL.—Cannady v. People, 17 Ill. 158; People v. Rice, 38 Ill. 435. MO.—State v. Spain, 29 Mo. 415; State v. Wingfield, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; State v. Houts, 36 Mo. App. 265. NEB.—State v. Pischel, 16 Neb. 608, 21 N. W. 468. PA.—Com. v. Schoenhutt, 3 Phila. 20.

5 As to Alabama Code, 1896, §§ 5076 and 5077, and Illinois Laws, 1907, p. 297, both of which statutes have been held to be constitutional. See Coleman v. State, 150 Ala. 64, 43 So. 715; People v. McBride, 234 Ill. 170, 84 N. E. 865.

1 State v. Brown, 31 Me. 520; State v. Cameron, 86 Me. 196, 29 Atl. 984.

2 Henry v. State, 113 Ind. 304, 15 N. E. 593; Com. v. Melling, 80 Mass. (14 Gray) 388; Com. v. Trainor, 123 Mass. 414; Slaughter v. State, (Tex.) 21 S. W. 247.

grand jury, he may be described as a person to the grand jury unknown;[3] but if the name of the purchaser is in fact known to the grand jury, and he is described as "unknown" in the indictment, it seems that the indictment can not be sustained;[4] timely preliminary objection must be made, however, it being too late after the cause has proceeded to trial.[5]

§ 786. ——— ON SALE TO AGENT. We have already seen that where a person, in prohibition territory, is made the seller in those instances in which he accepts money from and acts as agent for another in the unlawful procuring of intoxicating liquors,[1] he is to be described according to the requirements as to the description of a seller.[2] In all other cases where a person acts as the agent of another as purchaser on an unlawful sale of intoxicating liquors, where the principal is disclosed at the time of the sale, such principal should be properly described in the indictment or information as the purchaser;[3] but in the case of an undisclosed or an unknown principal, the indictment or information should allege the sale as made to, and describe such agent.[4] Where the principal is subsequently disclosed, the sale should be alleged to have been made to such principal, and he should be properly described within the rule.[5]

§ 787. ——— ON SALE TO PROHIBITED PERSON. A sale of intoxicating liquors to a prohibited person being charged, the indictment or information should set forth the name of such person,[1] together with such other aver-

3 See, supra, § 784, footnote 2.

4 Blodget v. State, 3 Ind. 403.

5 People v. Bradley, 11 N. Y. Supp. 594.

1 See, supra, § 783.

2 See, supra, §§ 758, 759, 782.

3 Com. v. Remby, 68 Mass. (2 Gray) 508.

4 Com. v. Kimball, 48 Mass. (7 Metc.) 308; Com. v. Very, 78 Mass. (12 Gray) 124; State v. Wentworth, 35 N. H. 442.

5 Com. v. McGuire, 77 Mass. (11 Gray) 460.

1 Myers v. People, 67 Ill. 503; Com. v. Pfaff, 17 Pa. Co. Ct. Rep. 302.

ments and allegations as will bring that person within the provisions of the statute as one of the class or classes of persons to whom intoxicating liquors are prohibited to be sold. Thus, on a charge of an unlawful sale to an Indian on or off of the reservation,[2] or to persons of Indian descent,[3] facts must be alleged showing him within the statute. On a charge of an unlawful sale to a minor,[4] the fact of his minority must be specifically alleged;[5] also that he was a white person must be alleged, under some statutes;[6] and the consent[7] of the parent,[8] guardian,[9] master,[10] or person having the management and

2 State v. Kenney, 83 Wash. 441, 145 Pac. 450.

As to power of congress to regulate the liquor traffic with tribe of Indians, see Perrin v. United States, 232 U. S. 478, 58 L. Ed. 691, 34 Sup. Ct. Rep. 387.

3 State v. Nicholls, 61 Wash. 142, Ann. Cas. 1912B, 1088, 112 Pac. 269, and note.

4 **Charging furnishing liquor to a minor**, without alleging a sale of the same, or that it was drunk by the minor, has been held to be insufficient.—Grunkemeyer v. State, 25 Ohio St. 548.

5 ARK.—Waller v. State, 38 Ark. 656. IND.—Lindner v. State, 93 Ind. 254. MASS.—Com. v. Fowler, 145 Mass. 398, 14 N. E. 457. WIS.—State v. Boncher, 59 Wis. 477, 18 N. W. 335.

"A minor" charged as the person to whom the sale was made, held to be a sufficient description as to age within the statute.—ARK.—Waller v. State, 38 Ark. 656. ILL.—Supernant v. People, 100 Ill. App. 121. MASS.—Com. v. O'Brien, 134 Mass. 198; Com. v. Sullivan, 156 Mass. 229, 30 N. E. 1023. WIS.—State v. Boncher, 59 Wis. 477, 18 N. W. 335.

"Under age of twenty-one" being alleged, unnecessary to set out the exact age.—Brinkman v. State, 57 Ind. 76; Shaffer v. State, 106 Ind. 319, 6 N. E. 818; State v. Allen, 12 Ind. App. 528, 40 N. E. 705.

6 Com. v. Ewing, 70 Ky. (7 Bush) 105.

7 **Written consent** or request is provided for by some statutes.—Com. v. Handcraft, 69 Ky. (6 Bush) 91.

8 **"Father," or "mother,"** not equivalent to "parent"; and it has been said that where used instead of the statutory "parent," will not be sufficient.—Newman v. State, 63 Ga. 533; Lantznester v. State, 19 Tex. App. 320.

9 **Consent of guardian** not negatived, where consent of parent is negatived, held insufficient.—State v. Emerick, 35 Ark. 324; State v. Shoemaker, 4 Ind. 100.

10 **In Alabama**, where the statute enumerates "master" with parent, guardian, etc., it has been held that an indictment which fails to negative the consent of the master, is sufficient.—Weed v. State, 55 Ala. 13, overruling Bryan v. State, 45 Ala. 86.

control of such minor, being required,[11] must be negatived. On a charge of selling to an intoxicated person, the indictment or information must allege that he was intoxicated at the time of the sale of liquors complained of;[12] and where the charge is that of selling intoxicating liquors to a person in the habit of becoming intoxicated, the indictment or information must specifically allege as to such evil habit.[13]

Notice of minority, or inebriate habits, being an element of the offense under the statute, the fact of such notice must be specifically alleged.[14]

Unnecessary allegations, on a charge of selling to a minor—that accused had no license to sell,[15] or that he was a bar-keeper, saloon-keeper, or the like,[16] or to allege for whose use the liquor was purchased,[17] or the value of an article bartered by the minor for such liquors, or that it had any value.[18] Under a statute prohibiting the giving to or the sale of intoxicating liquors to electors on election day, an indictment or information charging a violation of the statute in this regard, need not allege that the person to whom the liquors were given or sold was a qualified voter, or set out facts showing that he was qualified to vote in such election.[19]

§ 788. Negative averments—Authority in general. In those cases in which the act complained of might be authorized by properly constituted authorities, and would be unlawful only unless so authorized, an indictment or

11 Page v. State, 84 Ala. 446, 4 So. 697; Freiberg v. State, 94 Ala. 91, 10 So. 703.

12 Berry v. State, 67 Ind. 222; State v. Conner, 30 Ohio St. 405.

13 Wiedemann v. State, 92 Ill. 314; Dolan v. State, 122 Ind. 141, 23 N. E. 761.

14 Geraghty v. State, 110 Ind. 103, 11 N. E. 1; State v. Smith, 122 Ind. 178, 23 N. E. 714; State v. Hyde, 27 Minn. 153, 6 N. W. 555.

15 Myer v. State, 50 Ind. 18; State v. Hamilton, 75 Ind. 238; Johnson v. State, 74 Ind. 197; Com. v. O'Brien, 134 Mass. 198.

16 Johnson v. People, 83 Ill. 432; State v. McGinnis, 30 Minn. 52, 14 N. W. 258.

17 Com. v. Murphy, 155 Mass. 284, 29 N. E. 469.

18 Forkner v. State, 95 Ind. 406.

19 State v. Pearis, 35 W. Va. 320, 13 S. E. 1006.

information charging an unlawful sale of intoxicating liquors must negative the existence of an authorization;[1] but this negative averment is sufficiently alleged by charging that the accused "unlawfully" kept a place for the illegal sale of intoxicating liquors,[2] without a specific allegation that he was not a town agent,[3] manufacturer,[4] or did not have a license.[5] And where want of authority is required to be specifically charged, it is sufficient negativing to allege that accused did the act contemplated "without any authority of law,"[6] "without any legal appointment or authority therefor,"[7] or similar phrase of like import.[8] In those cases in which no authority could be

1 ALA.—Koopman v. State, 61 Ala. 70. IND.—Howe v. State, 10 Ind. 423; Stevenson v. State, 65 Ind. 409. MASS.—Com. v. Thurlow, 41 Mass. (24 Pick.) 374; Com. v. Tuttle, 66 Mass. (12 Cush.) 502. MO.—Com. v. McBride, 64 Mo. 364. N. H.—State v. Savage, 48 N. H. 484. ORE.—Cunningham v. Berry, 17 Ore. 622, 22 Pac. 115.

2 State v. Lang, 63 Me. 215; Com. v. Wilson, 65 Mass. (11 Cush.) 412; Com. v. Edds, 80 Mass. (14 Gray) 406; Com. v. Martin, 108 Mass. 29, note; Com. v. Bennett, 108 Mass. 30, 11 Am. Rep. 304; Com. v. Brusie, 145 Mass. 117, 13 N. E. 378; State v. Taylor, 73 Mo. 52.

Receiving to convey to purchasers being charged, authority to sell need not be negatived under Mass. Stats. 1869, ch. 415, § 37.—Com. v. Locke, 114 Mass. 288.

3 Com. v. Tuttle, 66 Mass. (12 Cush.) 502; State v. Barker, 3 R. I. 280.

Agent for any other city need not be negatived.—State v. Shaw, 35 N. H. 217.

Negative necessary under New Hampshire statute.—State v. Savage, 48 N. H. 484.

4 Com. v. Tuttle, 66 Mass. (12 Cush.) 502.

Manufacturer without license should be specifically charged, and this will be a sufficient negative of authority.—Com. v. Clark, 80 Mass. (14 Gray) 367.

Not manufacture of accused from his own product, should be alleged under the North Carolina Act of 1888, ch. 175, § 34, subds. 2 and 3.—State v. Hazell, 100 N. C. 471, 6 S. E. 404.

5 Com. v. Dunn, 111 Mass. 425.

As to negativing license, see, infra, §§ 790, 791.

Mass. Pub. Stats. ch. 100, § 1, requires authority to be specifically negatived.—Com. v. Crossley, 162 Mass. 515, 39 N. E. 278.

6 Com. v. Chadwick, 142 Mass. 595, 8 N. E. 589.

7 Com. v. Lafontaine, 69 Mass. (3 Gray) 479; Com. v. McSherry, 69 Mass. (3 Gray) 481, note.

8 MASS.—Com. v. Wilson, 65 Mass. (11 Cush.) 412; Com. v. Murphy, 68 Mass. (2 Gray) 510; Com. v. Clapp, 71 Mass. (5 Gray)

granted—e. g., sale in prohibited territory,[9] a sale on Sunday,[10] or a sale to minors,[11] and the like—authority need not be negatived.[12]

§ 789. —— SPECIAL AUTHORITY. Where the statute prohibits sales of intoxicating liquors without a special authorization therefor in writing or otherwise—e. g., prohibiting sale to minors, students, pupils, and the like, "without the consent or authority of the parent, guardian, master, or other person having the legal charge" of such purchaser, an indictment or information charging an offense against such law must specifically negative consent or authority on the part of all the persons enumerated in the statute as capable of giving such authority,[1] and also negative the giving of that authority in all the

97; Com. v. Conant, 72 Mass. (6 Gray) 482; Com. v. Keefe, 73 Mass. (7 Gray) 332; Com. v. Rowland, 78 Mass. (12 Gray) 132; Com. v. Boyle, 80 Mass. (14 Gray) 3; Com. v. Clarke, 80 Mass. (14 Gray) 367; Com. v. Dunn, 80 Mass. (14 Gray) 401; Com. v. Chisholm, 103 Mass. 213; Com. v. Lynn, 107 Mass. 214; Com. v. Grady, 108 Mass. 412; Com. v. Fredericks, 119 Mass. 199. MISS.—Norton v. State, 65 Miss. 297, 3 So. 665; West v. State, 70 Miss. 598, 12 So. 903. MO.—State v. Sutton, 25 Mo. 300. R. I.—State v. Johnson, 3 R. I. 94.

9 **Sale in prohibited territory:** South v. Com., 79 Ky. 493; State v. Hanley, 25 Minn. 429; Hargrave v. Com., (Va.) 22 S. E. 314, holding that an indictment charging a violation of the local-option law was not bad because it failed to allege that the sale was without a license, failed to state the magisterial district had voted against the sale of liquors therein, and did not state whether the sale was at wholesale or retail.

As to sale in prohibition territory, see, supra, § 779.

10 **Sale on Sunday:** Lehritter v. State, 42 Ind. 383; Hulsman v. State, 42 Ind. 500; Stein v. State, 50 Ind. 21; State v. Edlavitch, 77 Md. 144, 62 Atl. 406; Lambert v. State, 8 Mo. 492.

As to sale on prohibited days and hours, see, supra, § 770.

11 **Sale to minor:** Meyer v. State, 50 Ind. 18; Johnson v. State, 74 Ind. 197; State v. Hamilton, 75 Ind. 238.

As to sale to minor, see, also, supra, § 787.

12 Webster v. Com., 37 Ky. (7 Dana) 215; Com. v. Allen, 54 Ky. (15 B. Mon.) 1; Com. v. Harvey, 55 Ky. (16 B. Mon.) 1; People v. Curtis, 95 Mich. 212, 54 N. W. 767; State v. Gibson, 61 Mo. App. 368.

1 ALA.—Lindsey v. State, 19 Ala. 560; Agee v. State, 25 Ala. 67; Page v. State, 84 Ala. 446, 4 So. 697. ARK.—State v. Emerick, 35 Ark. 324. GA.—Newman v. State, 63 Ga. 533; Heyman v. State, 64 Ga. 437. KY.—Com. v. Kenner, 50

ways in which the consent or authority could be given under the statute.[2] In the case of a charge of a sale to a minor in violation of law, the indictment or information need not negative the existence of a justification for such sale, such justification, if it exists, being a matter of defense.[3]

§ 790. —— LICENSE—IN GENERAL. In the case of a charge of an unlawful sale of intoxicating liquors without

Ky. (11 B. Mon.) 1. S. C.—State v. Boice, Cheves 77.

"Master" and "legal" omitted from an indictment charging sale to minor in violation of such statute, held to render the indictment insufficient.—Weed v. State, 55 Ala. 13.

Mother's consent alone negatived, indictment or information is bad for the reason that "mother" is not synonymous with "parent." —Newman v. State, 63 Ga. 533; Heyman v. State, 64 Ga. 437. See, also, supra, § 787, footnote 8.

Compare: Reich v. State, 63 Ga. 616, in which the indictment was held good, it appearing from evidence that the father was dead, and that no guardian had been appointed.

Parent's consent negatived, but consent of guardian not negatived, is bad on demurrer.—State v. Emerick, 35 Ark. 324.

See, also, supra, § 787, footnote 9.

"Or order" being in the statute, but omitted from the indictment, held not to vitiate.—Mogler v. State, 47 Ark. 109, 14 S. W. 473.

"Who then and there did not have a written order," held to be insufficient because it did not deny distinctly enough that the sale was made "upon the written order, etc."—Franklin v. State, 12 Md. 236.

"Without the requisition of a physician for medical purposes" is not a sufficient negative under such statute.—Page v. State, 84 Ala. 446, 4 So. 697.

"Without the written order of the parent or guardian," held to sufficiently negative the existence of the order required under the statute.—Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522.

2 ALA.—Lindsey v. State, 19 Ala. 560; Agee v. State, 25 Ala. 67; Weed v. State, 55 Ala. 13; Page v. State, 84 Ala. 446, 4 So. 697; Freiberg v. State, 94 Ala. 91, 10 So. 703. ARK.—State v. Emerick, 35 Ark. 324; Mogler v. State, 47 Ark. 109, 14 S. W. 473. GA.—Newman v. State, 63 Ga. 533; Heyman v. State, 64 Ga. 437. KY.—Com. v. Kenner, 50 Ky. (11 B. Mon.) 1; Com. v. Handcraft, 69 Ky. (6 Bush) 91. MD.—Franklin v. State, 12 Md. 236; Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522. S. C.—State v. Boice, Cheves 77. TENN.—Taylor v. State, 26 Tenn. (7 Humph.) 510. TEX.—State v. Shwartz, 25 Tex. 764; Lantznester v. State, 19 Tex. App. 320.

3 Payne v. State, 74 Ind. 203.

a license,[1] or in those cases in which a license could not be granted authorizing the sale complained of—e. g., a sale to prohibited persons,[2] in prohibited territory,[3] or on Sunday[4]—the indictment or information need not negative a license on the part of the accused;[5] but in all those cases in which a license may authorize, on the part of the accused, the act complained of, the indictment or information must specifically negative the existence of such a license,[6] and in language broad enough to cover all sources from which such a license might be obtained.[7] The pleader

1 State v. Watson, 5 Blackf. (Ind.) 155; State v. Adams, 6 N. H. 532.

Compare: Fredericks v. Passaic (City of), 42 N. J. L. (13 Vr.) 87.

Accused agent of licensed owner, this is matter of defense to be shown on the trial.—State v. Devers, 38 Ark. 517.

Massachusetts Rev. Stats., ch. 47, § 3, requires license to be negatived.—Com. v. Thurlow, 41 Mass. (24 Pick.) 374.

2 Johnson v. State, 74 Ind. 197; State v. Cowgill, 75 Ind. 599.

As to sale to prohibited persons, see, supra, § 787

3 As to sale in prohibited territory, see, supra, § 773.

4 Vogel v. State, 31 Ind. 64; Lehritter v. State, 42 Ind. 482; Hulsman v. State, 42 Ind. 500; Ginz v. State, 44 Ind. 218.

As to sale on prohibited days and hours, see, supra, § 770.

5 ARK.—Glass v. State, 45 Ark. 173. COLO.—Logan v. People, 23 Colo. 414, 76 Pac. 1084. GA.—Mathis v. State, 93 Ga. 38, 18 S. E. 996. IOWA—State v. Collins, 11 Iowa 141. KAN.—State v. Tiessedre, 30 Kan. 476, 2 Pac. 650. KY.—Com. v. Allen, 54 Ky. (15 B. Mon.) 1; Com. v. Harvey, 55 Ky. (16 B. Mon.) 1. MASS.—Com. v. Shaw, 59 Mass. (5 Cush.) 522. N. Y.—Jefferson v. People, 101 N. Y. 19, 3 N. Y. Cr. Rep. 572, 3 N. E. 797.

6 ALA.—Koopman v. State, 61 Ala. 70. IND.—Howe v. State, 10 Ind. 423; State v. Carpenter, 20 Ind. 219. MASS.—Com. v. Thurlow, 41 Mass. (24 Pick.) 374; Com. v. Tuttle, 66 Mass. (12 Cush.) 502; Com. v. Byrnes, 126 Mass. 248; Com. v. Luddy, 143 Mass. 563, 10 N. E. 448. N. H.—State v. Adams, 6 N. H. 532; State v. Savage, 48 N. H. 484. N. J.—Fredericks v. Passaic (City of), 42 N. J. L. (13 Vr.) 87. N. C.—State v. Holder, 133 N. C. 709, 45 S. E. 862. TEX.—State v. Horan, 25 Tex. Supp. 271. VA.—Com. v. Hampton, 44 Va. (3 Gratt.) 590.

7 GA.—Hardison v. State, 95 Ga. 337, 22 S. E. 681. IND.—Meier v. State, 57 Ind. 386; O'Brien v. State, 63 Ind. 242; Henderson v. State, 60 Ind. 296. KAN.—State v. Pitzer, 23 Kan. 250. MISS.—Trost v. State, 64 Miss. 188. VT.—State v. Souvniers, 3 Vt. 156; State v. Munger, 15 Vt. 290.

See, also, infra, § 791.

may follow the language of the statute[8] in negativing the license, but it is not necessary to do so, words carrying the same meaning being sufficient.[9] Thus, it has been said to be sufficient negativing of license to allege that accused sold intoxicating, or spirituous, liquors without a license[10] and contrary to law,[11] and similar phrases negativing the existence of a license.[12] All superfluous alle-

[8] O'Connor v. State, 45 Ind. 347; Farrell v. State, 45 Ind. 371.

[9] State v. Buckner, 52 Ind. 278; Burke v. State, 53 Ind. 522; Howell v. State, 4 Ind. App. 148, 30 N. E. 714.

"Without having a license therefor according to law," held not to be equivalent to the statutory words "without paying such tax and obtaining such certificate as is prescribed by the fourteenth section" of the act, and for that reason the indictment was held insufficient.—Com. v. Young, 56 Va. (15 Gratt.) 664.

[10] ALA.—Bogan v. State, 84 Ala. 449, 4 So. 355. MO. — State v. Wishon, 15 Mo. 503; State v. Owen, 15 Mo. 506. N. H.—State v. Burns, 20 N. H. 550; State v. Blaisdell, 33 N. H. 388. R. I.—State v. Hines, 13 R. I. 10. VT.—State v. Munger, 15 Vt. 290; State v. Clark, 23 Vt. 293. VA.—In re Peer, 46 Va. (5 Gratt.) 674; Com. v. Young, 56 Va. (15 Gratt.) 664. WIS.—State v. Tall, 56 Wis. 577, 14 N. W. 596.

"And certificate" omitted after the word "license," which words appear in the statute, does not render the indictment defective.—In re Peer, 46 Va. (5 Gratt.) 674.

No license not specifically alleged but clearly implied, indictment held sufficient.—State v. Tall, 56 Wis. 577, 14 N. W. 596.

"Not being a licensed taverner or retailer," held sufficient negative of qualification in each capacity.—State v. Burns, 20 N. H. 550.

"Not having a license to sell said liquors, as aforesaid," relates to time of selling of liquors and not to time of filing of the indictment or information, and is a sufficient negative of a license at the time of sale.—State v. Munger, 15 Vt. 290.

"Without dram-shop, tavern, grocer's, merchant's, or any other kind of license," sufficient negative of license.—State v. Owen, 15 Mo. 506.

Timely objection to sufficiency of negative must be made, coming too late after judgment.—State v. Clark, 23 Vt. 293.

[11] Elam v. State, 25 Ala. 53; Powell v. State, 69 Ala. 10; Boon v. State, 69 Ala. 226; Sills v. State, 76 Ala. 92; McCreary v. State, 73 Ala. 480; Com. v. Young, 56 Va. (15 Gratt.) 664.

[12] GA.—Hardison v. State, 95 Ga. 337, 22 S. E. 681. IND.—State v. Buckner, 52 Ind. 278; Coverdale v. State, 60 Ind. 307; Howell v. State, 4 Ind. App. 148, 30 N. E. 714. KY.—Webster v. Com., 37 Ky. (7 Dana) 215. MASS.—Com. v. Tower, 49 Mass. (8 Metc.) 527; Com. v. Sloan, 58 Mass. (4 Cush.) 52. MINN.—State v. Nerborvig, 33 Minn. 480, 24 N. W. 321. MO.—State v. Hornbeak, 15 Mo. 478.

gations as to the sale of such intoxicating liquors may be rejected as surplusage.[13]

§ 791. ——— PARTICULAR LICENSES—PLACE, KINDS OF LIQUOR, AND QUANTITIES. In those cases in which a particular license may be granted for the sale of intoxicating liquors by two or more separate and distinct authorities or bodies—e. g., by license commissioners, by county commissioners, by county or circuit judge, or the like—the indictment or information must specifically negative a license in the accused from any of the authorities or bodies from whom it might be procured.[1] Where the li-

W. VA.—State v. Riffe, 10 W. Va. 794.

Compare: Com. v. Roberts, 55 Mass. (1 Cush.) 505, holding that an allegation that accused, sold to the complainant spirituous liquors in less quantities than twenty-eight gallons, without being first duly licensed as a retailer of wine and spirits, according to law, did not sufficiently allege that the accused was not duly licensed to make the sale complained of.

13 Com. v. Baker, 64 Mass. (10 Cush.) 405; People v. Gilkinson, 4 Park. Cr. Rep. 26.

1 IND.—Meier v. State, 57 Ind. 386; Henderson v. State, 60 Ind. 296; O'Brien v. State, 63 Ind. 242. KAN.—State v. Pittman, 10 Kan. 593; State v. Pitzer, 23 Kan. 250. N. J.—State v. Webster, 10 N. J. L. (5 Halst.) 293. TEX.—State v. Terry, 35 Tex. 366. VT.—State v. Sommers, 3 Vt. 156. WIS.—Neuman v. State, 76 Wis. 112, 45 N. W. 30.

"Had no license authorizing such sale or traffic," held sufficient under a statute prohibiting a sale until the accused had first obtained a "license or permit therefor," the word "permit" being used merely to indicate a pharmacist's license. —Neuman v. State, 76 Wis. 112, 45 N. W. 30.

Negativing license procured, alleging as to one of the methods only in which it might be procured, held to be insufficient.—State v. Webster, 10 N. J. L. (5 Halst.) 293.

"Without taking out and then having a license" as grocer, dramshop keeper, or tavern keeper from the tribunal transacting the county business of said county of" naming it, was held to be insufficient on a charge of selling intoxicating liquors in a town within the county, the words "from the tribunal transacting the county business of the county of" should have been omitted and inserted in their place "or from the counsel of said incorporated town or city" of said county.—State v. Pittman, 10 Kan. 593.

"Without taking out or then having a license for grocer, dramshop keeper or tavern keeper," held to be insufficient because it failed to cover all the forms of license which might have been procured.—State v. Pitzer, 23 Kan. 250.

cense gives authority to sell a specified kind of liquor, and accused is charged with the sale of another and a different kind of liquor, the indictment or information should allege the license granted to accused, state the kind of liquor permitted to be sold under such license, and further allege that the sale of the kind of liquor charged was not authorized by such license.[2] The law, or the license granted, prohibiting the selling at a particular place,[3] or in less than a specified quantity,[4] the indictment or information must allege such facts as bring the accused within the prohibition of the statute as to the place, or the quantity of liquor sold, and must be sufficiently broad to negative, not only the place or the quantity, but also the existence of a license authorizing the sale.[5]

§ 792. —— EXCEPTIONS IN STATUTE. The general rule of criminal pleading relating to the negativing of statutory exceptions applies to indictments and informations charging a violation of the liquor laws. If the exception occurs in the enacting clause,[1] or in the definition of the

2 Com. v. Thayer, 46 Mass. (5 Metc.) 246; Fleming v. New Brunswick (City of), 47 N. J. L. (18 Vr.) 231.

3 Burke v. State, 52 Ind. 461.

4 State v. Ashcraft, 11 Ind. App. 406, 39 N. E. 199.

5 State v. Haden, 15 Mo. 447; Sires v. State, 73 Wis. 251, 41 N. W. 81.

One quart of whisky charged as having been sold, with an allegation that accused suffered the same to be drunk on the place of sale without having a grocer's, dram-shop keeper's, or inn keeper's license, is not sufficiently broad for the reason that it fails to include a tavern-keeper's license.—State v. Haden, 15 Mo. 447.

1 ALA.—Davis v. State, 39 Ala. 521. ARK.—Thompson v. State, 37 Ark. 408; State v. Scarlett, 38 Ark. 563. FLA.—Baeumel v. State, 26 Fla. 71, 7 So. 371. GA.—Elkins v. State, 13 Ga. 435. IND.—Brutton v. State, 4 Ind. 601; Lemon v. State, 4 Ind. 603; Kinser v. State, 9 Ind. 543. KY.—Throckmorton v. Com., 18 Ky. L. Rep. 130, 35 S. W. 635. ME.—State v. Keen, 34 Me. 500; State v. Gurney, 37 Me. 149. MD.—Rawlins v. State, 2 Md. 201. MICH.—People v. Haas, 79 Mich. 449, 44 N. W. 928; People v. Decarie, 80 Mich. 578, 45 N. W. 491; People v. Wheeler, 96 Mich. 1, 55 N. W. 371. MO.—State v. Elam, 21 Mo. App. 290. N. H.—State v. Abbott, 31 N. H. 434; State v. McGlynn, 34 N. H. 422. N. J.—Roberson v. Lambertville (City of), 38

offense,[2] or is incorporated by reference,[3] it should be duly negatived in the pleading; but in those cases in which the exception is in a proviso,[4] in a subsequent clause,[5] in a subsequent section of the same statute,[6] or in another and subsequent statute,[7] it is merely a matter

N. J. L. (9 Vr.) 69. N. Y.—Jefferson v. People, 101 N. Y. 19, 3 N. Y. Cr. Rep. 572, 3 N. E. 797. N. C.—State v. Stamey, 71 N. C. 202. VA.—Com. v. Hill, 46 Va. (5 Gratt.) 682.

2 **Exception or proviso** descriptive of the offense and so incorporated as to be essential to a clear and accurate description of the offense, as distinguished from one affording matter of defense merely. — See: CONN. — State v. Miller, 24 Conn. 522. FLA.—Baeumel v. State, 26 Fla. 71, 7 So. 371. KY.—Thompson v. Com., 103 Ky. 685, 46 S. W. 492. ME.—State v. Keen, 34 Me. 500. NEB.—Holt v. State, 62 Neb. 134, 86 N. W. 1073. NEV.—State v. Ah Chew, 16 Nev. 50, 40 Am. Rep. 488. N. Y.—State v. O'Donnell, 1 Cow. Cr. Rep. 38. OHIO—Hale v. State, 58 Ohio St. 676, 51 N. E. 154. R. I.—State v. O'Donnell, 10 R. I. 472. VT.—State v. Abbey, 29 Vt. 600, 67 Am. Dec. 754; State v. Hodgdon, 41 Vt. 139; State v. Page, 78 Vt. 286, 6 Ann. Cas. 725, 62 Atl. 1017.

3 State v. O'Donnell, 10 R. I. 472; State v. Rush, 13 R. I. 198.

Compare: Com. v. Hill, 46 Va. (5 Gratt.) 682.

4 ALA.—Carson v. State, 69 Ala. 235. IOWA—State v. Stepp, 29 Iowa 551. MD.—Rawlins v. State, 2 Md. 201. MO.—State v. Ford, 47 Mo. App. 601; State v. Hale, 72 Mo. App. 78. N. H.—State v. Fuller, 33 N. H. 259. ORE.—State v. Tamler, 19 Ore. 528, 25 Pac. 71. VA.—Com. v. Hill, 46 Va. (5 Gratt.) 682.

5 FLA.—Baeumel v. State, 26 Fla. 71, 7 So. 371. GA.—Elkins v. State, 13 Ga. 435. ILL.—Metzker v. People, 14 Ill. 101. KAN.—State v. Thompson, 2 Kan. 427. ME.—State v. Gurney, 37 Me. 149. MICH.—People v. Taylor, 110 Mich. 491, 68 N. W. 303. N. H.—State v. Adams, 6 N. H. 532; State v. Abbott, 31 N. H. 434; State v. McGlynn, 34 N. H. 422. N. Y.—Jefferson v. People, 101 N. Y. 19, 3 N. Y. Cr. Rep. 572, 3 N. E. 797. FED.—Nelson v. United States, 30 Fed. 112; United States v. Nelson, 29 Fed. 202.

6 ARK.—Wilson v. State, 35 Ark. 414; Blackwell v. State, 36 Ark. 178. CONN.—State v. Miller, 24 Conn. 522; State v. Wadsworth, 30 Conn. 55. MASS.—Com. v. Tuttle, 66 Mass. (12 Cush.) 502. MICH.—People v. Robbins, 70 Mich. 130, 37 N. W. 924. MISS.—Surratt v. State, 45 Miss. 601. MO.—State v. Crowley, 37 Mo. 369. N. H.—State v. Shaw, 35 N. H. 217. N. Y.—Jefferson v. People, 101 N. Y. 19, 3 N. Y. Cr. Rep. 572, 3 N. E. 797. N. C.—State v. Downs, 116 N. C. 1064, 21 S. E. 689. OHIO—Becker v. State, 8 Ohio St. 392. R. I.—State v. Duggan, 15 R. I. 403, 6 Atl. 787. TEX.—Williams v. State, 37 Tex. Cr. Rep. 238, 39 S. W. 664.

7 ALA.—Bogan v. State, 84 Ala. 449, 4 So. 355. FLA.—Baeumel v. State, 26 Fla. 71, 7 So. 371. ILL.—Metzker v. People, 14 Ill. 101. MD.—Colson v. State, 7 Blackf. 590.

of defense and does not require to be negatived.[8] Where an exception or proviso withdraws a case from the opera-

IOWA—State v. Beneke, 9 Iowa 203; State v. Van Vliet, 92 Iowa 476, 61 N. W. 241. MASS.—Com. v. Shaw, 59 Mass. (5 Cush.) 522. MO.—State v. Moore, 107 Mo. 78, 16 S. W. 937; State v. Elam, 21 Mo. App. 290; State v. Barr, 30 Mo. App. 498. NEB.—Gee Wo v. State, 36 Neb. 241, 54 N. W. 513. N. J.—Mayer v. State, 64 N. J. L. 323, 45 Atl. 264. N. Y.—Jefferson v. People, 101 N. Y. 19, 3 N. Y. Cr. Rep. 572, 3 N. E. 797. VT.—State v. Freeman, 27 Vt. 523.

8 ALA.—Carson v. State, 69 Ala. 235; Bell v. State, 104 Ala. 79, 15 So. 557; State v. Simms, 135 Ala. 61, 33 So. 162. ARK.—Shover v. State, 10 Ark. 259; Matthews v. State, 24 Ark. 484; State v. Mullins, 67 Ark. 422, 55 S. W. 211. CONN.—State v. Wadsworth, 30 Conn. 55. FLA.—Baeumel v. State, 26 Fla. 71, 7 So. 371. GA.—Tigner v. State, 119 Ga. 114, 45 S. E. 1001. ILL.—Metzker v. People, 14 Ill. 101; Williams v. People, 20 Ill. App. 92. IND.—Brutton v. State, 4 Ind. 601; Kinser v. State, 9 Ind. 543; Alexander v. State, 48 Ind. 394; Russell v. State, 50 Ind. 174; Hewitt v. State, 121 Ind. 245, 23 N. E. 83. IOWA—Romp v. State, 3 G. Greene 276; State v. Beneke, 9 Iowa 203; State v. Williams, 20 Iowa 98; State v. Curley, 33 Iowa 359; State v. Van Vliet, 92 Iowa 476, 61 N. W. 241. KAN.—State v. Thompson, 2 Kan. 436; Kansas City v. Garnier, 57 Kan. 412, 46 Pac. 707. KY.—Com. v. McClanahan, 59 Ky. (2 Metc.) 8. LA.—State v. Lyons, 3 La. Ann. 154. ME.—State v. Lane, 33 Me. 536; State v. Keen, 34 Me. 500; State v. Gurney, 37 Me. 149; State v. Boyington, 56 Me. 512. MD.—Dode v. State, 7 Gill (Md.) 326; Rawlins v. State, 2 Md. 201; Barber v. State, 50 Md. 161; Kiefer v. State, 87 Md. 562, 40 Atl. 377; State v. Knowles, 90 Md. 646, 49 L. R. A. 695, 45 Atl. 877. MASS.—Com. v, Shaw, 59 Mass. (5 Cush.) 522; Com. v. Hart, 65 Mass. (11 Cush.) 135; Com. v. Fitchburg R. Co., 92 Mass. (10 Allen) 189; Com. v. Jennings, 121 Mass. 47, 23 Am. Rep. 249. MICH.—People v. Phippin, 70 Mich. 6, 37 N. W. 888. MO.—State v. Buford, 10 Mo. 703; State v. Shiflett, 20 Mo. 415, 64 Am. Dec. 190; State v. Batson, 31 Mo. 343; State v. Cox, 32 Mo. 566; State v. Jaques, 68 Mo. 260; State v. Elam, 21 Mo. App. 290. MONT.—Territory v. Burns, 6 Mont. 74, 9 Pac. 432. N. H.—State v. Adams, 6 N. H. 534; State v. Abbott, 31 N. H. 440; State v. McGlynn, 34 N. H. 422; State v. Shaw, 35 N. H. 217; State v. Cassady, 52 N. H. 500. N. J.—Mayer v. State, 63 N. J. L. 35, 42 Atl. 772; State v. Price, 71 N. J. L. 256, 58 Atl. 1015. N. Y.—Jefferson v. People, 101 N. Y. 19, 3 N. Y. Cr. Rep. 572, 3 N. E. 797. N. C.—State v. Heaton, 81 N. C. 542; State v. George, 93 N. C. 567; State v. Turner, 106 N. C. 691, 10 S. E. 1026; State v. Downs, 116 N. C. 1064, 21 S. E. 689; State v. Harris, 119 N. C. 811, 26 S. E. 148. OHIO—Stanglein v. State, 17 Ohio St. 543. OKLA.—Garver v. Territory, 5 Okla. 342, 49 Pac. 470. ORE.—State v. Tamler, 19 Ore. 530, 25 Pac. 71. S. C.—State v. Boughknight, 55 S. C. 353, 74 Am. St. Rep. 751, 33 S. E. 451. TENN.—

tion of the enacting clause of the statute, and which case would, but for such exception or proviso, be within the statute, it need not be negatived;[9] and likewise where the exception or proviso is not so incorporated with the enacting clause, or with the clause defining or describing the offense, as to be an essential part thereof, and the offense can be fully and clearly set forth without such exception or proviso, then, and in that case, the exception or proviso need not be negatived.[10] And where a prohibitory law

Matthews v. State, 10 Tenn. (2 Yerg.) 233; State v. Stanley, 71 Tenn. (3 Lea) 565; Villines v. State, 96 Tenn. 144, 33 S. W. 922. TEX.—Fahey v. State, 27 Tex. App. 162, 11 S. W. 108; Williams v. State, 37 Tex. Cr. Rep. 238, 39 S. W. 664. UTAH—People v. Fairbanks, 7 Utah 5, 24 Pac. 538; People v. Parman, 7 Utah 7, 24 Pac. 539. VT.—State v. Freeman, 27 Vt. 523. VA.—Com. v. Hill, 46 Va. (5 Gratt.) 682. W. VA.—State v. Dry Fork R. Co., 50 W. Va. 237, 40 S. E. 447. WIS.—Byrne v. State, 12 Wis. 525.

9 IOWA—State v. Stapp, 29 Iowa 551. MD.—State v. Knowles, 90 Md. 646, 49 L. R. A. 695, 45 Atl. 877. MASS.—Com. v. Hart, 65 Mass. (11 Cush.) 130. MICH.—People v. Richmond, 59 Mich. 570, 26 N. W. 770. MO.—State v. O'Gorman, 68 Mo. 189; State v. Doepke, 68 Mo. 208, 30 Am. Rep. 785; State v. O'Brien, 74 Mo. 549. N. J.—State v. Price, 71 N. J. L. 255, 58 Atl. 1015. N. Y.—People v. Walbridge, 6 Cow. 512. N. C.—State v. Norman, 13 N. C. (2 Dev. L.) 222. OHIO—Hale v. State, 58 Ohio St. 676, 51 N. E. 154. PA.—Com. v. Wickert, 6 Pa. Dist. Rep. 287, 19 Pa. Co. Ct. Rep. 254. TENN.—Worley v. State, 30 Tenn. (11 Humph.) 172. TEX.—Logan v. State, 5 Tex. App. 306. UTAH—People v. Fairbanks, 7 Utah 3, 24 Pac. 538. VT.—State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754. VA.—Com. v. Hill, 46 Va. (5 Gratt.) 682; Hendricks v. Com., 75 Va. 943.

10 ALA.—Clark v. State, 19 Ala. 552; Grattan v. State, 71 Ala. 344; Bellinger v. State, 92 Ala. 86, 9 So. 399. ARK.—Perry v. State, 37 Ark. 54; Dean v. State, 37 Ark. 59. CAL.—People v. Nugent, 4 Cal. 341; Ex parte Hornef, 154 Cal. 361, 97 Pac. 893. COLO.—People v. People, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025. GA.—Kitchens v. State, 116 Ga. 489, 43 S. E. 256. ILL.—Laquat v. People, 11 Ill. 330; Beasley v. People, 89 Ill. 571. IND.—Mergentheim v. State, 107 Ind. 567, 8 N. E. 568. IOWA—State v. Curley, 33 Iowa 359; State v. Williams, 70 Iowa 52, 29 N. W. 801. KAN.—Kansas City v. Garuier, 57 Kan. 412, 46 Pac. 707. KY.—Com. v. McClanahan, 59 Ky. (2 Metc.) 8. MONT.—Territory v. Burns, 6 Mont. 75, 9 Pac. 542. NEB.—O'Connor v. State, 46 Neb. 157, 65 N. W. 157, overruling Gee Who v. State, 36 Neb. 241, 54 N. W. 513; Sofield v. State, 61 Neb. 600, 85 N. W. 840. NEV.—State v. Robey, 8 Nev. 312, 321; State v. Ah Chew, 16 Nev. 50, 40 Am. Rep. 488; State v. Buckaroo Jack, 30

does not relieve any specified acts or persons from the general operation of the prohibitory restriction, and such acts or persons do not enter into the description of the offense, or as a qualification of the language defining or creating the offense, a negativing averment as to matter of exception is unnecessary because such exception, where it exists, is a mere matter of defense which the prosecution is not required to anticipate.[11]

Form of averment negativing exception may usually be in the language of the statute,[12] or in other words equally broad and specific, which meet all the requirements with equal certainty.[13]

§ 793. —— Legal purpose. Where a statute prohibiting the sale of intoxicating liquors contains a proviso and exception making lawful sales for mechanical, medicinal, pharmaceutical, sacramental or scientific purposes, and the like, it is generally held not necessary for an indictment or information charging an unlawful

Nev. 334, 69 Pac. 498. N. J.—State v. Price, 71 N. J. L. 255, 58 Atl. 1015. N. C.—State v. Emery, 98 N. C. 768, 3 S. E. 810. OHIO—Becker v. State, 8 Ohio St. 391; Stanglein v. State, 17 Ohio St. 453; Billingheimer v. State, 32 Ohio St. 435; Geiger v. State, 3 Ohio Cir. Dec. 141, 5 Ohio Cir. Ct. 283; Kowenstrot v. State, 6 Ohio Dec. 467, 4 Ohio N. P. 257. ORE.—State v. Tamler, 19 Ore. 530, 25 Pac. 71. R. I.—State v. Gallagher, 20 R. I. 266, 38 Atl. 655. TENN.—Villines v. State, 96 Tenn. 145, 33 S. W. 922. TEX.—State v. Clayton, 43 Tex. 410; Blasdell v. State, 5 Tex. App. 263; Mosely v. State, 18 Tex. App. 311; Williams v. State, 37 Tex. Cr. Rep. 238, 39 S. W. 664. UTAH—State v. Williamson, 22 Utah 248, 83 Am. St. Rep. 780, 62 Pac. 1022. VT.—State v. Hodgdon, 41 Vt. 139; State v. Norton, 45 Vt. 261; State v. Ambler, 56 Vt. 672; State v. Smith, 61 Vt. 346, 17 Atl. 492; State v. McCaffrey, 69 Vt. 85, 37 Atl. 234. W. VA.—State v. Dry Fork R. Co., 50 W. Va. 237, 40 S. E. 447.

11 Sturgeon v. State, 17 Ariz. 513, L. R. A. 1917B, 1230, 154 Pac. 150. See, CAL.—In re Lieritz, 166 Cal. 298, 135 Pac. 1129; People v. Dial, 28 Cal. App. 704, 153 Pac. 970. FLA.—Ferrell v State, 45 Fla. 26, 34 So. 220. MASS.—Com. v. Davis, 121 Mass. 352; Com. v. Shannihan, 145 Mass. 99, 13 N. E. 347. MONT.—Territory v. Burns, 6 Mont. 72, 9 Pac. 432. R. I.—State v. Gallagher, 20 R. I. 266, 38 Atl. 655.

12 See supra, § 758.

13 State v. Keen, 34 Me. 500; State v. McBride, 64 Mo. 364.

sale to negative a sale for any of such lawful purposes, as that fact, where it is a fact, may be shown by way of defense;[1] although there are authorities to the contrary.[2] That is to say, the general rule is that the indictment or information need not negative that the liquor charged to have been unlawfully sold was sold under circumstances made legal by the provisions of the statute,[3] and the same rule prevails as to giving away intoxicating liquors as to a sale under such a statute;[4] although it has been held that a charge of selling liquors within the prohibited distance of a college, or other institution of learning, a church, or other prohibited place, must negative an exception in the statute by averring that the sale was not made for medicinal purposes by a physician.[5]

§ 794. —— HOME-MADE LIQUORS, ETC. In those cases in which the statute prohibiting the sale of malt and spirituous liquors, makes an exception as to home-made, manufactured or distilled liquors—e. g., cider, wine, and the like—an indictment or information charging an unlawful sale need not negative the exception,[1] because the fact

1 KY.—Howard v. Com., 17 Ky. L. Rep. 1195, 33 S. W. 1115; Throckmorton v. Com., 18 Ky. L. Rep. 130, 35 S. W. 635. MASS.—Com. v. Burding, 66 Mass. (12 Cush.) 506. MO.—State v. Buford, 10 Mo. 703. N. J.—State v. Townley, 18 N. J. L. (3 Har.) 311. R. I. —State v. Duggan, 15 R. I. 403, 6 Atl. 787. FED.—Nelson v. United States, 30 Fed. 112.

2 Brutton v. State, 4 Ind. 601; Lemon v. State, 4 Ind. 603; Preston v. State, 7 Ind. 560; Kinser v. State, 9 Ind. 543; Roberson v. Lambertville (City of), 38 N. J. L. (9 Vr.) 69; Hirn v. State, 1 Ohio St. 15.

"Except such as shall be compounded and intended to be used as a medicine" must be negatived in New Jersey. — Roberson v. Lambertville (City of), 38 N. J. L. (9 Vr.) 69.

Exception of sale for medicine or pharmaceutical purposes must be negatived in Ohio.—Hirn v. State, 1 Ohio St. 15.

3 State v. Buford, 10 Mo. 703.

4 State v. Freeman, 27 Vt. 523.

5 As to physicians, see infra, § 796.

1 ARK.—State v. Mullins, 67 Ark. 422, 55 S. W. 211. GA.—Hancock v. State, 114 Ga. 439, 40 S. E. 317; Wells v. State, 118 Ga. 556, 45 S. E. 443; Kemp v. State, 120 Ga. 157, 47 S. E. 548. OHIO—Becker v. State, 8 Ohio St. 391. MASS.—Com. v. Martin, 108 Mass. 29, note; Com. v. Shea, 115 Mass. 102; Com. v. Petranich, 183 Mass.

that the liquors are of the class excepted from the operation of the statute is merely a matter of defense which the prosecution is not required to anticipate, within the rule above laid down.[2]

§ 795. —— ORIGINAL PACKAGES. The various questions relating to original packages in general, and original packages of intoxicating liquors in particular, raise some delicate and difficult problems involving a discussion of the intricate matters of the law of interstate commerce, as regulated by the commerce-clause of the federal constitution—all of which is beyond the scope of the present treatise—such as the right of a municipality to require a license to engage in the handling of original packages of intoxicating liquors,[1] and the like, although it seems that such packages may be sold without further restrictions or burdens imposed by the state where received.[2] State liquor and prohibition laws must be so framed

217, 66 N. E. 807. N. H.—State v. McGlynn, 34 N. H. 422; State v. Shaw, 35 N. H. 217.

In Missouri, Act April 17, 1901, § 4, not applying to liquors manufactured for export, or to those manufactured before the enactment of the statute, an information charging accused, as a dram-shop keeper, with unlawfully and knowingly receiving into his dram-shop, one barrel containing distilled liquor, commonly known as "whiskey," without having affixed thereto the license-tax stamps, was held to be insufficient because it did not show that the liquor was within the terms of the act.—State v. Bengsch, 170 Mo. 81, 70 S. W. 717.

Tex. Rev. Stats., art. 5060A, prohibiting persons from selling liquor in local-option districts on physician's prescription without a license therefor, an indictment or information charging selling liquor on a physician's prescription is insufficient which does not allege that the sale was made in a local-option district without accused first obtaining a license "for the purpose of selling liquors on prescription." — Williamson v. State, 41 Tex. Cr. Rep. 461, 55 S. W. 568.

2 See supra, § 792, footnotes 8 and 9.

1 **License may be imposed without violating the commerce-clause** of the federal constitution. See, among other cases, Mobile (City of) v. Phillips, 146 Ala. 158, 40 So. 826; affirmed, 208 U. S. 472, 52 L. Ed. 578, 28 Sup. Ct. Rep. 370.

See, also, note 52 L. Ed. 578.

2 People v. Schmidt, 218 N. Y. 256, 112 N. E. 755, affirming 171 App. Div. 954, 155 N. Y. Supp. 1132; In re Ware, 53 Fed. 783.

See, Rhodes v. State of Iowa, 170 U. S. 412, 18 Sup. Ct. Rep. 950, 42 L. Ed. 1088, and note.

and phrased as not to conflict with the commerce-clause[3] of the federal constitution,[4] and this is usually done by exempting from liquor and prohibition laws such liquors as are shipped from without the state, while in "original packages."[5] An indictment or information charging a violation of the liquor or prohibition laws is not required to negative the "original package" exemption-clause of such a statute;[6] but if the pleader undertakes to negative such clause, it is sufficiently done by alleging that the liquors charged to have been unlawfully sold were not imported from any other state or from any foreign country.[7]

§ 796. —— PRESCRIPTIONS, PHYSICIANS AND DRUGGISTS. In those cases in which a sale of intoxicating liquors would be lawful, under the statute, where made upon the prescription of a practicing physician, an indictment or information charging an unlawful sale must negative a physician's prescription.[1] Where by the statute physi-

3 See State v. Fuller, 33 N. H. 259; State v. Blaisdell, 33 N. H. 388.

4 Art. I, § 8, clause 3; 10 Fed. Stats. Ann., 1st ed., pp. 189, 373-578.

5 **Original packages** as affecting question as to what amounts to retail as distinguished from wholesale of liquor, see notes 32 **L. R. A.** (N. S.) 625; **L. R. A.** 1915B, 389.

See, also, **Ann. Cas.** 1912C, 678; 1913C, 638.

6 ME.—State v. Gurney, 37 Me. 149. MASS.—Com. v. Hart, 65 Mass. (11 Cush.) 130; Com. v. Edwards, 66 Mass. (12 Cush.) 187; Com. v. Purtle, 77 Mass. (11 Gray) 78; Com. v. Walters, 77 Mass. (11 Gray) 81; Com. v. Gagne, 153 Mass. 205, 10 **L. R. A.** 442, 26 N. E. 449; Com. v. Gay, 153 Mass. 211, 26 N. E. 571, 582. N. H.—State v. Fuller, 33 N. H. 259; State v. Blaisdell, 33 N. H. 388; State v. McGlynn, 34 N. H. 422; State v. Shaw, 35 N. H. 217.

7 State v. Brown, 31 Me. 520.

1 ALA.—Dean v. State, 100 Ala. 102, 14 So. 762. ARK.—Thompson v. State, 37 Ark. 408. IND.—Shepler v. State, 114 Ind. 194, 16 N. E. 521. KY.—Throckmorton v. Com., 18 Ky. L. Rep. 130, 35 S. W. 635. MO.—State v. Harris, 47 Mo. App. 558; State v. Bradford, 79 Mo. App. 346. N. C.—State v. Stamey, 71 N. C. 202. TEX.—Fleeks v. State, 47 Tex. Cr. Rep. 327, 83 S. W. 381.

"Licensed physician" in charge of sale to a minor without written prescription, is good, although the statute uses the word "physician."—Dean v. State, 100 Ala. 102, 14 So. 762.

Sale during election charged, in-

cians are permitted to prescribe and sell liquors, for medical purposes, without a license therefor, an indictment or information charging an unlawful sale made by a physician, need not negative accused was a physician;[2] and where such a statute prohibits a physician from prescribing liquors for one unless he is "actually sick," an indictment or information must negative the fact that the person receiving the prescription was at the time sick.[3]

Apothecaries and druggists being permitted, under certain restrictions and conditions, to sell liquors for specified purposes, an indictment or information charging an unlawful sale of liquors need not negative accused being an apothecary[4] or a druggist,[5] although there are authorities to the contrary;[6] and a druggist being prosecuted for an unlawful sale of liquors without a prescription, the indictment or information must negative the fact of a prescription on the part of the person to whom the sale was made;[7] and in some jurisdictions it must be averred that the liquor was not compounded and intended to be sold as medicine;[8] and on a charge of unlawful sale to be drunk on premises where sold, the indictment or informa-

dictment or information must negative the fact that it was upon "the prescription of a practicing physician and for medical purposes," which sale is permitted by the statute.—State v. Stamey, 71 N. C. 202.

2 Surratt v. State, 45 Miss. 601.

3 Frank v. Com., 13 Ky. L. Rep. 833, 15 S. W. 877.

4 State v. Mercer, 58 Iowa 182, 12 N. W. 269; Surratt v. State, 45 Miss. 601.

5 Baeumel v. State, 26 Fla. 71, 7 So. 371; People v. Robbins, 70 Mich. 130, 37 N. W. 924; People v. Gault, 104 Mich. 575, 62 N. W. 724; Surratt v. State, 45 Miss. 601; State v. Jaques, 68 Mo. 260; State v. Moore, 170 Mo. 78, 16 S. W. 937.

6 People v. Telford, 56 Mich. 541, 23 N. W. 213; People v. Haas, 79 Mich. 449, 44 N. W. 928; People v. Decarie, 80 Mich. 578, 45 N. W. 491; State v. McBride, 64 Mo. 364; State v. McAdoo, 80 Mo. 216.

"Therefor" in the statutory phrase "prescription therefor," being omitted in indictment or information does not affect validity. —Shepler v. State, 114 Ind. 194, 16 N. E. 521.

7 Com. v. Porter, 31 Leg. Int. (Pa.) 398.

8 State v. Townley, 18 N. J. L. (3 Har.) 311.

tion need not negative the fact that accused had a license as a saloon keeper.[9]

§ 797. UNNECESSARY AVERMENTS—MISCELLANEOUS. We have already seen[1] that an indictment or information charging the sale of intoxicating liquors need not set out the name of the agent or employee by whom the sale was made, and an indictment or information charging accused with being interested in the sale of intoxicating liquors to a minor need not give the name of the agent making such sale.[2] Under a statute making it unlawful for a liquor dealer to permit lewd women on his premises, the indictment or information need not give the names of the women.[3] While it is true that an indictment or information charging selling intoxicating liquors contrary to law must allege in what respect the sale was contrary to law,[4] under the general rule that an indictment under a statute must state all the circumstances which constitute the definition of the offense in the statute so as to bring the accused precisely within it;[5] yet, on a charge of selling without a license,[6] the indictment or information need not aver facts showing that it was possible for the accused to procure a license,[7] or that the business could lawfully be engaged in in the county by persons having a license,[8] the general rule being that impossibility of securing a license is no defense,[9] whether

9 People v. Curtis, 95 Mich. 212, 54 N. W. 767.

1 See, supra, § 782, footnote 7.

2 O'Bryan v. State, 48 Ark. 42.

3 Ferguson v. State, 72 Tex. Cr. Rep. 494, 163 S. W. 65.

4 State v. Dolan, 58 W. Va. 263, 6 Ann. Cas. 450, 52 S. E. 181, following State v. Campbell, 53 W. Va. 591, 45 S. E. 924.

See Cohen v. King Knob Club, 55 W. Va. 108, 46 S. E. 799.

5 State v. Dolan, 58 W. Va. 263, 6 Ann. Cas. 450, 52 S. E. 181. See Com. v. Hampton, 44 Va. (3 Gratt.) 562; Com. v. Young, 56 Va. (15 Gratt.) 664; Glass v. Com. 74 Va. (33 Gratt.) 827; State v. Whittier, 18 W. Va. 36.

6 As to negativing license, see, supra, §§ 490, 491.

7 State v. Ely, 22 S. D. 487, 18 Ann. Cas. 92, 118 N. W. 687.

8 State v. Ely, 22 S. D. 487, 18 Ann. Cas. 92, 118 N. W. 687.

9 Reese v. Atlanta (City of), 63 Ga. 344.

that inability results from an absolute prohibition;[10] because of lack of legislative provision for a license during the period in which the sale complained of was made;[11] because there was no law allowing a license in the place where the sale was made;[12] because there was no officer or tribunal authorized to grant a license;[13] because the officer empowered to grant the license was too ill to attend to the business of his office,[14] and the like. In a prosecution for the unlawful sale of liquor, it is unnecessary to allege whether the sale was at wholesale or retail,[15] where the punishment is the same for a sale by either method; nor need it be alleged that the liquor was sold to be drunk on the premises,[16] in some states. The unlawful sale of wine within non-license territory being charged, the indictment or information need not aver that the wine sold contained one per cent or more, by volume, of alcohol,[17] under some statutes; but where the charge is the unlawful possession of an imitation and substitute of a malt liquor, the indictment or information must allege that the substitute contained as much as one-half of

10 State v. Tucker, 45 Ark. 55; State v. Kantler, 33 Minn. 69, 21 N. W. 856.

11 Erb v. State, 35 Ark. 638.

12 Welsh v. State, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883.

13 State v. McNeary, 88 Mo. 143; State v. Scampini, 77 Vt. 92, 59 Atl. 201.

14 ARK.—Erb v. State, 35 Ark. 638; Siloam Springs v. Thompson, 41 Ark. 456; State v. Tucker, 45 Ark. 55. IND.—Welsh v. State, 126 Ind. 71, 9 L. R. A. 664, 25 N. E. 883. KY.—Reynolds v. Com., 106 Ky. 37, 49 S. W. 969; Rosenham v. Com., 8 Ky. L. Rep. 519, 2 S. W. 230. LA.—State v. Kuhn, 24 La. Ann. 474; State v. Brown, 41 La. Ann. 771, 6 So. 638. MASS.—Com. v. Hoyer, 125 Mass. 20. MINN.—State v. Funk, 27 Minn. 318, 7 N. W. 359; State v. Langdon, 31 Minn. 316, 17 N. W. 859; State v. Kantler, 33 Minn. 69, 21 N. W. 856. MO.—State v. Jamison, 23 Mo. 330; State v. McNeary, 88 Mo. 143. NEB.—Hunzinger v. State, 39 Neb. 653, 58 N. W. 194. VT.—State v. Darling, 77 Vt. 67, 58 Atl. 974; State v. Scampini, 77 Vt. 92, 59 Atl. 201.

15 Vines v. State, 19 Wyo. 255, 116 Pac. 1013.

As to allegation of mode of sale, see, however, supra, § 780, **foot-notes 3 and 4.**

16 Vines v. State, 19 Wyo. 255, 116 Pac. 1013.

17 People v. Mueller, 168 Cal. 526, 143 Pac. 753.

one per cent of alcohol,[18] under some statutes. An indictment or information charging the keeping and exposing of intoxicating liquors for sale need not show how the liquor was kept or exposed for sale, where the offense is charged in the language of the statute;[19] nor need the kinds of liquors kept or exposed be specified.[20] An indictment or information charging the unlawful conveyance of whisky from one place to another within the state, need not allege that the conveyance was for an unlawful purpose;[21] and on a charge of the offense of unlawfully transporting liquor into prohibition territory it need not be alleged whether the transportation was intrastate or interstate.[22]

§ 798. Joinder—Of defendants, judgment. Under the general rule of criminal pleading, all persons interested in the unlawful keeping for sale or selling of intoxicating liquors, or in a violation of the liquor laws in any of the phases, may be joined as defendants in the same indictment; but where two or more jointly presented or indicted are convicted, the judgment and sentence against them must be separate as to any fine imposed or other punishment inflicted,[1] although it must be joint as to the costs in the case.[2] The reason for the several judgment is the fact that there can be no partnership in such offenses, and there can be no division of the punishment that follows a conviction of these offenses; all are principals; every one is answerable for his own offense; payment of a fine by one of several such offenders can

18 Ex parte Hunnicutt, 7 Okla. Cr. 213, 123 Pac. 179; Wortman v. State, 9 Okla. Cr. 440, 132 Pac. 358.

19 State v. Paige, 78 Vt. 286, 6 Ann. Cas. 725, 62 Atl. 1017.

20 Id.; State v. Reynolds, 47 Vt. 297.

21 Maynes v. State, 6 Okla. Cr. 487, 119 Pac. 644.

22 Longmire v. State, (Tex.) 172 S. W. 252.

1 State v. White, 125 Tenn. 143, Ann. Cas. 1913C, 74, 140 S. W. 1059.

2 McLeod v. State, 35 Ala. 395; Coleman v. State, 55 Ala. 173; Calico v. State, 4 Ark. 430; Straughan v. State, 16 Ark. 37; Johnson v. State, 26 N. J. L. (2 Dutch.) 313, affirmed 29 N. J. L. (5 Dutch.) 453.

not relieve others equally guilty, any more than imprisonment of one will satisfy the law as to the others.[3]

§ 799. —— OF COUNTS. We have already treated sufficiently the joinder of separate offenses in one count as relating to duplicity, and as affecting the sufficiency of the indictment or information;[1] it remains to set out here general principles, only, relating to the joinder of offenses in one count or in separate counts. We have already seen[2] that where the statute enumerates a series of acts as representing stages in the commission of the offense, and each act or stage may alone constitute the offense, the commission of all of the acts or stages thus enumerated may be charged against the accused in one count, as constituting but a single offense;[3] but where two separate offenses under the statutes are charged in one count—e. g., the offense of selling intoxicating liquors, and the offense of maintaining a nuisance, and the like—the court, on motion, will compel the prosecution to separate the charges.[4] The general rule permitting offenses of the same general character and belonging to the same family of offenses, requiring the same manner of trial, and punishable with similar penalties, to be joined in one indictment, in separate counts, when all are committed by the same individual in the same jurisdiction,[5] applies to indictments and informations charging violations of the liquor and prohibition laws,

3 State v. White, 125 Tenn. 143, Ann. Cas. 1913C, 74, 140 S. W. 1059.

1 See, supra, § 762.

2 See, supra, § 762, footnote 5.

3 State v. Schweiter, 27 Kan. 499; State v. Smith, 61 Me. 386; State v. Woodward, 25 Vt. 616; State v. Brown, 36 Vt. 560.

4 State v. Lund, 49 Kan. 209, 30 Pac. 518.

5 South v. Com., 79 Ky. 493. ME.—Lord v. State, 37 Me. 177. MISS.—See Jones v. State, 67 Miss. 111, 7 So. 220. NEB.—Martin v. State, 30 Neb. 507, 46 N. W. 621. N. Y.—People v. Polhamus, 8 App. Div. 133, 11 N. Y. Cr. Rep. 372, 40 N. Y. Supp. 491. PA.—Com. v. Liebtreu, 1 Pears. 107. TENN.—Tillery v. State, 78 Tenn. (10 Lea) 35. VA.—Peer's Case, 46 Va. (5 Gratt.) 674; Lewis v. Com. 90 Va. 843, 20 S. E. 777; Mitchell v. Com., 93 Va. 775, 20 S. E. 892.

in any of the various phases.[6] Thus, distinct violations of a local-option law may be joined in separate counts;[7] so also may a count charging keeping a saloon without a license be joined with a count charging retailing liquor without a license;[8] a count charging unlawful sale may be joined with a count charging keeping a place where intoxicating liquors are unlawfully sold,[9] and the like. Where the statute provides a greater punishment upon a conviction for a subsequent violation thereof, an indictment or information may charge two violations of the statute, in different counts, committed on the same date, and the accused having been convicted on both counts, may be sentenced as for a first offense.[10]

§ 800. —— ELECTION, COUNTS AND OFFENSES. An indictment or information charging a violation of the liquor or prohibition laws, in any of the phases, joining in one

6 DAK.—Bruguier v. United States, 1 Dak. 5. GA.—Williams v. State, 107 Ga. 693, 33 S. E. 641. ILL.—Gitchell v. People, 146 Ill. 175, 37 Am. St. Rep. 147, 33 N. E. 757; Pope v. People, 26 Ill. App. 44. IOWA—Walters v. State, 5 Iowa 507; State v. Howorth, 70 Iowa 157, 30 N. W. 389; State v. Ruferty, 70 Iowa 160, 30 N. W. 391; State v. Schuler, 109 Iowa 111, 80 N. W. 213. KAN.—State v. McLaughlin, 47 Kan. 143, 27 Pac. 840. KY.—South v. Com., 79 Ky. 493. MD.—State v. Blakeney, 96 Md. 711, 54 Atl. 614 MASS.—Com. v. Moorhouse, 67 Mass. (1 Gray) 470; Com. v. Clark, 80 Mass. (14 Gray) 367; Com. v. Gillon, 84 Mass. (2 Allen) 505; Com. v. Mead, 92 Mass. (10 Allen) 396; Com. v. Bearce, 150 Mass. 389, 23 N. E. 99; Com. v. Jacobs, 152 Mass. 276, 25 N. E. 463. MO.—State v. Klein, 78 Mo. 627. NEB.—Hans v. State, 50 Neb. 150, 69 N. W. 838. N. Y.—People v. Charbineau, 115 N. Y. 433, 22 N. E. 271. S. C.—State v. Atkinson, 33 S. C. 100, 11 S. E. 693. TEX.—Elsner v. State, 30 Tex. 524; Witherspoon v. State, 30 Tex. Cr. Rep. 65, 44 S. W. 164, 1096.

7 South v. Com., 79 Ky. 493.

8 State v. Moelling, 129 La. 204, 55 So. 764.

9 Rash v. State, 13 Ala. App. 262, 69 So. 239.

Defendant may be charged in one count with keeping a grog or tippling shop without previously having obtained a license and in a separate count with having retailed intoxicating liquors without having previously obtained a license; and a conviction on either count would be good. — State v. Daspit, 129 La. 752, 56 So. 661.

10 Scavarda v. People, 57 Colo. 541, 143 Pac. 575 (the imprisonment for each conviction ran concurrently).

count all the various steps or means by which the offense denounced may be committed, the prosecution can not be required to elect upon which step or means it will rely for conviction; where two or more offenses denounced by such a statute are joined in the same indictment, in distinct counts, the prosecution can not be compelled to elect upon which count it will proceed,[1] although the trial court may, in its discretion, require the prosecution to elect.[2] Thus, it has been held in Alabama that where an indictment contained two counts, one charging the accused with selling intoxicating liquors without a license, and the other charging a sale without a license at a different time, the prosecution can not be compelled to elect on which count it will rely for a conviction.[3] But it has been held in Iowa that where there are several counts charging an unlawful sale of intoxicating liquors in the same language, the prosecution should be required to elect upon which count it will rely for conviction;[4] and in Michigan it has been said that where one count charges the keeping of a saloon where liquors were stored for sale, sold and furnished, and another count charges a sale to a particular person named, the trial court erred in refusing to order the prosecution to elect upon which count it would proceed.[5] In a prosecution for a persistent violation of the liquor laws, the indictment or information may allege, in a single count, or in several counts, as many subsequent violations as there may have been offenses, and the prosecutor will not be required to elect; on the trial, the proof of one count, or one instance of

1 Mitchell v. Com., 93 Va. 775, 20 S. E. 892.

2 MINN.—State v. Mueller, 38 Minn. 497, 38 N. W. 691. N. Y.—Osgood v. People, 39 N. Y. 449, 1 Cow. Cr. Rep. 151. N. C.—State v. Farmer, 104 N. C. 887, 10 S. E. 563. VT.—State v. Smith, 22 Vt. 74.

3 Taylor v. State, 100 Ala. 68, 14 So. 634.

4 State v. Van Haltschuherr, 72 Iowa 541, 34 N. W. 323.

5 Tiedke v. Saginaw (City of), 43 Mich. 64, 4 N. W. 627; People v. Keefer, 97 Mich. 15, 56 N. W. 105.

unlawful sale, will be sufficient to warrant a verdict of guilty.[6]

Separate and distinct offenses shown by the evidence, all of the nature of the one charged against the accused, and all committed within the time covered by the indictment or information, the prosecution, on motion of the accused, will be required to elect upon which violation it will rely for a conviction,[7] and the refusal of the court to require an election, when thus duly applied for by the accused, is reversible error.[8]

Making election, the prosecution must point out with reasonable certainty the particular offense or offenses upon which it will rely for a conviction,[9] and where the

6 State v. Shiffler, 93 Kan. 618, 144 Pac. 845.

7 IND.—Long v. State, 13 Ind. 566; Long v. State, 56 Ind. 182, 26 Am. Rep. 19; Lebkovitz v. State, 113 Ind. 26, 14 N. E. 363, 597. KAN.—State v. Schweiter, 27 Kan. 499; State v. Lund, 49 Kan. 209, 30 Pac. 518; State v. Lund, 49 Kan. 663, 31 Pac. 309. KY.—Kehoe v. Com. 26 Ky. L. Rep. 35, 88 S. W. 1107. MASS.—Com. v. O'Hanlon, 155 Mass. 198, 29 N. E. 518; Com. v. Coyne, 207 Mass. 21, 20 Ann. Cas. 1069, 92 N. E. 1028. MISS.—Kittrell v. State, 89 Miss. 666, 42 So. 609. MO.—State v. Heinze, 45 Mo. App. 403. N. D. — State v. Poull, 14 N. D. 557, 105 N. W. 717. OHIO—Stockwell v. State, 27 Ohio St. 563. S. D.—State v. Boughner, 5 S. D. 461, 59 N. W. 736; rehearing denied, 7 S. D. 103, 63 N. W. 542; State v. Valentine, 7 S. D. 98, 63 N. W. 541. TENN.—Murphy v. State, 77 Tenn. (9 Lea) 373. TEX.—Tweatt v. State, 49 Tex. Cr. Rep. 617, 95 S. W. 517; Gelber v. State, 56 Tex. Cr. Rep. 460, 120 S. W. 863. VT.—State v. Barr, 78 Vt. 97, 62 Atl. 43. VA.—Hatcher v. Com., 106 Vt. 827, 55 S. E. 677; Dix v. Com., 110 Va. 907, 67 S. E. 344. W. VA.—State v. Chisnell, 36 W. Va. 659, 15 S. E. 412.

8 KAN.—State v. Lund, 49 Kan. 663, 31 Pac. 309. N. D.—State v. Poull, 14 N. D. 557, 105 N. W. 717. OHIO—Stockwell v. State, 27 Ohio St. 563; Stick v. State, 23 Ohio Cir. Ct. 392. S. D.—State v. Valentine, 7 S. D. 98, 63 N. W. 541. TEX.—Larned v. State, 41 Tex. Cr. Rep. 509, 55 S. W. 826; Gelber v. State, 56 Tex. Cr. Rep. 460, 120 S. W. 863.

The right to compel an election is a personal privilege and not a matter of favor dependent upon the will of the prosecution, and the refusal of the court to require an election is not cured by the voluntary concession of the district attorney in his closing argument that he will ask for a conviction for but one offense.—Com. v. Coyne, 207 Mass. 21, 20 Ann. Cas. 1069, 92 N. E. 1028.

9 State v. Guettler, 34 Kan. 582, 9

testimony shows various sales, on different dates, of different kinds of liquors, the election, to be sufficient, must designate the particular date and sale, and the kind of liquor sold at that time.[10] An election, when made, is binding upon the prosecution throughout all subsequent proceedings in the case, and on a second trial, in some jurisdictions,[11] but not in others.[12]

Pac. 200. See Seibert v. State, 40 Ala. 60.

10 State v. O'Connell, 31 Kan. 383, 2 Pac. 579; State v. Guettler, 34 Kan. 582, 9 Pac. 200; State v. Saxton, 2 Kan. App. 13, 41 Pac. 1113.

11 Elam v. State, 26 Ala. 48.

12 State v. Dow, 74 Iowa 141, 37 N. W. 114.

CHAPTER LIII.

INDICTMENT—SPECIFIC CRIMES.

Kidnapping.

§ 801. Indictment—At common law.
§ 802. —— Under statute, language of statute.
§ 803. —— —— Necessary averments.
§ 804. —— —— Negative averments.
§ 805. —— —— Intent.
§ 806. Joinder of counts.
§ 807. —— Duplicity.

§ 801. INDICTMENT[1]—AT COMMON LAW. At common law the offense of kidnapping is regarded as an aggravated species of false imprisonment, as all the ingredients of false imprisonment are necessarily comprehended therein,[2] and an indictment or information charging the offense of kidnapping, at common law, should charge assault, battery, detention, or the carrying and transportation of the injured party from his home or county to another place or county, unlawfully and against his will.[3]

§ 802. —— UNDER STATUTE, LANGUAGE OF STATUTE. In most, if not all, the jurisdictions in this country, the offense of kidnapping is defined and punished, or at least prohibited and punished, by statute; and in all such jurisdictions where there is such a statute, an indictment or information may charge the offense in the language of the statute defining it, where it is defined, or in the language of the statute prohibiting it, where the statute merely prohibits and punishes the offense,[1] or

1 As to forms of indictment, see Forms Nos. 1418-1429.

2 Click v. State, 3 Tex. 282.

3 Ibid.

1 CAL.—People v. Fick, 89 Cal. 144, 26 Pac. 759. GA.—Dowda v. State, 74 Ga. 12. IND.—State v. McRoberts, 4 Blackf. 178; State v. Sutton, 116 Ind. 527, 8 Am. Cr. Rep. 452, 19 N. E. 602. N. C.—

in words of equivalent import.[2] Where the statute does not use the word "feloniously" in defining the offense, the indictment or information need not allege that it was feloniously done.[3] Where the statute under which the prosecution is had, in defining the offense, uses the phrase "without authority of law," an indictment or information which substitutes for these statutory words the word "unlawfully," will not for that reason be bad.[4] The statute prohibiting and punishing forcible seizure and carrying away, or the secreting or imprisonment, of any person, an indictment or information need not charge that the person was "forcibly" imprisoned.[5] Under a statute[6] providing that any one who seizes, inveigles, or kidnaps another with intent to cause him to be secretly confined or imprisoned within the state, or to be sent out of the state, or in any way held to service, or kept or detained against his will, is guilty of kidnapping, the word "secretly" does not modify the words "kept or detained," and need not be employed in an indictment or information charging these facts.[7]

§ 803. ——— Necessary averments. An indictment or information charging kidnapping must set out all the essential elements or ingredients of the offense as it is defined by the statute under which the prosecution is had, and if this is done, it will be sufficient, but if not done, the indictment or information will be insufficient.[1] The place from whence taken and to which transported, not being an element in the offense, an indictment or information charging the kidnapping of a child, need not

State v. George, 93 N. C. 567; State v. Harrison, 145 N. C. 408, 59 S. E. 867.

2 State v. Sutton, 116 Ind. 527, 8 Am. Cr. Rep. 452, 19 N. E. 602.

3 State v. Holland, 120 La. 429, 14 Ann. Cas. 692, 45 So. 380.

4 State v. Holland, 120 La. 429, 14 Ann. Cas. 692, 45 So. 380.

5 State v. Backarow, 38 La. Ann. 316.

6 Montana Rev. Codes, § 8306.

7 Ex parte McDonald, 50 Mont. 348, 146 Pac. 942; Ex parte Bradley, 50 Mont. 354, 146 Pac. 944.

1 Com. v. Myers, 146 Pa. St. 24, 23 Atl. 164, 29 W. N. C. 497.

state from whence nor to what place the child was taken,[2] nor set out the means by which it was enticed away.[3] An indictment or information, under the Georgia statute,[4] charging inveigling a child from its parents and against their will, need not set out the names of the parents of the child,[5] nor allege that the child was enticed away against its father's will.[6] The purpose for which a person or child is taken or detained being immaterial, it need not be alleged, and where alleged need not be proved, being treated as surplusage.[7]

§ 804. ——— NEGATIVE AVERMENTS. An indictment or information charging kidnapping, either of a child or of a grown person, should charge that the act was not done in pursuance of the laws of the state or of the United States, and omitting to so charge, will not state an offense;[1] but a charge of abducting a child from its parents without their consent need not negative the consent of the guardian;[2] neither need it negative a proviso in the statute as to accused's not being a nearer blood relation of the child than that of the person from whom it was abducted.[3]

§ 805. ——— INTENT. We have already seen that the purpose for which a person or a child is taken or detained, being immaterial, need not be alleged,[1] but the

2 Dowda v. State, 74 Ga. 12.

3 Dowda v. State, 74 Ga. 12; State v. George, 93 N. C. 567.

4 Pen. Code, 1895, § 110.

5 Arrington v. State, 3 Ga. App. 30, 59 S. E. 207.

6 Arrington v. State, 3 Ga. App. 30, 59 S. E. 207.

In North Carolina same rule prevails.—State v. George, 93 N. C. 567.

7 People v. Fick, 89 Cal. 144, 26 Pac. 759; State v. Backarow, 38 La. Ann. 316.

1 State v. Kimmerling, 124 Ind. 382, 24 N. E. 722.

2 Pruitt v. State, 102 Ga. 688, 29 S. E. 437.

3 State v. George, 93 N. C. 567.

Charging carrying away a child with intent to detain it from its parent, or other person having the lawful charge of it, it is immaterial whether the woman lawfully entitled to the custody was the mother or not.—State v. Tillatson, 85 Kan. 577, 117 Pac. 1030.

1 See, supra, § 803, footnote 7.

intent of the taking and carrying away, which enters into the definition of the offense described in the statute under which the prosecution is had, must be alleged.[2] The intent mentioned in the statute defining the offense has been said to qualify each preceding clause of the section to which it can be made applicable, and that the intent for that reason must be alleged,[3] and that if it is not alleged, the indictment or information will merely charge the common-law offense of false imprisonment.[4] Although it has been said that on a charge of forcibly carrying away a certain female from her place of residence, and also of fraudulently decoying said female from her place of residence, need not charge a felonious intent in the commission of the alleged act.[5]

§ 806. JOINDER OF COUNTS. Under the general rule of criminal pleading, an indictment or information charging kidnapping may join with it other offenses of the same general family of crimes, requiring the same kind of a trial, and punished with the same kind of punishment. Thus a count for kidnapping may be joined with a count charging the abduction of a female for the purposes of prostitution;[1] and a count charging the kidnapping of a child may be joined with a count charging the harboring and concealing of a child, knowing it to have been kidnapped or enticed away.[2]

§ 807. —— DUPLICITY. An indictment or information joining a count charging kidnapping and a count charging abduction is not bad for duplicity;[1] and a charge that the accused attempted to take and entice away two chil-

[2] State v. Sutton, 116 Ind. 527, 8 Am. Cr. Rep. 452, 19 N. E. 602; Smith v. State, 63 Wis. 453, 23 N. W. 879.

[3] Smith v. State, 63 Wis. 453, 23 N. W. 879.

[4] Smith v. State, 63 Wis. 453, 23 N. W. 879.

[5] Boes v. State, 125 Ind. 205, 25 N. E. 218.

[1] Mason v. State, 29 Tex. App. 24, 14 S. W. 71.

[2] Com. v. Westervelt, 11 Phila. (Pa.) 461.

[1] Mason v. State, 29 Tex. App. 24, 14 S. W. 71.

dren, does not charge two offenses, and is not bad for duplicity where there was but a single act of attempt.[2]

[2] People v. Milne, 60 Cal. 71. See R. v. Fuller, 1 Bos. & P. 180; R. v. Bykerdike, 1 Moo. & R. 179.

CHAPTER LIV.

INDICTMENT—SPECIFIC CRIMES.

Larceny.

§ 808. Form and sufficiency of indictment—At common law.
§ 809. —— Under statute.
§ 810. —— Language of statute.
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§ 833. —— —— —— Estrays.
§ 834. —— —— —— Hogs or swine.
§ 835. —— —— —— Horses, mules and asses.
§ 836. —— —— —— Poultry or fowls.
§ 837. —— —— —— Sheep.
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§ 839. ——— Articles of food and drink.
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§ 852. ——— Written instruments—In general.
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§ 857. —— As to sufficiency of allegation of ownership.
§ 858. —— Necessity of laying ownership in true owner.
§ 859. —— Negativing ownership of accused.
§ 860. —— Part of property belonging to accused.
§ 861. —— General and special ownership.
§ 862. —— Joint ownership—Partnership.
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§ 864. —— Corporation.
§ 865. —— Custodia legis, property in.
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§ 869. —— Landlord and tenant.
§ 870. —— Principal and agent.
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§ 875. —— Property of estate of decedent.
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§ 877. —— Unknown owners.
§ 878. Possession and custody of property.
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§ 880. Secreting, withholding or appropriating.
§ 881. Larceny by trick or device.
§ 882. Larceny by agent, bailee, servant, or trustee.
§ 883. Larceny from the person.
§ 884. Larceny from a dwelling-house, store, or other building.
§ 885. Bringing stolen property into state or jurisdiction.
§ 886. Joinder—Of parties defendant.
§ 887. —— Of offenses.
§ 888. —— Duplicity.
§ 889. —— Election.

§ 808. FORM AND SUFFICIENCY OF INDICTMENT[1]—AT COMMON LAW. The form, requirements and sufficiency of an indictment at common law, charging larceny, are no longer of sufficient practical value in this country to require extended treatment, the crime being now a statutory offense in all jurisdictions. It is sufficient to here say that the time-honored form was to charge, in technical language, that, with force and arms,[2] the accused designated articles of personal property, of a specified value—the value being affixed to each article taken—"of the goods and chattels of one," naming him, "then and there being found, feloniously did steal, take and carry away," or in case of a horse[3] or cattle,[4] "did feloniously steal, take and lead" or "drive away."[5] In case of several articles or things charged to have been stolen, it was necessary to state the number with certainty,[6] and the description

1 As to forms of indictment charging larceny, in its various phases, see Forms Nos. 1446-1568.

2 Neither "force" nor "arms" being necessary, the phrase, "with force and arms," should be omitted from the indictment or information. — Walklate v. Com., (Ky.) 118 S. W. 314.

3 Horse stolen should be charged cepit et abduxit.—Stark. Crim. Pl. 78, note u.

4 Sheep stolen should be charged cepit et effrigavit.—Stark. Crim. Pl. 78, note u.

5 Arch. Cr. Pl. & Ev. (10th London ed.) 169; 3 Chit. Crim. L. 944; Stark. Crim. Pl. 192.

6 Insufficient to say "felonice furatus est aves" or "columbas"

of the articles or things, the ownership, and the like, were required to be minutely and accurately set forth. A common-law form of indictment will be sufficient to charge larceny under a statute, except in those instances in which the statutory crime may be committed in two or more ways, some of which ways did not constitute the offense at common law, in which case, it has been said, such indictment will not be sufficient for a form of larceny not existing at common law,[7] although there is authority to the contrary.[8]

§ 809. —— UNDER STATUTE. An indictment or information charging the crime of larceny under a statute is required to state the facts[1] importing the crime charged,[2] in ordinary and concise language,[3] and with such fullness and certainty as to enable the accused (1) to know with just what he is charged, (2) to intelligently prepare his defense, and (3) to enable him to plead a judgment of conviction or acquittal in bar of a subsequent prosecution for the same offense;[4] and to this

out of a dovecote, or young hawks out of the nest, without expressing the number.—2 Hale P. C. 182; 2 Russ. on Cr. (9th American ed.) 313.

7 State v. Henn, 39 Minn. 464, 40 N. W. 564; People v. Dumar, 106 N. Y. 502, 8 N. Y. Cr. Rep. 263, 13 N. E. 325, reversing 42 Hun 80, 5 N. Y. Cr. Rep. 55; People v. Dimick, 107 N. Y. 13, 14 N. E. 178.

8 Dowdy v. Com., 50 Va. (9 Gratt.) 727, 60 Am. Dec. 314; Leftwick v. Com., 61 Va. (20 Gratt.) 716; Price v. Com., 62 Va. (21 Gratt.) 846; Anable v. Com., 65 Va. (24 Gratt.) 566.

1 See, infra, § 810, footnotes 6 and 7.

2 People v. Williams, 35 Cal. 671; People v. Moore, 37 Hun (N. Y.) 84, 3 N. Y. Cr. Rep. 458; State v. Miller, 34 Tex. 535.

3 State v. Rooke, 10 Ida. 388, 79 Pac. 82; State v. Derst, 10 Nev. 443; Irvin v. State, 37 Tex. 412; Sansbury v. State, 4 Tex. App. 99.

4 People v. Williams, 35 Cal. 671; Ex parte Helbing, 66 Cal. 215, 5 Pac. 103; People v. Peltin, 1 Cal. App. 612, 82 Pac. 980; Norris v. State, 33 Miss. 373.

"About eighty dollars lawful money of the United States," shows with sufficient definiteness and certainty that more than fifty dollars was stolen, and is good as against a general demurrer.—People v. Peltin, 1 Cal. App. 612, 82 Pac. 980.

"About" is frequently used as synonymous with the word

end the charge must be of the facts and not of the evidence by which those facts are to be proved,[5] and must be in direct terms and not by way of inference[6] or implication,[7] or by mere surmise or suspicion.[8] The certainty in every particular required in a common-law indictment is not required,[9] and while the technical term "steal" is probably necessary[10]—although there are cases holding that words conveying the same idea are sufficient[11]—the word "larceny" is not essential;[12] and where the word "steal" is used the expressions "carry away," "lead or drive away," and "from the possession of" the owner,[13] are not essential, because these are ex-

"nearly" or "approximately," and a person of common understanding being able readily to know what is meant, and no substantial right of the accused being infringed, the indictment or information will be upheld.—Id.

Larceny of water by connecting any pipe, tube, or other instrument with any water main or pipe for the purpose of fraudulently taking water therefrom, being made a misdemeanor, an indictment or information charging accused with making a connection for such purpose is sufficient without charging that the connection was by means of a pipe, tube or other instrument, where it substantially follows the language of the statute.—Ex parte Helbing, 66 Cal. 215, 5 Pac. 103.

5 Smith v. State, 35 Tex. 738; State v. Reis, 9 Wash. 329, 37 Pac. 452.

Conspiracy to cheat at cards while pretending to play a game need not be charged where it is charged that while so pretending to play accused snatched from the prosecuting witness a sum of money. — State v. Reis, 9 Wash. 329, 37 Pac. 452.

6 Randall v. State, 132 Ind. 539, 32 N. E. 305.

7 State v. Dooly, 64 Mo. 146.

8 Frisbie v. Butler, Kirby (Conn.) 213.

9 State v. Miller, 34 Tex. 535.

10 State v. Casteel, 53 Mo. 124.

11 IND.—Willis v. State, 4 Blackf. 457; Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494. KY.—Walklate v. Com., (Ky.) 118 S. W. 314. MISS. — Damewood v. State, 2 Miss. (1 How.) 262. ORE.—State v. Yan Yan, 10 Ore. 365. TEX.— Musquez v. State, 41 Tex. 226; Hall v. State, 41 Tex. 287; Austin v. State, 42 Tex. 345.

12 State v. Hinckley, 4 Minn. 345.

13 People v. Cleary, 1 Cal. App. 52, 81 Pac. 753; People v. Hutchings, 8 Cal. App. 550, 97 Pac. 325; Trafton v. State, 5 Tex. App. 480; Thompson v. Com., 4 Va. (2 Va. Cas.) 135.

Compare: Henley v. State, 61 Tex. Cr. Rep. 428, 135 S. W. 133.

pressed in the technical term "steal."[14] Any mere imperfection or informality,[15] as designating the offense "burglary" or "embezzlement" instead of "larceny,"[16] where it does not prejudice the accused in any of his substantial rights, or the omission of the word "away" in the technical clause alleging asportation, because the technical term "steal" includes a completed asportation,[17] will not vitiate the indictment or information.[18]

§ 810. —— LANGUAGE OF STATUTE. Larceny, being a statutory offense, an indictment or information therefor in the language of the statute will be sufficient,[1] except in a charge of larceny from the person, in some states;[2] but it is not necessary to follow the exact language of

14 Spittorff v. State, 108 Ind. 177, 8 N. E. 911; In re Leddy, 11 Mich. 197; State v. Mann, 25 Ohio St. 668.

Compare: Rountree v. State, 58 Ala. 381; State v. Perry, 94 Ark. 215, 126 S. W. 717; Com. v. McDonald, 187 Mass. 581, 73 N. E. 852.

15 King v. State, 44 Ind. 285; Heath v. State, 101 Ind. 512; State v. White, 129 Ind. 153, 28 N. E. 425.

16 State v. White, 129 Ind. 153, 28 N. E. 425; State v. Gillett, 92 Iowa 527, 61 N. W. 169; State v. Coon, 18 Minn. 518.

17 IOWA—State v. Chambers, 2 G. Greene 308. LA. — State v. Parry, 48 La. Ann. 1483, 21 So. 30. MASS.—Com. v. Adams, 73 Mass. (7 Gray) 43. OHIO — State v. Mann, 25 Ohio St. 668. ORE.—State v. Witt, 35 Ore. 230, 55 Pac. 1054.

18 Oats v. United States, 1 Ind. Ter. 152, 38 S. W. 673; State v. Sweeney, 56 Mo. App. 409.

1 ALA. — Ragan v. State, (Ala. App.) 72 So. 506. CAL.—People v. Gracia, 25 Cal. 531; People v. Tomlinson, 35 Cal. 503, 508. DEL.—State v. Nicholson, 2 Marv. 448, 43 Atl. 251. GA.—Aiken v. State, 73 Ga. 812; Patterson v. State, 122 Ga. 587, 50 S. E. 489. LA.—State v. Benjamin, 7 La. Ann. 47. ME.—State v. Leavitt, 66 Me. 440. MO.—State v. Dewitt, 152 Mo. 76, 53 S. W. 429; State v. Swearengin, 234 Mo. 549, 137 S. W. 880. N. Y.—People v. Moore, 37 Hun 84, 3 N. Y. Cr. Rep. 458. TEX.—Burrus v. State, 76 Tex. Cr. Rep. 120, 172 S. W. 781. WASH.—State v. Reis, 9 Wash. 329, 37 Pac. 452; State v. Jakubowski, 77 Wash. 78, 137 Pac. 448.

2 State v. Hall, 54 Wash. 142, 102 Pac. 888, in which case it is said: "This court has held that the crime of robbery and the crime of larceny from the person fall within the exceptions, and not within the general rule," permitting the offense to be charged in the language of the statute, citing State v. Dengel, 24 Wash. 49, 63 Pac. 1104; State v. Morgan, 31 Wash. 226, 71 Pac. 723.

the statute, words of equivalent import being sufficient,[3] except in those cases in which the statute in defining or describing the offense charged uses such technical terms as "feloniously"[4] or "fraudulently,"[5] which can not be dispensed with. So also is it sufficient to follow the form prescribed by the statute under which drawn, except in those cases in which the legislature has provided for an abbreviated form in which there is not set forth the essential facts importing the crime sought to be charged,[6] or dispenses with a description of the property stolen.[7]

§ 811. —— CONJUNCTIVE AND DISJUNCTIVE ALLEGATIONS. The general rule of criminal pleading as to conjunctive and disjunctive allegations applies in an indictment or information charging larceny, and an allegation in the disjunctive will be insufficient for uncertainty,[1] except in those cases in which the disjunctive particle is used in the sense of "to wit" in the statute and connects synonymous words or phrases,[2] as charging the accused with "stealing, taking and leading or driving away" two

3 Riggs v. State, 104 Ind. 261, 6 Am. Cr. Rep. 394, 3 N. E. 886; State v. Crawford, 38 S. C. 330, 17 S. E. 36; State v. Chapin, 74 Ore. 346, 144 Pac. 1187.

4 See, infra, § 817.

5 See, infra, § 818.

6 Williams v. State, 12 Tex. App. 395; Hodges v. State, 12 Tex. App. 554; Young v. State, 12 Tex. App. 614; Flores v. State, 13 Tex. App. 337; Brown v. State, 13 Tex. App. 347.

7 Randall v. State, 132 Ind. 539, 32 N. E. 305.

1 See: CAL.—People v. Tomlinson, 35 Cal. 503, 508. MASS.—Brown v. Com., 8 Mass. 59; Com. v. Grey, 68 Mass. (2 Gray) 501, 61 Am. Dec. 476. VT.—State v. Gilbert, 13 Vt. 647. WIS.—Clifford v. State, 29 Wis. 330. ENG.—Ex parte Pain, 5 Barn. & C. 251, 11 Eng. C. L. 450, 108 Eng. Repr. 94; Davy v. Baker, 4 Burr. 2471, 98 Eng. Repr. 295; R. v. Sadler, 2 Chit. 519, 18 Eng. C. L. 766; R. v. North, 6 Dow. & R. 143, 16 Eng. C. L. 258; Speart's Case, 2 Roll. Abr. 81; R. v. Morley, 1 You. & J. 221.

2 CAL.—People v. Smith, 15 Cal. 408. See People v. Tomlinson, 35 Cal. 503, 508. ILL.—Blemer v. People, 76 Ill. 271. MASS.—Com. v. Grey, 68 Mass. (2 Gray) 501, 61 Am. Dec. 476. MO.—State v. Ellis, 4 Mo. 474. N. C.—State v. Harper, 64 N. C. 129. ORE.—State v. Humphreys, 43 Ore. 44, 79 Pac. 824. TEX.—Potter v. State, 39 Tex. 388. WASH.—State v. Brookhouse, 10 Wash. 87, 38 Pac. 862. WIS.—Clifford v. State, 29 Wis. 329.

horses,[3] or twenty-five head of cattle,[4] because "leading" and "driving" are regarded as synonymous terms,[5] and being synonymous, may be charged disjunctively.[6] But a charge that accused converted property described to his own use "or otherwise disposed of it," is bad pleading and vulnerable to a special demurrer because "converted to own use," and "otherwise disposing of" are not synonymous phrases,[7] but are each one of the means or methods by which the offense may be committed according to the means enumerated in the statute. The general rule is that where the statute enumerates several acts disjunctively which separately, or together, shall constitute the offense described, the indictment or information, if it charges more than one of them, which it may do, and that, too, in the same count, should do so in the conjunctive, and not in the disjunctive.[8]

§ 812. —— GRAMMATICAL INACCURACY, WRONG SPELLING, ETC. Grammatical inaccuracies,[1] which do not affect the sense, misspelled words,[2] and bad chirography,[3] do not

3 People v. Smith, 15 Cal. 408.

4 State v. Brookhouse, 10 Wash. 87, 38 Pac. 862.

5 Id.

6 People v. Tomlinson, 35 Cal. 503, 508.

7 Sanders v. State, 86 Ga. 717, 12 S. E. 1058.

8 People v. Tomlinson, 35 Cal. 503, 508. See People v. Hood, 6 Cal. 236; People v. Ah Woo, 28 Cal. 205; People v. Frank, 28 Cal. 507; Com. v. Grey, 68 Mass. (2 Gray) 501, 61 Am. Dec. 476; United States v. Potter, 6 McL. 186, Fed. Cas. No. 16078; R. v. Stocker, 1 Salk. 342, 91 Eng. Repr. 300; R. v. Stoughton, 2 Str. 901, 93 Eng. Repr. 927.

1 State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

2 "The chirography is certainly bad, and the spelling of some of the words equally bad, but taking the whole together, I find no difficulty in ascertaining the words used, as well as the full meaning of every sentence. In transcribing and printing the transcript the misspelling has been greatly emphasized and in some instances, exaggerated and perverted by converting badly written words into letters which do not make words. For instance, the word written 'seventy-five' is printed 'sunty-five,' and the word 'dignity,' which was written without crossing the 't,' is printed 'dignily.' It is not difficult for a person of common understanding to read and understand the meaning of this indictment."—State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

3 "Legible or plain writing is an

affect the validity of an indictment or information,[4] so long as the writing is legible, and a person of ordinary understanding can comprehend what is the meaning and intention.[5] If the sense be clear, nice exceptions ought not to be regarded.[6] And even where the sense, or the word, is ambiguous, this will not be fatal, in those cases in which it is sufficiently shown by the context in what sense the word or phrase was intended to be used.[7]

§ 813. Essential allegations—The taking. An indictment or information charging larceny, must allege that the accused feloniously did take[1] property which

accomplishment not often possessed even by good lawyers; and if the courts should make legible and accurate chirography requisites of valid indictments, prisoners would more often escape for want of these qualities than by reason of their innocence."—State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

4 State v. Hedge, 6 Ind. 333; Shay v. People, 22 N. Y. 317; State v. Gilmore, 9 W. Va. 641; State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

5 State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

6 People v. Wheeler, 6 App. Div. (N. Y.) 187, 16 N. Y. Cr. Rep. 206, 73 N. Y. Supp. 130; reversed on another point, 169 N. Y. 487, 16 N. Y. Cr. Rep. 270, 62 N. E. 572; Bolton v. State, 41 Tex. Cr. Rep. 642, 57 S. W. 813; State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

7 State v. Edward, 19 Mo. 674; State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407; R. v. Stevens, 5 East 244, 260, 102 Eng. Repr. 1063.

1 "Taking" has a definite and well-understood significance when used in connection with the offense of larceny, and involves the wrongful taking of the property from the actual or constructive possession of the owner.—State v. Friend, 47 Minn. 449, 50 N. W. 692.

Means a felonious severance of the article or property from the possession of the owner.—State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550.

Felonious or wrongful taking is essential to constitute the crime of larceny. See, among other cases: KAN.—State v. Woodruff, 47 Kan. 151, 27 Am. St. Rep. 285, 27 Pac. 482. MISS.—Beatty v. State, 61 Miss. 18. MO.—State v. Campbell, 108 Mo. 611, 18 S. W. 1109. N. C.—Dodd v. Hamilton, 4 N. C. 471; State v. Ledford, 67 N. C. 60. TENN.—Hite v. State, 17 Tenn. (9 Yerg.) 198; Dodge v. Brittain, 19 Tenn. (Meigs) 84; Kemp v. State, 30 Tenn. (11 Humph.) 320. TEX.—Price v. State, 41 Tex. 215; Pitts v. State, 3 Tex. App. 210; Madison v. State, 16 Tex. App. 435; Lott v. State, 20 Tex. App. 230. VA.—Tanner v. Com., 55 Va. (14 Gratt.) 635. FED.—United States v. Marselis, 2 Blatchf. 108,

is the subject of larceny by the statute under which the prosecution is had,[2] and it is usually sufficient to charge this fact generally without averring from where taken;[3] although there are cases to the effect that where the statute in describing the offense uses the word "steal," only, that word includes both the taking and the carrying away,[4] and that the omission of a direct allegation of taking does not render the indictment or information bad.[5] In the case of larceny from the person,[6] the manner of the taking must be described.[7] The taking must be alleged to have been in a manner which is sufficient to show a trespass,[8] because one coming into possession lawfully of money or property can not become guilty of larceny by afterward converting it to his own use.[9] Any removal, however slight, of an article which is not attached to the soil or to another thing removed, is sufficient to constitute a "taking,"[10] such as the lifting of a

Fed. Cas. No. 15724; United States v. Pearce, 2 Sumn. 575, Fed. Cas. No. 16021; In re Burkhardt, 33 Fed. 27.

Means of taking need not be alleged at common law.—State v. Edwards, 51 W. Va. 220, 59 L. R. A. 45, 41 S. E. 429.

2 ALA. — Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 76. CAL.—People v. Prather, 134 Cal. 386, 66 Pac. 483. IND.—Gregg v. State, 64 Ind. 223. MASS.—Com. v. Pratt, 132 Mass. 246. NEB.—Van Buren v. State, 65 Neb. 223, 91 N. W. 201. N. Y.—People v. Burr, 4 How. Pr. 293. N. C.—State v. Copeland, 86 N. C. 691; State v. McCoy, 89 N. C. 466.

3 State v. Piatt, 20 Iowa 267.

4 See, supra, § 809, footnotes 17 et seq.

5 Gay v. State, 20 Tex. 504; Austin v. State, 42 Tex. 345.

6 **As to larceny from the person**, see, infra, § 883.

7 Kerry v. State, 17 Tex. App. 178, 50 Am. Rep. 122.

8 State v. Copeland, 86 N. C. 691; Kemp v. State, 30 Tenn. (11 Humph.) 320.

Felonice cepit was required to be alleged at common law.—1 Hawks P. C. 134.

"From which it follows that if the party be not guilty of any trespass in taking the goods, he can not be guilty of a felony in carrying them away." — State v. McCoy, 89 N. C. 466.

"Taking" as used in connection with larceny imports a trespass. —State v. Friend, 47 Minn. 449, 50 N. W. 692.

9 Snapp v. Com., 82 Ky. 173, 6 Am. Cr. Rep. 183.

10 State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550.

pocket-book partly from the pocket of another, with intent to steal.[11] The ordinary and sufficient form of allegation as to the taking is that the accused "did steal, take and carry away."[12]

§ 814. —— THE ASPORTATION. An indictment or information charging larceny must allege asportation as well as a felonious taking,[1] in the absence of a statutory provision under which such an allegation is unnecessary, as where the statute makes the offense complete without removal;[2] and this allegation is sufficiently made in the phrase "did steal, take and carry[3] away,"[4] although it has been said that an indictment or information which omits the word "away" from that phrase will be insufficient,[5] yet there are authorities to the contrary.[6] In the case of taking from the person, no further asportation need be alleged.[7]

11 Id. See Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67; State v. Craig, 80 N. C. 475, 45 Am. Rep. 698.

12 See, supra, §§ 808, 809. Also, People v. Strong, 46 Cal. 302; Gregg v. State, 64 Ind. 223; State v. Gower, 6 La. Ann. 311; State v. Friend, 47 Minn. 449, 50 N. W. 692.

1 ALA. — Rountree v. State, 58 Ala. 381; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67. CAL.—People v. Myer, 75 Cal. 383, 17 Pac. 431; People v. Prather, 134 Cal. 386, 66 Pac. 483. IND.—Gregg v. State, 64 Ind. 223. MASS. — Com. v. Adams, 73 Mass. (7 Gray) 43; Com. v. Pratt, 132 Mass. 246. NEB.—Van Buren v. State, 65 Neb. 223, 91 N. W. 201. NEV.—State v. Newman, 9 Nev. 48, 16 Am. Rep. 3. N. C.—State v. Copeland, 86 N. C. 691.

2 See Austin v. State, 42 Tex. 345; Madison v. State, 16 Tex. App. 435; Lott v. State, 20 Tex. App. 230; Tanner v. Com., 55 Va. (14 Gratt.) 635.

3 "Carry" omitted, held not to vitiate.—Walker v. State, 50 Ark. 532, 8 S. W. 939.

"Haul" instead of "carry, lead and drive," held not ground for quashing.—Spittorff v. State, 108 Ind. 171, 8 N. E. 911.

4 "Lead or drive away" is sufficient (People v. Smith, 15 Cal. 408), but need not be added after the clause "steal, take, and carry away."—People v. Strong, 46 Cal. 302.

5 Rountree v. State, 58 Ala. 381; Com. v. Adams, 73 Mass. (7 Gray) 43.

6 State v. Mann, 25 Ohio St. 668.

See, also, supra, § 809, footnotes 18 and 19.

7 People v. Lonnen, 139 Cal. 634, 73 Pac. 586.

See, also, supra, § 813, footnote 6; infra, § 883.

§ 815. —— THE TIME OF TAKING. An indictment or information charging larceny must state the time when the property was taken,[1] but time not being of the essence of the offense—except in the case of a larceny from a dwelling-house in the night-time, and the like, when the time must be laid and proved[2]—it need not be precisely or exactly laid,[3] it being sufficient if laid before the filing of the indictment or the presentation of the information,[4] and within the statute of limitations;[5] proof of commission of the act charged at any time within those two periods will be sufficient.[6]

§ 816. —— THE PLACE OF TAKING. An indictment or information charging larceny should allege the place of the commission of the offense,[1] but it is usually required to be with such certainty, only, as to place it within the jurisdiction of the court;[2] and to do this, naming the

1 Morgan v. State, 13 Fla. 671; State v. Flower, 27 Ida. 223, 147 Pac. 786.

Compare: Bell v. State, 75 Ala. 25.

2 Davis v. State, 43 Tenn. (3 Coldw.) 77.

3 State v. Kane, 33 La. Ann. 1269; State v. Johnson, 32 Tex. 96.

"On or about" is sufficient.—Rema v. State, 52 Neb. 375; State v. Woolsey, 19 Utah 486, 57 Pac. 426.

4 Hutchinson v. State, 62 Ind. 556; State v. Woolsey, 19 Utah 486, 57 Pac. 426.

5 GA.—Fisher v. State, 73 Ga. 595. LA.—State v. Charlot, 8 Rob. (La.) 529; State v. Clark, 8 Rob. (La.) 533; State v. Kane, 33 La. Ann. 1269; State v. Wren, 48 La. Ann. 803, 19 So. 745. MASS.—Com. v. Sego, 125 Mass. 210. MISS.—Oliver v. State, 6 Miss. (5 How.) 14; Snowden v. State, 62 Miss. 100. S. C.—State v. Howard, 32 S. C. 91. TEX.—Johnson v. State, 1 Tex. App. 118; Shuman v. State, 34 Tex. Cr. Rep. 69, 29 S. W. 160.

6 State v. Carr, 4 Penn. (Del.) 523, 57 Atl. 370; State v. Clark, 8 Rob. (La.) 533; State v. Charlot, 8 Rob. (La.) 529; Com. v. Sego, 125 Mass. 210.

1 State v. Flower, 27 Idaho 223, 147 Pac. 786; Morgan v. State, 13 Fla. 671.

2 FLA.—Baldwin v. State, 46 Fla. 115, 35 So. 220; Enson v. State, 58 Fla. 37, 138 Am. St. Rep. 92, 50 So. 948. GA.—Hall v. State, 120 Ga. 142, 47 S. E. 519; Gibson v. State, 13 Ga. App. 67, 78 S. E. 829. IOWA—State v. Lillard, 59 Iowa 749, 13 N. W. 637. LA.—State v. Capers, 6 La. Ann. 267. MICH.—People v. Turney, 124 Mich. 542, 83 N. W. 873. N. H.—State v. Cotton, 24 N. H. 143. N. Y.—People v. Horton, 62 Hun 610, 10 N. Y. Cr. Rep. 104, 17 N. Y. Supp. 1; Howell v. People, 2 Hill

county, is sufficient,[3] unless the place is necessary to identify the property stolen,[4] in which case the place must, of course, be stated with care and precision. In those cases in which the place from which the property was taken enters into the elements of the crime, or affects the severity of the punishment to be inflicted—e. g., larceny from the person,[5] or larceny from a dwelling-house, or other designated place[6]—the place must be exactly laid in order to bring the act within the prohibition of the statute,[7] and must be proved as laid.[8]

§ 817. —— FELONIOUS ACT. The rule at common law was that an indictment charging larceny should allege that the act was "feloniously" done, and the same rule prevails under statute, in many jurisdictions as to those larcenies which are made a felony by the statute,[1] and not in others;[2] but in those states in which such an allegation is required, it is not necessary to allege in terms that the act was feloniously done,[3] it being sufficient to

281. TEX.—State v. Johnson, 32 Tex. 96.

Proof of commission anywhere within the jurisdiction of the court will warrant a verdict of conviction.—People v. Honeyman, 3 Den. (N. Y.) 121.

3 State v. Lillard, 59 Iowa 479, 13 N. W. 367; Wedge v. State, 12 Md. 232; State v. Odum, 11 Tex. 12.

In county where grand jury organized.—People v. Horton, 62 Hun (N. Y.) 610, 10 N. Y. Cr. Rep. 104, 17 N. Y. Supp. 1.

4 Gibson v. State, 13 Ga. App. 67, 78 S. E. 827.

5 **As to larceny from the person,** see, infra, § 883.

6 **As to larceny from a dwelling-house,** etc., see, infra, § 884.

7 State v. Savage, 32 Me. 584; Com. v. Mahar, 74 Mass. (8 Gray) 469; State v. O'Neil, 21 Ore. 170, 27 Pac. 138.

Words construed according to their usual acceptation in common language, and a charge of having committed the offense "in a dwelling, namely the Riverside Hotel," sufficiently charges the act to have been committed in a house.—State v. O'Neil, 21 Ore. 170, 27 Pac. 138.

8 United States v. Davis, 5 Mas. C. C. 356, Fed. Cas. No. 14930.

1 ARK.—Mason v. State, 32 Ark. 238. IND.—Scudder v. State, 62 Ind. 13; Gregg v. State, 64 Ind. 223; Sovine v. State, 85 Ind. 576. MASS.—Com. v. Pratt, 132 Mass. 246. MO.—State v. Casteel, 53 Mo. 124; State v. Weldon, 70 Mo. 572. N. C.—State v. Williams, 31 N. C. 140. VA.—Barker v. Com., 4 Va. (2 Va. Cas.) 122.

2 Yates v. State, 67 Ga. 770.

3 IOWA—State v. Griffin, 79 Iowa 568, 44 N. W. 813; State v.

charge accused with the commission of a felony in "stealing, taking and carrying away" specified property,[4] the word "stealing" signifying a taking which, at common law, was felonious.[5] Under some statutes the word "steal" has been changed to "theft," and the word "feloniously" to "fraudulently." Under such statutes the act must be charged to have been "fraudulently" done.[6]

Petit larceny being made a misdemeanor by statute, it is not necessary to allege that the act was "feloniously" done,[7] although to so allege will not vitiate the indictment or information.[8]

McDermet, 138 Iowa 86, 115 N. W. 884. NEV.—State v. Jones, 7 Nev. 408. N. J.—Randall v. State, 53 N. J. L. 485, 22 Atl. 45; Gardner v. State, 55 N. J. L. 17, 26 Atl. 30. N. C.—State v. Williams, 31 N. C. 140. ORE.—State v. Lee Yan Yan, 10 Ore. 365; State v. Minnick, 54 Ore. 86, 102 Pac. 605. VA.—Halkem v. Com., 4 Va. (2 Va. Cas.) 4.

"Feloniously took away" the property, without using the word "stealing" in any form, indictment was held sufficient.—State v. Lee Yan Yan, 10 Ore. 365.

"Took, stole and carried away" being alleged in the indictment or information, is sufficient without averring that the taking was felonious.—State v. Griffin, 79 Iowa 568, 44 N. W. 813.

"Did feloniously take, steal, and carry away" the property of another, held sufficient without alleging that the taking was unlawful and wilful.—State v. McDermet, 138 Iowa 86, 115 N. W. 884.

"Took, carried, stole, led and drove away two heifers of the value of thirty dollars, contrary to the statute," is sufficient without the averment that the taking was felonious.—State v. Minnick, 54 Ore. 86, 102 Pac. 605.

4 People v. Lopez, 90 Cal. 569, 27 Pac. 427.

5 ARK.—State v. Eldridge, 12 Ark. 608. CAL.—People v. Lopez, 90 Cal. 569, 27 Pac. 427. DEL.—State v. Fitzpatrick, 9 Houst. 386, 32 Atl. 1072. IOWA—State v. Chambers, 2 G. Greene 308; State v. Griffin, 79 Iowa 568, 44 N. W. 813. LA.—State v. Benjamin, 7 La. Ann. 47. MO.—State v. Casteel, 53 Mo. 124. N. J.—Gardner v. State, 55 N. J. L. 17, 26 Atl. 30; Randall v. State, 53 N. J. L. 485, 22 Atl. 45. TENN.—State v. Shelton, 90 Tenn. 539, 13 S. W. 253.

"Steal" or "stealing," used in a criminal statute, if not qualified by the context, signifies such a taking as was "felonious" at common law, and imports the common-law offense of larceny.—Gardner v. State, 55 N. J. L. 17, 26 Atl. 30.

6 See, infra, § 818.

7 State v. Boyce, 65 Ark. 82, 44 S. W. 1043; State v. Sipult, 71 Iowa 575; Gardner v. State, 55 N. J. L. 17, 26 Atl. 30; R. v. Stokes, 8 Car. & P. 151, 34 Eng. C. L. 660.

8 State v. Hogard, 12 Minn. 293;

§ 818. —— FRAUDULENT ACT. By statutory enactment in some states, as in Texas, the technical word "steal" has been supplanted by the word "theft," and "fraudulently" has been substituted for "feloniously," and has been declared to be equivalent thereto.[1] Under such statutes an indictment or information, after properly setting out the taking, must directly charge that such taking was "fraudulently," instead of "feloniously," done;[2] it not being sufficient to allege simply that the taking was with the fraudulent intent to deprive the owner of his property and appropriate the same to the use of the accused;[3] the former holding that under such a statute an allegation that the accused "did feloniously steal" sufficiently alleges that the taking was "fraudulent,"[4] having been overruled,[5] and it is now held that the terms "unlawfully" and "feloniously" will not supply the place of the statutory word "fraudulently."[6]

§ 819. —— CONSENT OF OWNER. At common law it was required that an indictment explicitly charge that the taking[1] and carrying away[2] were without the consent and against the will of the owner,[3] and under statute, the

State v. Joiner, 19 Mo. 224; Wolverton v. Com., 75 Va. 909.

1 Austin v. State, 42 Tex. 345.

2 Muldrew v. State, 12 Tex. App. 617; Sloan v. State, 18 Tex. App. 225; Ortis v. State, 18 Tex. App. 282; Ware v. State, 19 Tex. App. 13; Spain v. State, 19 Tex. App. 469; McPherson v. State, 20 Tex. App. 194; Chance v. State, 27 Tex. App. 441, 11 S. W. 457; Baldwin v. State, 76 Tex. Cr. Rep. 499, 175 S. W. 701; Duff v. Com., 92 Va. 769, 23 S. E. 643.

3 Chance v. State, 27 Tex. App. 441, 11 S. W. 457.

4 Musquez v. State, 41 Tex. 226.

5 Muldrew v. State, 12 Tex. App. 617.

6 Sloan v. State, 18 Tex. App. 225; Ortis v. State, 18 Tex. App. 282; Ware v. State, 19 Tex. App. 13.

1 As to the taking, see, supra, § 813.

2 As to the carrying away, see, supra, § 814.

3 NEB.—Chazem v. State, 56 Neb. 496, 76 N. W. 1056. N. Y.—People v. Dilcher, 38 Misc. 89, 16 N. Y. Cr. Rep. 547, 77 N. Y. Supp. 108. TENN.—Hite v. State, 17 Tenn. (9 Yerg.) 198; Dodge v. Brittain, 19 Tenn. (Meigs) 84. TEX.—Johnson v. State, 39 Tex. 393; Bland v. State, 18 Tex. App. 12; Bailey v. State, 18 Tex. App. 426; Frazier v. State, 18 Tex. App. 434.

indictment or information must negative the consent of the owner;[4] but where the taking and asportation are charged in due and regular form, it need not be expressly alleged that the property was taken against the will[5] or without the consent[6] of the owner, in some states.[7] The property charged to have been taken from one not the owner, the indictment or information must negative, not only the consent of the owner, but also the consent of the person in whose possession the property was at the time of the taking,[8] except in those cases in which the ownership is laid in the special owner and not in the general owner, in which case it is not necessary to negative the consent of the general owner.[9] In those cases in which the indictment or information charging larceny a joint ownership of the property in two or more persons is alleged, the nonconsent of each owner must be averred,[10]

4 Hall v. Com., 14 Ky. L. Rep. 731, 21 S. W. 353; State v. Hogard, 12 Minn. 293; Johnson v. State, 39 Tex. 393; Hammel v. State, 14 Tex. App. 326; Long v. State, (Tex.) 39 S. W. 674; Swink v. State, 32 Tex. Cr. Rep. 530, 24 S. W. 893.

Property sent by owner to accused for the purpose of entrapping him, the conversion thereof and depriving the owner of his property can not be charged as larceny.—Dodd v. Hamilton, 4 N. C. 471.

5 People v. Davis, 97 Cal. 194, 31 Pac. 1109; Com. v. Butler, 144 Pa. St. 568, 24 Atl. 910.

6 ARIZ.—Marley v. State, 15 Ariz. 495, 140 Pac. 215. CAL.—People v. Davis, 97 Cal. 194, 31 Pac. 1109. LA.—State v. Jones, 41 La. Ann. 784, 6 So. 638. TENN.—Wedge v. State, 75 Tenn. (7 Lea) 687. TEX.—Burns v. State, 35 Tex. 724; Johnson v. State, 39 Tex. 393.

7 CAL.—People v. Davis, 97 Cal. 194, 31 Pac. 1109. KY.—Hall v. Com., 14 Ky. L. Rep. 731, 21 S. W. 353. LA.—State v. DeSerrant, 33 La. Ann. 797; State v. Jones, 41 La. Ann. 784, 6 So. 638. PA.—Com. v. Butler, 144 Pa. St. 568, 24 Atl. 910. TENN.—Wedge v. State, 75 Tenn. (7 Lea) 687.

8 Bowling v. State, 13 Tex. App. 338; Bland v. State, 18 Tex. App. 12; Bailey v. State, 18 Tex. App. 426; Frazier v. State, 18 Tex. App. 434; Swink v. State, 32 Tex. Cr. Rep. 530, 24 S. W. 893.

9 Bailey v. State, 18 Tex. App. 426; Otero v. State, 30 Tex. App. 450, 17 S. W. 1081.

10 Bland v. State, 18 Tex. App. 12; Taylor v. State, 18 Tex. App. 489; Williams v. State, 19 Tex. App. 276; Williams v. State, 23 Tex. App. 619, 5 S. W. 129; Swink v. State, 32 Tex. Cr. Rep. 530, 24 S. W. 893; Arseneaux v. State, 63 Tex. Cr. Rep. 566, 140 S. W. 776.

it being insufficient simply to aver the want of joint consent.[11]

§ 820. —— DEGREE OF OFFENSE. An indictment or information charging larceny will be sufficient without alleging the grade or degree of the offense,[1] where it states the value of the property taken.[2]

§ 821. —— SECOND AND SUBSEQUENT OFFENSES. In those cases where by the statute under which the prosecution is had a second and subsequent convictions are more severely punished, or differently punished,[1] than a conviction for a first offense, the indictment or information must allege the former conviction;[2] and should set out a full and exact description of such first conviction,[3] in order to enable the court to inflict the increased, or different, punishment on conviction of the offense charged.

Petit larceny charged to have been committed a second time, which, by the statute, is made a felony, the indictment or information, in addition to the allegations of a first conviction as above pointed out, must charge the offense as a "felony."[4]

Common thief defined and punishment prescribed by

Taking from two owners A and B by separate acts the individual property of each, "without the consent of said owners," has been held to be sufficient.—Smith v. State, 21 Tex. App. 96, 133, 17 S. W. 558, 560.

11 Taylor v. State, 18 Tex. App. 489; Arseneaux v. State, 63 Tex. Cr. Rep. 566, 140 S. W. 776.

1 State v. Powell, 28 La. Ann. 315; State v. Lartigue, 29 La. Ann. 642.

2 Turner v. State, 124 Ala. 159, 27 So. 272; People v. Garcia, 6 Cal. Unrep. 367, 59 Pac. 576; State v. Dilworth, 34 La. Ann. 216.

1 As punishing second conviction of petit larceny as a felony. See, post, footnote 4, this section.

2 See MASS.—Wilde v. Com., 43 Mass. (2 Metc.) 408. MICH.—People v. Buck, 109 Mich. 687, 97 N. W. 982. N. Y.—People v. Youngs, 1 Cai. 37; People v. Price, 6 N. Y. Cr. Rep. 141, 2 N. Y. Supp. 414. OHIO—Larney v. Cleveland, (City of), 34 Ohio St. 599.

3 State v. Loehr, 93 Mo. 103, 5 S. W. 696; Pryor v. Com., (Va.) 26 S. E. 864; R. v. Clark, 3 Car. & K. 367; R. v. Allen, Russ. & R. 382.

4 People v. Gutierrez, 74 Cal. 81, 15 Pac. 444; State v. Weldon, 70 Mo. 572; State v. Loehr, 93 Mo. 103, 5 S. W. 696.

See People v. Lewis, 64 Cal. 401, 1 Pac. 490; Ex parte Young Ah Gow, 73 Cal. 438, 15 Pac. 76.

the statute, but which does not provide for an indictment as such, it is not necessary that the indictment or information shall allege a former conviction in order to enable the court to inflict the punishment prescribed by the statute for the offense of being a common thief;[5] and where the indictment or information, as a basis for securing the punishment of the accused as a common thief, in three counts, charges three larcenies of the goods of different persons on the same day, it will not be presumed that the larceny was by a single act.[6]

§ 822. —— ACCESSORIES. An indictment or information charging accused with being an accessory before the fact, in that he advised and procured the principal to commit the offense for him, is sufficient where the facts of the crime are stated, and it is then alleged that the principal acted for the accused,[1] even though, under the statute, the accused could have been indicted as a principal;[2] the circumstances of procurement or aid by the accused need not be set forth.[3]

§ 823. —— ATTEMPT TO COMMIT LARCENY. At common law an indictment or information charging an attempt to commit a crime was required to aver that the accused did some act, directed by a particular intent, which would have apparently resulted, in the ordinary and likely course of things, in the perpetration of the particular crime;[1] and a charge of an attempt to commit larceny was required to set out all the acts constituting the alleged attempt.[2] The same rule prevails under some statutes,[3]

5 State v. Riley, 28 Iowa 547.

6 Bushman v. Com., 138 Mass. 507.

1 Sanderson v. Com., 11 Ky. L. Rep. 341, 8 Am. Cr. Rep. 687, 12 S. W. 136; People v. Peckens, 12 App. Div. (N. Y.) 626, 43 N. Y. Supp. 1160; affirmed, 153 N. Y. 576, 12 N. Y. Cr. Rep. 433, 47 N. E. 883.

2 People v. Peckens, supra.

3 Lamb v. State, 69 Neb. 212, 95 N. W. 1050; Gann v. State, 42 Tex. Cr. Rep. 133, 57 S. W. 837.

1 R. v. Marsh, 1 Den. C. C. 505.

2 R. v. Bullock, Dears. C. C. 653.

3 CONN.—State v. Wilson, 30 Conn. 500. ILL.—Thompson v. People, 96 Ill. 158. NEV.—State v. Brannan, 3 Nev. 238. N. Y.—

but under other statutes, a general allegation of an attempt to steal is sufficient.[4] Where the attempt is defined by statute, an indictment or information in the language of such statute will be sufficient.[5] The particular articles, goods or property intended to be stolen need not be averred,[6] or an allegation of the particular manner in which the attempt was made.[7] As it is not necessary to allege that the crime was actually committed,[8] neither is it necessary to allege that the accused failed in the perpetration of the offense attempted.[9]

Attempt to steal from the person[10] being charged, the

People v. Moran, 123 N. Y. 254, 10 L. R. A. 109, 8 N. Y. Cr. Rep. 105, 25 N. E. 412. N. C.—State v. Colvin, 90 N. C. 717. PA.—Randolf v. Com., 6 Serg. & R. 398. TENN.—Clark v. State, 86 Tenn. 111, 8 S. W. 145. TEX.—State v. Johnson, 11 Tex. 22. VA.—Com. v. Clark, 47 Va. (6 Gratt.) 675. FED.—United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16594.

4 Jackson v. State, 91 Ala. 55, 24 Am. St. Rep. 860, 8 So. 773.

"Attempt" is among the adjudicated words, and has a well-defined legal meaning, and implies more than a mere intention formed; it means to make an effort, or an endeavor, or an attack. —Prince v. State, 35 Ala. 367; Lewis v. State, 35 Ala. 381; Bordeaux v. Davis, 58 Ala. 612; Gray v. State, 63 Ala. 73.

"The doctrine of attempt to commit a substantive crime, is one of the most important and, at the same time, most intricate titles of criminal law. There is no title, indeed, less understood by the courts, or more obscure in the text-books, than that of attempt. There must be an attempt to commit a crime and an act toward its consummation. So long as the act rests in bare intention, it is not punishable; but immediately when an act is done, the law charges not only the act done but 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 and punishable."—Cunningham v. State, 49 Miss. 701; State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66.

5 People v. Murray, 67 Cal. 103, 6 Am. Cr. Rep. 54, 7 Pac. 178.

6 Bloch v. State, 161 Ind. 276, 68 N. E. 287; State v. Hughes, 76 Mo. 323; State v. Utley, 82 N. C. 556; Hayes v. State, 83 Tenn. (15 Lea) 64.

7 People v. Bush, 4 Hill (N. Y.) 133.

8 State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66.

9 State v. Utley, 82 N. C. 556; Clark v. State, 86 Tenn. 511, 8 S. W. 145.

10 As to stealing from person, see, infra, § 883.

indictment or information must allege an assault.[11] An allegation that the accused "with intent to steal the personal property of" a named individual, "being in her pocket and on her person," did "thrust, insert, put, and place his hand upon the dress and near the pocket" of the said individual, alleges an assault and is sufficiently precise and certain;[12] and charging that accused placed his hand in the pocket of the prosecutor, sufficiently charges that the pocket was a pocket in the clothing and wearing apparel of the prosecutor at the time of the alleged attempt.[13]

§ 824. INTENT TO STEAL. The intent of the accused to steal the property described is an essential element in the crime of larceny, and the indictment or information must allege, in some form, the intent of the accused to deprive the owner of the property.[1] At common law the allegation was required to be expressly made, and the old form of allegation has been said to be sufficient under the codes.[2] The intent of the accused is generally sufficiently alleged where it is charged that he "wilfully, feloniously,

11 Randolf v. Com., 6 Serg. & R. (Pa.) 398.

Charging that A "with force and arms unlawfully and wickedly did attempt to pick the pocket of one B, with intent then and there feloniously to steal, take and carry away the goods and chattels, moneys, and properties of the said B," was held to be fatally defective, because there can be no attempt to commit a crime without doing some act, and it is absolutely necessary for the indictment to state the act done, which is claimed to constitute the attempt, in order to give the accused an opportunity of disproving that he did the specific alleged act, and also to enable the court to determine whether what is claimed he did was an indictable offense.—Randolf v. Com., 6 Serg. & R. (Pa.) 398; State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66, 71.

12 Com. v. Bonner, 97 Mass. 587.

13 Com. v. Sherman, 105 Mass. 169.

1 ALA.—McCord v. State, 79 Ala. 269. ALASKA—Ex parte Dubuque, 1 Alaska 16. OKLA.—Sullivan v. Territory, 8 Okla. 499, 58 Pac. 650; Steil v. Territory, 12 Okla. 377, 14 Am. Cr. Rep. 479, 71 Pac. 653. TEX.—State v. Sherlock, 26 Tex. 106; Moore v. State, 74 Tex. Cr. Rep. 66, 166 S. W. 1153.

2 Yates v. State, 67 Ga. 770; Martin v. State, 67 Neb. 37, 93 N. W. 161.

etc., took and stole,"[3] or "feloniously took, stole," etc.,[4] and the simple allegation that the accused "stole" certain described property has been held, in some states, to be a sufficient allegation of the intent,[5] on the ground that the word "steal" imports a common-law felony and includes the intent.[6]

3 People v. Brown, 27 Cal. 500; State v. Allen, 34 Mont. 403, 87 Pac. 177.

Charging larceny "in that he then and there wilfully, unlawfully, and feloniously, and with the intent then and there to steal, did take, steal, carry, and drive away" a certain bay mare, sufficiently alleges the felonious intent, both at common law and under the statute.—State v. Allen, 34 Mont. 403, 87 Pac. 177.

4 CAL. — People v. Brown, 27 Cal. 500; People v. Lopez, 90 Cal. 569, 27 Pac. 427. GA.—Taylor v. State, 120 Ga. 484, 48 S. E. 158. IND.—Hamilton v. State, 142 Ind. 276, 41 N. E. 588. IOWA—State v. Griffin, 79 Iowa 568, 44 N. W. 813. ME.—State v. Leavitt, 66 Me. 440. MINN.—State v. Hackett, 47 Minn. 425, 28 **Am. St. Rep.** 380, 50 N. W. 472. MO.—State v. Dewitt, 152 Mo. 76, 58 S. W. 429. NEB.—Rema v. State, 52 Neb. 375, 72 N. W. 474. N. M. — Territory v. Garcia, 12 N. M. 87, 75 Pac. 34. N. Y.—People v. Ostrosky, 160 N. Y. Supp. 493. ORE.—State v. Minnick, 54 Ore. 86, 102 Pac. 605. PA.—Com. v. Butler, 144 Pa. St. 568, 24 Atl. 910. S. D.—State v. Halpin, 16 S. D. 172, 91 N. W. 606.

"Did unlawfully and wrongfully take and carry away with intent to steal," is sufficient. — Taylor v. State, 120 Ga. 484, 48 S. E. 158.

"Feloniously took," held sufficient.—Hamilton v. State, 142 Ind. 276, 41 N. E. 588.

"Feloniously took, stole, and carried away," held sufficient.—State v. Hackett, 47 Minn. 425, 28 **Am. St. Rep.** 380, 50 N. W. 472.

"Feloniously steal, take and carry away," held sufficient. — State v. Dewitt, 152 Mo. 76, 58 S. W. 429.

"Feloniously, wilfully, and with force and arms, stole, took," etc., held sufficient.—People v. Brown, 27 Cal. 500.

"Wilfully and feloniously did steal, take and drive away" certain described stock, held sufficient.—Rema v. State, 52 Neb. 375, 72 N. W. 474.

5 State v. Griffin, 79 Iowa 568, 44 N. W. 813; Gardner v. State, 55 N. J. L. 17, 26 Atl. 30; Halkem v. Com., 4 Va. (2 Va. Cas.) 4.

"Took, stole and carried away," is sufficient.—State v. Griffin, 79 Iowa 568, 44 N. W. 813.

6 ARK. — State v. Eldridge, 12 Ark. 608. CAL.—People v. Lopez, 90 Cal. 569, 27 Pac. 427. DEL.—State v. Fitzpatrick, 9 Houst. 586, 32 Atl. 1072. IOWA — State v. Chambers, 2 G. Greene 308; State v. Griffin, 79 Iowa 568, 44 N. W. 813. LA.—State v. Benjamin, 7 La. Ann. 47. MO.—State v. Casteel, 53 Mo. 124. N. J.—Randall v. State, 53 N. J. L. 485, 22 Atl. 45; Gardner v. State, 55 N. J. L. 17, 26 Atl. 30.

Intent to deprive the owner of his property, or of its value, is made a statutory element in some states,[7] and the additional element of intent to convert the same to the use of the accused is found in some statutes.[8] These statutory elements must be specifically alleged.[9] Charging an intent on the part of the accused to appropriate the

TENN.—State v. Shelton, 90 Tenn. 539, 18 S. W. 253.

[7] Sullivan v. Territory, 8 Okla. 499, 58 Pac. 650; Steil v. Territory, 12 Okla. 377, 14 **Am. Cr. Rep.** 479, 71 Pac. 653; Barbe v. Territory, 16 Okla. 562, 86 Pac. 61; State v. Sherlock, 26 Tex. 106; Ridgeway v. State, 41 Tex. 231; Harris v. State, 2 Tex. App. 102; Tallant v. State, 14 Tex. App. 234; Thompson v. State, 16 Tex. App. 74; Peralto v. State, 17 Tex. App. 578; Robinson v. State, 17 Tex. App. 589; Eaton v. State, (Tex.) 41 S. W. 604; Hendricks v. State, (Tex.) 56 S. W. 55.

Under Oklahoma statute charging feloniously stealing a cow, without alleging a design by the accused to convert it to his own use, is fatally defective.—Sullivan v. Territory, 8 Okla. 499, 58 Pac. 650.

An indictment for larceny which charges that the property described in the indictment was taken with the intent then and there, wilfully, maliciously, and feloniously to deprive the owner of the possession thereof, and which does not charge that the property was taken with intent to deprive another thereof, is not a sufficient charge of the crime of larceny under the statute.—Steil v. Territory, 12 Okla. 377, 14 **Am. Cr. Rep.** 479, 71 Pac. 653.

Charging accused with the unlawful and felonious intent to deprive the owner of the property stolen, and to convert the same to his own use, is a sufficient charge under the statute.—Barbe v. Territory, 16 Okla. 562, 86 Pac. 61.

Under Texas statute there must be an allegation that the intent was to deprive the owner of the stolen property "of the value of the same" (Peralto v. State, 17 Tex. App. 578), and also "with intent to appropriate to the use and benefit of him, the said" accused. —Hendricks v. State, (Tex.) 56 S. W. 55.

—Theft from person, sufficiently alleges intent to steal by an averment that the taking of money was with intent to deprive the owner of its value, and to appropriate the same to the use and benefit of the accused.—Eaton v. State, (Tex.) 41 S. W. 604.

[8] State v. Sherlock, 26 Tex. 106; Williams v. State, 12 Tex. App. 395; Jones v. State, 25 Tex. App. 621, 8 **Am. St. Rep.** 449, 8 S. W. 801.

[9] State v. Sherlock, 26 Tex. 106; Ridgeway v. State, 41 Tex. 231; Jones v. State, 12 Tex. App. 424; Jones v. State, 25 Tex. App. 621, 8 **Am. St. Rep.** 449, 8 S. W. 801; Chance v. State, 27 Tex. App. 441, 11 S. W. 723; Lawless v. State, (Tex.) 19 S. W. 676.

property taken to the use of the owner, is fatally defective.[10]

§ 825. Description of property stolen—In general. An indictment or information charging larceny must describe the article alleged to have been stolen with such certainty and particularity as to enable (1) the court to see that it is a subject of larceny;[1] (2) the jury to know that the property described in the indictment is the same as that referred to in the evidence;[2] (3) to identify the particular transaction and advise the accused with reasonable certainty of the property alleged to have been taken,[3] (4) and enable him to prepare to meet the charge on the trial;[4] (5) to bring the case under the prohibition of the particular statute under which the indictment or information is framed;[5] and (6) to enable the accused to plead a judgment of acquittal or conviction in bar of a subsequent

10 Lawless v. State, (Tex.) 19 S. W. 676.

Names same of accused and of owner, an indictment charging an intent to convert "to the use of the said M. B.," and M. B. being the name of the owner, also, the indictment was held good.—Brown v. State, 28 Tex. App. 379, 13 S. W. 150.

1 ALA. — Chisolm v. State, 45 Ala. 66. ARK.—State v. Parker, 34 Ark. 158, 36 Am. Rep. 5. CAL.—People v. Williams, 35 Cal. 671. IDA.—People v. Freeman, 1 Ida. 322. KAN.—State v. McAnulty, 26 Kan. 536. MASS.—Com. v. James, 18 Mass. (1 Pick.) 375. NEB.—Barnes v. State, 40 Neb. 545, 59 N. W. 125. N. C.—State v. Liles, 78 N. C. 496. N. Y.—People v. Jackson, 8 Barb. 637. WASH.—McCarty v. State, 1 Wash. 377; State v. Holmes, 9 Wash. 528, 37 Pac. 283. ENG.—R. v. Cox, 1 Car. & K. 494, 47 Eng. C. L. 494.

2 People v. Jackson, 8 Barb. (N. Y.) 637.

3 Bone v. State, 120 Ga. 866, 48 S. E. 356.

4 ALA.—Chisolm v. State, 45 Ala. 66. FLA.—Glover v. State, 22 Fla. 493. KAN.—State v. McAnulty, 26 Kan. 536. ME.—State v. Dawes, 75 Me. 51. MICH.—Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314. MONT. — Territory v. Shipley, 4 Mont 468, 4 Am. Cr. Rep. 491, 2 Pac. 313. NEB.—Barnes v. State, 40 Neb. 545, 59 N. W. 125. N. Y.—People v. Jackson, 8 Barb. 637. N. C.—State v. Nipper, 95 N. C. 653. S. C. — State v. Smart, 4 Rich. L. 356, 55 Am. Dec. 683. TENN.—Lewis v. State, 50 Tenn. (3 Heisk.) 333. TEX.—Thomas v. State, 2 Tex. App. 293.

5 Schamberger v. State, 68 Ala. 543; State v. Liles, 78 N. C. 496; State v. Bragg, 86 N. C. 687; State v. Thompson, 93 N. C. 537; State v. Shuler, 19 S. C. 140.

prosecution for the same offense.[6] A description in the language of the statute making the property a subject of larceny is generally sufficient.[7] A detailed and definite description of the article or property stolen should be given to the extent necessary to fully identify the property and the offense, and no more, because the description of the property is material and must be proved as alleged;[8] and where the property is described with greater particularity than is necessary, that portion which is unnecessarily particular can not be disregarded as surplusage.[9] Thus, an indictment charging the stealing of a book of a designated value, without giving the title of the book, is sufficient.[10] "A pair of shoes," of a specified value, is a sufficient description against a charge of being too general and not informing the court as to whether they are shoes for human beings, or for horses, or other animals;[11] but it has been said that a charge of stealing "a pair of boots" was not supported by proof of stealing two boots, both of which were for the same foot, each

6 ALA. — Chisolm v. State, 45 Ala. 66. FLA.—Glover v. State, 22 Fla. 493. LA.—State v. Edson, 10 La. Ann. 230; State v. Hoyer, 40 La. Ann. 745, 4 So. 899. MICH.—Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314. N. C.—State v. Nipper, 95 N. C. 653.

"One hundred and twenty-five pounds of upland or short cotton in the seed, of the value of five dollars, the property of" a person named, held to be a sufficient description.—Lindsey v. State, 9 Ga. App. 299, 70 S. E. 1114.

"One hundred pounds of cotton seed of the value of" a sum named, insufficient against the special demurrer calling for a more definite description. — Bright v. State, 10 Ga. App. 17, 72 S. E. 519.

7 State v. Wilson, 63 Ore. 344, Ann. Cas. 1914D, 646, 127 Pac. 980.

8 ALA.—Morris v. State, 97 Ala. 82, 12 So. 276. GA.—Crenshaw v. State, 64 Ga. 449; Robertson v. State, 97 Ga. 206, 22 S. E. 974. ME.—State v. Noble, 15 Me. 476; State v. Jackson, 30 Me. 29. MO.—State v. Babb, 76 Mo. 501. N. Y.—Alkenbrack v. People, 1 Den. 80. TENN.—Turner v. State, 50 Tenn. (3 Heisk.) 452. TEX. — Hill v. State, 41 Tex. 257; Rose v. State, 1 Tex. App. 401; Ranjel v. State, 1 Tex. App. 461; Scria v. State, 2 Tex. App. 297; Allen v. State, 8 Tex. App. 360; Statum v. State, 9 Tex. App. 273.

9 Alkenbrack v. People, 1 Den. (N. Y.) 80; Turner v. State, 50 Tenn. (3 Heisk.) 452.

10 State v. Logan, 1 Mo. 532.

11 Palmer v. State, 136 Ind. 393, 36 N. E. 130.

being from a different "pair;"[12] "Buck-skin" gloves alleged to have been stolen, is not supported by proof of a taking of "sheep-skin" gloves;[13] a charge of stealing a "Smith & Weston" revolver is not supported by evidence of the taking of a "Smith & Wesson" revolver;[14] and a charge of stealing a "woolen" sheet has been held not to be supported by proof of the taking of a sheet partly "woolen,"[15]—but these are extreme cases in which the soundness of the decision is questionable, and many parallel cases could be cited in which it was ruled otherwise; e. g., "cast-iron balance wheel" alleged to have been stolen, held to have been supported by evidence that the wheel had been converted into "old iron" by accused to facilitate removal;[16] "calf skin" alleged to have been stolen, held to be supported by evidence that the article taken was "kip skin;"[17] "strain cloth" alleged to have been stolen, held supported by evidence of the taking of a "strainer cloth";[18] "silver tea pot" alleged to have been stolen, held supported by proof of larceny of a "silver plated" tea pot;[19] "gold watch" alleged to have been stolen, held to be supported by evidence of the taking of what is known to the trade as a "filled case," consisting of an outside covering of gold filled in with a base metal,[20] and the like.

§ 826. —— CERTAINTY AND DEFINITENESS—COMMON AND GENERIC NAMES. The property alleged to have been stolen

12 State v. Harris, 3 Harr. (Del.) 359.

13 "One metal church bell" belonging to a named church, held sufficient against the special demurrer on the ground that it did not sufficiently specify the property.—Gibson v. State, 13 Ga. App. 67, 78 S. E. 829.

McGee v. State, 4 Tex. App. 625.

14 Morgan v. State, 61 Ind. 447.

15 Alkenbrack v. People, 1 Den. (N. Y.) 80.

16 Gettinger v. State, 13 Neb. 308, 14 N. W. 403.

17 State v. Campbell, 76 N. C. 261.

18 State v. Underwood, 77 N. C. 502.

19 Goodall v. State, 22 Ohio St. 203.

20 Glover v. State, 22 Fla. 493.

must be described with certainty to a common intent,[1] as above pointed out.[2] Where the property has a general or generic name under which it is generally known, a description by that name, that is, by the class to which it belongs,[3] stating the number of articles or animals taken, will be a sufficient description;[4] and where property or articles have acquired a well recognized name of their own in commercial language or in common parlance, they may be described by such common name[5]—e. g., "a parcel of oats;"[6] a quantity of "specimens of gold and silver ore," giving the weight;[7] a "bull tongue," for a peculiarly shaped plow-shear;[8] "eight cords of wood;"[9] "one book;"[10] "one hide;"[11] "one pair of shoes;"[12] "one metal church bell;"[13] "one trunk;" so many pounds of

1 People v. Jackson, 8 Barb. (N. Y.) 637.

2 See, supra, § 825.

3 Pfister v. State, 84 Ala. 432, 4 So. 395; Nordlinger v. United States, 24 App. D. C. 406, 70 L. R. A. 227.

4 CAL.—People v. Stanford, 67 Cal. 27, 7 Pac. 4. GA.—Nightengale v. State, 94 Ga. 395, 21 S. E. 221. IDA.—People v. Freeman, 1 Ida. 322; State v. Collett, 9 Ida. 615, 75 Pac. 723. IND.—Williams v. State, 25 Ind. 150. IND. TER.—Oats v. United States, 1 Ind. Ter. 152, 38 S. W. 673. MD.—State v. Dowell, 3 Gill & J. 310. MASS.—Com. v. Brettun, 100 Mass. 207. MINN.—State v. Friend, 47 Minn. 449, 50 N. W. 692. MO.—State v. Logan, 1 Mo. 532. N. C.—State v. Clark, 30 N. C. (8 Ired. L.) 226; State v. Martin, 82 N. C. 672. S. C.—State v. Smart, 4 Rich. L. 356, 55 Am. Dec. 683. TENN.—State v. Longbottoms, 30 Tenn. (11 Humph.) 39; Baldwin v. State, 33 Tenn. (1 Sneed) 411; Pyland v. State, 36 Tenn. (4 Sneed) 357; Lewis v. State, 50 Tenn. (3 Heisk.) 333. TEX.—Dignowitty v. State, 17 Tex. 531, 67 Am. Dec. 670.

5 Dignowitty v. State, 17 Tex. 531, 67 Am. Dec. 670.

6 State v. Brown, 12 N. C. (1 Dev. L.) 137, 17 Am. Dec. 562.

7 People v. Freeman, 1 Ida. 322.

8 State v. Clark, 30 N. C. (8 Ired. L.) 226.

9 State v. Labaune, 46 La. Ann. 548, 15 So. 172.

"A lot of cord wood," of a stated value, held demurrable for want of a sufficient description.—Walthour v. State, 114 Ga. 75, 14 Am. Cr. Rep. 472, 39 S. E. 872.

10 Turner v. State, 102 Ind. 425, 6 Am. Cr. Rep. 360, 1 N. E. 869; State v. Logan, 1 Mo. 532. See State v. King, 31 La. Ann. 179; State v. Carter, 33 La. Ann. 1214.

11 State v. Dowell, 3 Gill & J. (Md.) 310.

12 Palmer v. State, 136 Ind. 393, 36 N. E. 130.

13 Churchwell v. State, 117 Ala. 124, 23 So. 72.

"One shovel," of the value of

"iron" or "tin," for ingots of iron or ingots of tin;[14] "ten yards of brocade silk;"[15] "three horseshoes;"[16] "two bales of cotton,"[17] and the like. But a description of money stolen as "one hundred twenty-five dollars," without an allegation as to the value, or of any excuse for want of greater particularity,[18] held to be fatally defective because it was not certain whether the larceny charged was that of money or other personal property.[19]

§ 827. —— DEFECTIVE AND UNKNOWN DESCRIPTION. A description of the property stolen which is defective[1] or indefinite[2] to such an extent as not to fully designate and identify such property, is insufficient,[3] and may be taken advantage of by motion in arrest of judgment. In those cases in which a particular and definite description of the property can not be given with the certainty required by the rules above laid down, an excuse must be given for the omission[4] by alleging in the indictment or information

one dollar, too general.—Melvin v. State, 120 Ga. 490, 48 S. E. 198.

14 R. v. Mansfield, 1 Car. & M. 140, 41 Eng. C. L. 81.

15 Harrington v. State, 76 Ind. 12.

16 Dougherty v. State, 20 Ind. 442.

17 Peters v. State, 100 Ala. 10, 14 So. 896.

18 As to excuse for failure to particularly describe property stolen, see, infra, § 827, footnotes 4 and 5.

19 Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314.

As to description of money, see, infra, §§ 844-848.

1 "Trunk or chest" is bad for uncertainty, the words not being synonymous.—See Potter v. State, 39 Tex. 388.

2 "Neat stock or beeves" is uncertain for the reason that the two words are not synonymous, and all "neat" stock are not "beeves." —Castello v. State, 36 Tex. 324.

3 ARK.—McCowan v. State, 58 Ark. 17, 22 S. W. 955. GA.—Melvin v. State, 120 Ga. 490, 48 S. E. 198. N. H.—Lord v. State, 20 N. H. 404, 51 Am. Dec. 321. N. C.—State v. McLeod, 50 N. C. 318; State v. Jenkins, 78 N. C. 478; State v. Patrick, 79 N. C. 655, 28 Am. Rep. 340; State v. Hill, 79 N. C. 656; State v. Crumpler, 88 N. C. 647. WIS.—State v. Morey, 2 Wis. 494, 60 Am. Dec. 439.

4 IND.—State v. Hoke, 84 Ind. 137. KAN.—State v. Tilney, 38 Kan. 714, 17 Pac. 606. ME.—State v. Dawes, 75 Me. 51. MONT.—Territory v. Shipley, 4 Mont. 468, 4 Am. Cr. Rep. 491, 2 Pac. 313. W. VA.—State v. McCung, 35 W. Va. 280, 13 S. E. 654.

that a better description is to the grand jury, or to the prosecutor—as the case may be,—unknown.[5]

§ 828. —— PARTICULAR KINDS OF PROPERTY—IN GENERAL. We have already seen that in a prosecution charging larceny the goods alleged to have been stolen must be described with substantial accuracy,[1] so that its identity may be unquestionable, and that the accused may be enabled to plead a judgment of acquittal or conviction as a bar to subsequent prosecution for the same offense,[2] and that when the required degree of certainty can not be given, an adequate excuse for the omission must be set out in the indictment or information;[3] the statement as to want of information is not traversable.[4] In some jurisdictions, where several articles of the same kind are taken at the same time, it is held not to be necessary to state the number, or to allege the value of each article,

5 ALA.—Du Bois v. State, 50 Ala. 139. CAL.—People v. Bogart, 36 Cal. 245. IND.—Hart v. State, 55 Ind. 599; McQueen v. State, 82 Ind. 72; State v. Hoke, 84 Ind. 137; Riggs v. State, 104 Ind. 261, 6 Am. Cr. Rep. 394, 3 N. E. 886. ME.—State v. Dawes, 75 Me. 51. MASS.—Com. v. Sawtelle, 65 Mass. (11 Cush.) 142; State v. Duffey, 65 Mass. (11 Cush.) 145; Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 Am. Dec. 666. MINN.—State v. Taunt, 16 Minn. 109. MONT.—Territory v. Shipley, 4 Mont. 468, 4 Am. Cr. Rep. 491, 2 Pac. 313; Territory v. Bell, 5 Mont. 562, 6 Pac. 60. N. Y.—Haskins v. People, 16 N. Y. 344; People v. Dimick, 41 Hun 616, 5 N. Y. Cr. Rep. 185; reversed on another point, 107 N. Y. 13, 14 N. E. 178. TEX.—Statum v. State, 9 Tex. App. 273. WASH.—State v. Burns, 19 Wash. 52, 52 Pac. 316.

1 See, supra, §§ 825 and 826; State v. Fenn, 41 Conn. 590, 1 Am. Cr. Rep. 378.

On demand through special demurrer accused is entitled to have a definite description of the property alleged to have been stolen.—Gibson v. State, 13 Ga. App. 76, 78 S. E. 829. See Roberts v. State, 83 Ga. 369, 8 Am. Cr. Rep. 474.

2 See, supra, § 825; State v. Fenn, 41 Conn. 590, 1 Am. Cr. Rep. 378; Ayers v. State, 3 Ga. App. 305, 59 S. E. 924.

3 See, supra, § 825; Enson v. State, 58 Fla. 37, 18 Ann. Cas. 940, 50 So. 948; State v. Williams, 118 Iowa 494, 14 Am. Cr. Rep. 570, 92 N. W. 652; Woodring v. Territory, 14 Okla. 250, 2 Ann. Cas. 855, 78 Pac. 85.

4 State v. Taunt, 16 Minn. 109; Woodring v. Territory, 14 Okla. 250, 2 Ann. Cas. 855, 78 Pac. 85.

it being sufficient to allege the larceny of "a quantity,"[5] or of "divers" or "divers and sundry," articles of an aggregate value;[6] but this rule does not seem to apply to money.[7] It is thought to be of practical utility to show the applications of the general rules heretofore laid down to the various kinds of property which are made the subject of larceny, with some of the illustrative cases from the various jurisdictions.

§ 829. ——— ANIMALS DOMESTICATED—IN GENERAL. Domesticated animals may generally be described by the generic name of the class to which they belong, or the common name by which generally known, without more explicit description,[1]—e. g., as cow,[2] bull,[3] mare,[4] horse,[5]

5 Com. v. O'Connell, 94 Mass. (12 Allen) 451.

6 Territory v. Anderson, 6 Dak. 30, 50 N. W. 124; Com. v. Sawtelle, 65 Mass. (11 Cush.) 142; Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 Am. Dec. 666; Com. v. Butts, 124 Mass. 449; Com. v. Collins, 138 Mass. 483, 5 Am. Cr. Rep. 345; State v. Taunt, 16 Minn. 109; People v. Evans, 69 Hun 226, 10 N. Y. Cr. Rep. 469, 23 N. Y. Supp. 717; affirmed, 143 N. Y. 638, 37 N. E. 823.

7 See, infra, §§ 844-848.

1 ALA.—Stollenwerk v. State, 55 Ala. 142; Washington v. State, 58 Ala. 355; Lavender v. State, 60 Ala. 60. CAL.—People v. Soto, 49 Cal. 67; People v. Pico, 62 Cal. 50; People v. Stanford, 64 Cal. 27, 28 Pac. 106; People v. Machado, 6 Cal. Unrep. 600, 63 Pac. 66. FLA.—Mizell v. State, 38 Fla. 20, 20 So. 769; Jones v. State, 64 Fla. 92, L. R. A. 1915B, 71, 59 So. 892. GA.—Robertson v. State, 97 Ga. 206, 22 S. E. 974. LA.—State v. Carter, 33 La. Ann. 1214; State v. Bassett, 34 La. Ann. 1108; State v. Stelly, 48 La. Ann. 1478, 21 So. 89. NEB.—Barnes v. State, 40 Neb. 545, 59 N. W. 125. ORE.—State v. Brinkley, 55 Ore. 134, 104 Pac. 893; rehearing denied, 105 Pac. 708. TENN.—Wiley v. State, 43 Tenn. (3 Coldw.) 362. TEX.—State v. Mansfield, 33 Tex. 129; Lunn v. State, 44 Tex. 85; Grant v. State, 2 Tex. App. 164; Davis v. State, 23 Tex. App. 210, 4 S. W. 590.

2 Whatson v. State, 125 Ark. 597, 187 S. W. 434; People v. Machado, 60 Cal. Unrep. 600, 63 Pac. 66; Wilburn v. Territory, 10 N. M. 402, 14 Am. Cr. Rep. 500, 62 Pac. 968.

See, also, infra, § 830.

3 Peeples v. State, 46 Fla. 101, 4 Ann. Cas. 870, 35 So. 223.

See, also, infra, § 830.

4 State v. Rathbone, 8 Ida. 161, 67 Pac. 186; Beauchamp v. Com., 4 Ky. L. Rep. 27; State v. Shuck, 38 Wash. 270, 80 Pac. 444.

5 State v. Colbert, 9 Ida. 608, 75 Pac. 271; State v. Blair, 63 W. Va. 635, 60 S. E. 795.

steer,[6] calf,[7] cattle,[8] hog,[9] mule,[10] and the like. It is not essential to describe the animal by ear-marks,[11] color,[12] or the like.[13] The description of an animal by the generic name, or by the name under which usually known, usually means living and not dead animals, even in the case of animals of a kind ordinarily used for human food.[14] In those jurisdictions in which a full description of the property alleged to have been stolen is required, an indictment or information which avers that a better description can not be given because unknown to the grand jury or to the prosecutor, will be sufficient, and that declaration can not be traversed by the accused by introducing evidence tending to show that the jury or the prosecutor did have, or could have obtained, a more perfect description.[15] Where the indictment or information gives a fuller de-

6 Oxier v. United States, 1 Ind. Ter. 85, 38 S. W. 331.

7 People v. Warren, 130 Cal. 683, 63 Pac. 86; Oats v. United States, 1 Ind. Ter. 152, 38 S. W. 673; State v. Brinkley, 55 Ore. 134, 104 Pac. 893; rehearing denied, 105 Pac. 708.

See, infra, § 830.

8 Hubotter v. State, 32 Tex. 479; Matthews v. State, 4 Tex. Cr. Rep. 98, 51 S. W. 915; Walton v. State, 41 Tex. Cr. Rep. 454, 55 S. W. 566; Warren v. State, (Tex.) 105 S. W. 817.

Compare: State v. Brookhouse, 10 Wash. 87, 88 Pac. 862, cited infra, § 830, footnote 6, and text going therewith.

9 State v. Stelly, 48 La. Ann. 1478, 21 So. 89; Guerrero v. State, 46 Tex. Cr. Rep. 445, 80 S. W. 1001.

10 Territory v. Valles, 15 N. M. 228, 103 Pac. 984.

11 Perry v. State, 37 Ark. 54; Mizell v. State, 38 Fla. 20, 20 So. 769; State v. Charlot, 8 Rob. (La.) 529.

12 People v. Smith, 15 Cal. 409; State v. Gilbert, 13 Vt. 647.

13 ARK.—Perry v. State, 37 Ark. 54. CAL.—People v. Stanford, 64 Cal. 27, 28 Pac. 106. FLA.—Mizell v. State, 38 Fla. 20, 20 So. 769. MISS.—Jones v. State, 51 Miss. 718, 24 Am. Rep. 568. TENN.—Turner v. State, 50 Tenn. (3 Heisk.) 452. TEX.—Allen v. State, 8 Tex. App. 360.

14 See, infra, § 831.

15 Woodring v. Territory, 14 Okla. 250, 2 Ann. Cas. 855, 78 Pac. 85. See State v. Taunt, 16 Minn. 109.

scription than is required, such surplus description becomes material, and must be established by the evidence.[16]

§ 830. ——— ——— ——— CATTLE. As to the requisites and sufficiency of the description of the property taken on a charge of the larceny of "cattle," the cases are not harmonious. It has been said that an indictment or information charging the larceny of animals of the Bovine family may properly describe them as "cattle,"[1] specifying the number, and that this will be sufficient,[2] without specifying the particular cattle;[3] but that the generic term "cattle" need not be used in an indictment or information designating the class to which the animal belongs,—e. g., cow, steer, ox, and the like.[4] On the other hand, it has been said that the term "cattle" is a generic expression which includes all domestic quadrupeds collectively which are made a subject of larceny,[5] and that an indict-

16 Robertson v. State, 97 Ga. 206, 22 S. E. 974; Ranjel v. State, 1 Tex. App. 461.

1 See, supra, § 829, footnote 8.

For forms of indictment for larceny of domestic animals, see Forms Nos. 1454-1462.

"Neat cattle" in statute, omission of "neat" does not vitiate.—Hubotter v. State, 32 Tex. 479.

As to "neat cattle," see footnote 15, this section.

2 CAL.—People v. Littlefield, 5 Cal. 355; People v. Pico, 62 Cal. 50. FLA.—Mizell v. State, 38 Fla. 20, 20 So. 769. TENN.—Wiley v. State, 43 Tenn. (3 Coldw.) 362. TEX.—Davis v. State, 23 Tex. 210, 4 S. W. 590; Matthews v. State, 41 Tex. Cr. Rep. 98, 51 S. W. 915 (one head of cattle); Walton v. State, 41 Tex. Cr. Rep. 454. 55 S. W. 566 (twenty head of cattle); Warren v. State, 105 S. W. 817.

Compare: State v. Brookhouse, 10 Wash. 87, 38 Pac. 862, discussed footnote 6, this section, and text going therewith.

"Cattle," without specifying the number taken, is insufficient.—Matthews v. State, 39 Tex. Cr. Rep. 553, 48 S. W. 189.

"One head of cattle" said to be a sufficient description in Matthews v. State, 41 Tex. Cr. Rep. 98, 51 S. W. 915.

3 People v. Littlefield, 5 Cal. 355; Robertson v. State, 1 Tex. App. 311.

4 Robertson v. State, 1 Tex. App. 311.

5 State v. Lawn, 80 Mo. 241; State v. Bowers, (Mo.) 1 S. W. 288; State v. Brookhouse, 10 Wash. 87, 38 Pac. 862.

ment merely charging the larceny of "twenty-five head of cattle" would be sustained by showing the taking of twenty-five head of horses as well as by showing the taking of twenty-five head of "steers," and for that reason is insufficient for indefiniteness and uncertainty.[6] We have already seen that, in some jurisdictions, a full description of the property alleged to have been stolen is required to be given in the indictment or information, or the failure to do so legally excused.[7] In all such jurisdictions, the simple description of the animal or animals stolen as "cattle," it is thought, will not be regarded as sufficient.

Instances of sufficient description by the common name by which an animal of the bovine species is known, alleged to have been stolen, among others, are "beef,"[8] "beef steer,"[9] "one beef cattle,"[10] "beeves,"[11] "bull,"[12]

6 State v. Brookhouse, 10 Wash. 87, 38 Pac. 862 (Hoyt and Scott, JJ., dissenting). See State v. Enslow, 10 Iowa 115; State v. Hambleton, 22 Mo. 452; Ohio & M. R. Co. v. Bruhaker, 47 Ill. 462; United States v. Mattock, 2 Sawy. 148, Fed. Cas. No. 15744.

7 See, supra, § 829; Woodring v. Territory, 14 Okla. 250, 2 Ann. Cas. 855, 78 Pac. 85.

8 State v. Baden, 42 La. Ann. 295, 7 So. 582.

"A beef" or "one beef" sufficient description for stealing an animal of the cow kind, because those words do not necessarily import beef dressed for the market.—Morey v. State, 2 Tex. App. 350.

9 Robertson v. State, 1 Tex. App. 311.

"One beef steer" sufficient description.—Short v. State, 36 Tex. 644.

10 Duval v. State, 8 Tex. App. 370.

11 **Either alive or dead.**—State v. Baden, 42 La. Ann. 295, 7 So. 582. But, see, infra, § 831.

"Two beeves, the same being cattle," a sufficient description of the property.—Hubotter v. State, 32 Tex. 479.

"Three head of neat stock or beeves" is not sufficiently certain for the reason that all "neat stock" are not beeves.—Castello v State, 36 Tex. 324.

12 A description of the property as "one bull and of the goods and chattels and property of one Parker," is not so vague and indefinite as to require the quashing of the indictment.—Peeples v. State, 46 Fla. 101, 4 Ann. Cas. 870, 35 So. 223.

"calves,"[13] "cow,"[14] "neat cattle,"[15] "live-stock,"[16]

[13] CAL.—People v. Warren, 130 Cal. 683, 63 Pac. 86. IND. TER.—Oats v. United States, 1 Ind. Ter. 152, 38 S. W. 673. N. M.—State v. Klasner, 19 N. M. 474, **Ann. Cas.** 1917D, 824, 145 Pac. 679. ORE.—State v. Brinkley, 55 Ore. 134, 104 Pac. 893; rehearing denied, 105 Pac. 708; Grant v. State, 3 Tex. App. 1.

"Calf" sufficiently described under statute providing that when the larceny involves the taking of an animal, the indictment or information is sufficiently certain if it describes the animal by the common name of its class.—State v. Brinkley, 55 Ore. 134, 104 Pac. 893; rehearing denied, 105 Pac. 708.

"Calf of the neat cattle kind" a sufficient description.—Grant v. State, 3 Tex. App. 1.

"Nineteen head of calves," not duplicitous.—State v. Klasner, 19 N. M. 474, **Ann. Cas.** 1917D, 824, 145 Pac. 679.

As to duplicity, see, infra, § 888.

[14] ARK.—Whatson v. State, 125 Ark. 597, 187 S. W. 434. CAL.—People v. Machado, 6 Cal. Unrep. 600, 63 Pac. 66. MO.—State v. Crow, 107 Mo. 341, 17 So. 745. N. M.—Wilburn v. Territory, 10 N. M. 402, 14 **Am. Cr. Rep.** 500, 62 Pac. 968.

"Certain cattle, to wit, a cow" is a sufficient description under a statute making the stealing of "neat cattle" grand larceny.—State v. Crow, 107 Mo. 341, 17 So. 745.

"Cow" for "bull" is an insufficient allegation of a bull.—State v. McMinn, 34 Ark. 160.

"Cow" for "heifer" has been held to be a sufficient description on the theory that the greater includes the less (Parker v. State, 39 Ala. 365; People v. Soto, 49 Cal. 67; State v. Crow, 107 Mo. 341, 17 S. W. 745), although a contrary doctrine is held in R. v. Cook, 1 Leach C. C. 105; and it is said in Garvin v. State, 52 Miss. 207, that an indictment charging the larceny of a heifer will not be supported by proof of the larceny of a cow.

"One cow (bull)" is sufficient to support a conviction on evidence showing the theft of a bull.—State v. Haller, 119 Ark. 503, 177 S. W. 1138.

[15] State v. Hoffman, 53 Kan. 700, 37 Pac. 138; State v. Dewitt, 152 Mo. 76, 58 S. W. 429; Territory v. Christman, 9 N. M. 582, 58 Pac. 343; State v. Murphy, 39 Tex. 46.

"One head of neat cattle, to wit, a 'steer,'" sufficient description.—State v. Mumford, 70 Kan. 858, 79 Pac. 669.

"Neat cattle, to wit, one beef," sufficient description.—State v. Garrett, 34 Tex. 674.

"Neat cattle" named in statute, indictment not insufficient because omitting the word "neat."—Hubotter v. State, 32 Tex. 479.

[16] **"Live-stock,"** as to sufficiency of as a description in an indictment, see State v. Hill, 79 N. C. 656.

"ox,"[17] "oxen,"[18] "steers,"[19] "yearling,"[20] and the like. And it has been said that a description as "a female animal of the bovine species, nearly two years old," etc., is sufficient.[21]

§ 831. ———— Dead animals. The general rule is that an animal, the subject of larceny, charged to have been stolen, the law presumes it to have been alive at the time of the taking, and if it was not alive, it must be described as dead, because if it is not so described, evidence of the taking of a dead animal or carcass can not be introduced in support of the indictment or information;[1] and

17 **"Ox"** sufficient description under statute against theft of "cattle." — Parchman v. State, 44 Tex. 192.

18 Musquez v. State, 41 Tex. 227; Parchman v. State, 44 Tex. 192; Henry v. State, 45 Tex. 84; Camplin v. State, 1 Tex. App. 108; Robertson v. State, 1 Tex. App. 311.

"Oxen" sufficient under a statute punishing theft of "cattle."—Henry v. State, 45 Tex. 84.

19 IND. TER.—Oxier v. United States, 1 Ind. Ter. 85, 38 S. W. 331. KAN.—Wessels v. Territory, 1 Kan. 100. MO.—State v. Lawn, 80 Mo. 241; State v. Bowers, 1 S. W. 288. TEX.—State v. Lange, 22 Tex. 491; State v. Earp, 41 Tex. 487.

"Certain cattle, to wit, one steer," held to be a sufficient description.—State v. Lawn, 80 Mo. 241; State v. Bowers, (Mo.) 1 S. W. 288.

"Steer" charged to have been stolen, the allegation is not supported by proof of the larceny of a cow or a bull.—Territory v. Marinez, 5 Ariz. 55, 44 Pac. 1089; State v. Royster, 65 N. C. 539.

"Two steers or working cattle," sufficient after judgment. — Wessels v. Territory, 1 Kan. 100.

20 Berryman v. State, 45 Tex. 1.

"Yearling" sufficient description under statute punishing theft of "cattle." — Berryman v. State, 45 Tex. 1.

Contra: Stollenwerk v. State, 55 Ala. 142.

21 Jones v. State, 64 Fla. 92, L. R. A. 1915B, 71, 59 So. 892.

"An animal of the female sex, and the species of animals known as 'cattle,'" sufficient description of stealing a cow.—Nightengale v. State, 94 Ga. 395, 21 S. E. 221.

1 Com. v. Beaman, 74 Mass. (8 Gray) 497; R. v. Rough, 2 East P. C. 607; R. v. Halloway, 1 Car. & P. 128, 11 Eng. C. L. 342; R. v. Edwards, 1 Russ. & R. C. C. 497.

Objection to the indictment for such insufficiency because of indefiniteness and uncertainty must be taken timely in the trial court; it will be too late to present the question in the first instance on appeal.—State v. Jenkins, 51 N. C. (6 Jones L.) 19.

this rule is said to apply even in the cases in which the animal is known by the same name whether alive or dead,[2] although there are some cases to the contrary;[3] and an exception to the rule has been made in a Delaware case in respect to animals feræ naturæ,[4] a case of doubtful soundness, because it is held differently in what seems to be better reasoned cases.[5]

"Meat" charged to have been stolen, the allegation is insufficient because of indefiniteness and uncertainty, the generic term "meat" applying alike to all the flesh of dead "food animals" and to all kinds of provisions fit for the sustenance of man.[6] An indictment or information charging the stealing of "meat" should indicate the class of animal from whose carcass it was cut. The rule above announced does not apply to meat which, by its very name or nature, indicates the class of animal from whose carcass it was taken,—e. g., "bacon,"[7] "ham," or "boar's head."[8]

2 Com. v. Beaman, 74 Mass. (8 Gray) 497; State v. Kidder, 78 N. C. 481; R. v. Hundsdon, 2 East. P. C. 611.

3 State v. Donovan, 1 Houst. Cr. Cas. (Del.) 43 (see comment on this case in next note); State v. Baden, 42 La. Ann. 295, 7 So. 582; Walker v. State, 3 Tex. App. 70.

"A hog" may mean a dead or a live hog.—Walker v. State, 3 Tex. App. 70.

"One beef" may mean either a live or a dead animal of the bovine species.—State v. Baden, 42 La. Ann. 295, 7 So. 582.

See, also, supra, § 830, footnotes 9-11.

4 **"A shad,"** on charge of stealing fish, may be either a dead or a live fish, has been held in Delaware (State v. Donovan, 1 Houst. Cr. Cas. 43), following R. v. Puckering, 1 Moo. C. C. 242, which last case is commented on and the doctrine denied in Com. v. Beaman, 74 Mass. (8 Gray) 497.

5 **"Partridge"** charged to have been stolen, the bird must be described as being alive or dead (R. v. Rough, 2 East. P. C. 607), and where charged to have been dead, evidence of stealing a live bird will not support the allegation.—R. v. Roe, 11 Cox C. C. 554.

6 State v. Patrick, 79 N. C. 655, 28 Am. Rep. 340; State v. Morey, 2 Wis. 494, 60 Am. Dec. 439.

7 State v. Jenkins, 78 N. C. 478. The word "meat" is used in the syllabus and the report of this case, but the word "bacon" should have been used, as that word appears in the original papers on file in the case, is declared in State v. Patrick, 79 N. C. 655, 28 Am. Rep. 340.

8 R. v. Gallears, 1 Den. C. C. 501. See, also, post, § 839, footnote 4.

§ 832. ——— ——— ——— Dogs.[1] Cuvier asserted that the dog was, perhaps, necessary for the establishment of civil society, and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. The poet Otway has said of dogs:

> They are honest creatures,
> And ne'er betray their master, never fawn
> On any they love not.

And it has been said[2] that dogs and cats, even in a state of domestication, never wholly lose their wild natures and therefore, although a man may have a right of property in a dog such as to maintain trespass or trover for unlawfully taking or destroying it, yet he can have no absolute and valuable "property" therein which could be the subject of prosecution for larceny at common law.[3] But having become thoroughly reclaimed from the wild state and domesticated, and become useful to man, dogs have, by judicial decision, and by statute, been recognized as "property" and by statute made the objects of larceny

1 Forms of indictment for stealing dog, see Forms Nos. 1463, 1464.

2 Blair v. Forehand, 100 Mass. 136, 1 Am. Rep. 94.

3 ALA.—White v. Brantley, 37 Ala. 430; Ward v. State, 48 Ala. 161, 17 Am. Rep. 31. ARK.—Hayward v. State, 4 Ark. 479. CAL.—Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219. GA. — Jemison v. Southwestern R. Co., 75 Ga. 444, 58 Am. Rep. 476; Patton v. State, 93 Ga. 111, 24 L. R. A. 732, 19 S. E. 734. IND. — Mitchell v. Williams, 27 Ind. 62; State v. Doe, 79 Ind. 9, 41 Am. Rep. 599. KY.—Com. v. Hazelwood, 84 Ky. 681, 2 S. W. 489. ME.—State v. Harriman, 75 Me. 562, 46 Am. Rep. 423. MASS.—Blair v. Forehand, 100 Mass. 136, 1 Am. Rep. 94. N. H.—Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573; State v. McDuffie, 34 N. H. 523, 69 Am. Dec. 516. N. Y.—People v. Campbell, 4 Park. Cr. Rep. 386; People ex rel. Shand v. Tighe, 9 Misc. 607, 30 N. Y. Supp. 368. N. C.—State v. Holder, 81 N. C. 527, 31 Am. Rep. 517; Mowery v. Salisbury, 82 N. C. 175. OHIO—State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772. PA.—Findley v. Bear, 8 Serg. & R. 571. S. C.—State v. Langford, 55 S. C. 322, 74 Am. St. Rep. 746, 33 S. E. 370. TENN.—State v. Brown, 68 Tenn. (9 Baxt.) 53, 40 Am. Rep. 81. TEX.—State v. Marshall, 13 Tex. 55. ENG.—R. v. Robinson, Bell C. C. 34.

where subject to taxation.[4] Particularly under those statutes defining personal property as "goods and chattels," and punishing as larceny the taking thereof with criminal intent, a dog has been held to be a subject of larceny.[5] An indictment or information charging the larceny of such an animal, describing it as "a dog" will be sufficiently definite, if good in other respects.[6]

§ 833. ——— ——— ——— ESTRAYS. An indictment or information charging the larceny of a horse which was

4 **Dogs as property and subject of larceny** both are discussed in the following, among other cases: ALASKA—In re Burkell, 2 Alaska 120. CONN.—Woolf v. Chalker, 31 Conn. 121, 81 **Am. Dec.** 175. DEL.—State v. Butler, 2 Penn. 127, 43 Atl. 480. D. C.—Washington (Mayor of City of) v. Meigs, 1 McA. 53, 29 **Am. Rep.** 578. GA.—Patton v. State, 93 Ga. 111, 24 **L. R. A.** 732, 19 S. E. 734. IND.—Kinsman v. State, 77 Ind. 132. KAN.—Harrington v. Miles, 11 Kan. 480, 15 **Am. Rep.** 355. KY.—Com. v. Hazelwood, 84 Ky. 681, 2 S. W. 489. MICH.—Heisrodt v. Hackett, 34 Mich. 283, 22 **Am. Rep.** 529; Rockwell v. Circuit Judge, 133 Mich. 12, 94 N. W. 378. N. Y.—Mullaly v. People, 86 N. Y. 365, affirming 1 N. Y. Cr. Rep. 351; People v. Malony, 1 Park. Cr. Rep. 593; People v. Campbell, 4 Park. Cr. Rep. 386; People ex rel. Longwell v. McMaster, 10 Abb. Pr. N. S. 132; People ex rel. Shand v. Tighe, 9 Misc. 607, 30 N. Y. Supp. 368; Laverty v. Hogan, 2 N. Y. City Ct. Rep. 197; affirmed, 13 Daly 533. OHIO—State v. Yates, 10 Ohio Dec. 182, 19 Week. L. Bul. 150, 37 Alb. L. J. 232. PA.—Com. v. Depuy, 148 Pa. St. 201, 23 Atl. 896. R. I.—Harris v. Eaton, 20 R. I. 81, 34 Atl. 308. S. C.—State v. Langford, 55 S. C. 322, 74 **Am. St. Rep.** 746, 33 S. E. 370. TENN.—Weathley v. Harris, 36 Tenn. (4 Sneed) 468, 70 **Am. Dec.** 258; State v. Brown, 68 Tenn. (9 Baxt.) 53, 40 **Am. Rep.** 81. TEX.—Hurley v. State, 30 Tex. App. 333, 28 **Am. St. Rep.** 916, 17 S. W. 455. ENG.—R. v. Helps, 3 Maule & S. 331, 105 Eng. Repr. 636.

5 Hamby v. Samson, 105 Iowa 112, 67 **Am. St. Rep.** 285, 40 **L. R. A.** 508, 74 N. W. 918; State v. Brown, 68 Tenn. (9 Baxt.) 53, 40 **Am. Rep.** 81.

6 **Describing as "dog"** in indictment charging larceny is frequently met with in the cases, but it is not found that the sufficiency of such description has ever been questioned. Such a description occurs in the following cases: Ward v. State, 48 Ala. 161, 17 **Am. Rep.** 31; State v. Holder, 81 N. C. 527, 31 **Am. Rep.** 517; State v. Lymus, 26 Ohio St. 400, 20 **Am. Rep.** 772; State v. Langford, 55 S. C. 322, 74 **Am. St. Rep.** 746, 33 S. E. 370; Hurley v. State, 30 Tex. App. 333, 28 **Am. St. Rep.** 916, 17 S. W. 455 ("did then and there forcibly steal, take and carry away from the possession of Charles Perner a domesticated

an estray[1] need not describe the property as coming within the estray law.[2] Charging that accused took up and traded off an estray bay gelding of a particular brand and value, is a sufficient description of the property;[3] but charging that the animal in question is one "coming within the estray laws," is not equivalent to charging that it was or is an estray, and is for that reason insufficient.[4]

§ 834. ——— ——— ——— HOGS OR SWINE. In those states in which the statute makes it an offense to steal a hog, an indictment or information charging that the accused stole "a certain hog,"[1] is a sufficient description of the property alleged to have been stolen;[2] identifying the individ-

animal, to wit, one dog, of the value of fifty dollars").

1 **As to allegation of ownership** of an estray alleged to have been stolen, see, infra, § 876.

2 McGee v. State, 43 Tex. 662.

As to larceny of estrays, see McKinney v. State, 12 Ala. App. 155, 68 So. 518; Dansby v. United States, 2 Ind. Ter. 456, 51 S. W. 1083; Palmer v. State, 70 Neb. 136, 97 N. W. 235; Crockford v. State, 73 Neb. 1, 119 Am. St. Rep. 876, 102 N. W. 70; United States v. Cerna, 21 Philippine 144; Gosler v. State, (Tex.) 56 S. W. 51; Baxter v. State, (Tex.) 43 S. W. 87; Landrette v. State, 44 Tex. Cr. Rep. 239, 70 S. W. 758.

3 State v. Dunham, 34 Tex. 675. See State v. Ivy, 33 Tex. 646.

4 State v. Meschac, 30 Tex. 518.

1 **"Hog,"** in its narrower sense, means a gelded male animal of the swine family, a barrow hog; but in its broader sense, and according to common usage, includes pig, sow, barrow and boar. See Cent. Dict.

As to forms of indictment for larceny of domestic animals, see Forms Nos. 1454-1462.

"Hog" may refer either to a dead or a live animal of the swine species. See, supra, § 831, footnote 2.

2 ALA. — Lavender v. State, 60 Ala. 60. CAL.—People v. Stanford, 64 Cal. 27, 28 Pac. 106. GA.—Alderman v. State, 57 Ga. 367; Robertson v. State, 97 Ga. 206, 29 S. E. 974; Harvey v. State, 121 Ga. 590, 49 S. E. 674. LA.—State v. Carter, 33 La. Ann. 1214; State v. Stelly, 48 La. Ann. 1478, 21 So. 89. NEB. — Barnes v. State, 40 Neb. 545, 59 N. W. 125. N. C.—State v. Godet, 29 N. C. 210. TEX.—State v. Mansfield, 33 Tex. 129; Lunn v. State, 44 Tex. 85; Grant v. State, 2 Tex. App. 163; Moore v. State, 2 Tex. App. 350; Guerrero v. State, 46 Tex. Cr. Rep. 445, 80 S. W. 1001.

"A black and white hog."—Harvey v. State, 121 Ga. 590, 49 S. E. 674.

"One head of hogs."—Guerrero

ual hog stolen is a matter of evidence.[3] Under such a statute, on a charge of stealing hogs, any description which will enable the owner to identify the hogs taken, is sufficiently definite.[4] It is not necessary that the color, kind, weight, mark, or brand be stated;[5] neither is it necessary to aver that the hog was either under twelve months old or was marked.[6] A pig five months old may be described as a "hog,"[7] without alleging the sex.[8] A charge of stealing "one hog of the male sex" is good.[9] An indictment charging the larceny of a "hog" will be supported by evidence of the theft of a "pig,"[10] although it has been held differently in South Carolina,[11] on the ground that the word "pig" did not occur in the statute against "hog stealing;" and on the same principle of reasoning an indictment or information charging the larceny of a "boar," a "barrow," or a "sow," would be held bad, although it is universally known, and it would be presumed the court would take judicial notice, that these are individuals in the hog family. But a charge of stealing "a female hog" will not be supported by evidence of the theft of a "boar."[12]

§ 835. ——— ——— ——— HORSES, MULES, AND ASSES. As in the case of cattle,[1] the decisions are not in harmony in

v. State, 46 Tex. Cr. Rep. 445, 80 S. W. 1001.

"Three hogs about eleven months old, weighing about one hundred and seventy-five pounds each."—Barnes v. State, 40 Neb. 545, 59 N. W. 125.

3 Grant v. State, 2 Tex. App. 163; Moore v. State, 2 Tex. App. 350.

4 Rivers v. State, 57 Ga. 28.

5 People v. Stanford, 64 Cal. 27, 28 Pac. 106. See Matthews v. State, 24 Ark. 484.

6 Matthews v. State, 24 Ark. 484.

7 Lavender v. State, 60 Ala. 60. "One black pig, white listed, and one white pig with a blue rump" held to be a sufficient description. —Brown v. State, 44 Ga. 300.

8 Brown v. State, 44 Ga. 300.

9 Alderman v. State, 57 Ga. 367.

10 Washington v. State, 58 Ala. 355; Lavender v. State, 60 Ala. 60.

11 State v. McLain, 2 Brev. L. (S. C.) 443.

12 Green v. State, 95 Ga. 463, 22 S. E. 289.

1 See, supra, § 830.

As to forms of indictments for larceny of domestic animals, see Forms Nos. 1454-1462.

their holdings as to what constitutes a sufficient description of an animal of the Equine family, alleged to have been stolen. This want of harmony in decision is due to the variance in the statutory provisions under which the indictments or informations were drawn and the decisions made. Statutes prohibiting and punishing the larceny of animals of the horse kind may be divided broadly into two classes: First, those statutes which denounce and punish horse-stealing in generic terms; and second, those which enumerate the classes or species of the animals constituting those animals involved in the prohibition and punishment,—such as "any horse, gelding, mare, colt, ass, or mule;[2] or "any mare, gelding, stallion, colt, foal or filly, mule, or ass,"[3] and the like.

Under the first class of statutes, the word "horse" is a generic term, including, ordinarily, in its signification all the different classes or species of this kind of animal, however diversified by age, sex, use, or artificial means,[4] and an indictment or information need not employ technically descriptive words to designate the sex or artificial character,[5] or color[6] of the animal charged to have been stolen; neither need the animal be described as a "mare,"[7] it being sufficient to allege that it was "an animal of the

2 Tex. Pascal's Dig., art. 2409.

3 Mont. Crim. Laws, § 78 (1890).

4 Lunsford v. State, 1 Tex. App. 448, 28 Am. Rep. 414. See: ARK.—State v. Gooch, 60 Ark. 218, 29 S. W. 640. CAL.—People v. Pico, 62 Cal. 50; People v. Monteith, 73 Cal. 7, 14 Pac. 373. KY.—McBride v. Com., 76 Ky. (13 Bush) 337. MISS.—Jones v. State, 51 Miss. 718, 24 Am. Rep. 658. MO.—State v. Donnegan, 34 Mo. 67. TENN.—Wiley v. State, 43 Tenn. (3 Coldw.) 362. TEX.—Wright v. State, 10 Tex. App. 476; Smythe v. State, 17 Tex. App. 244; Barnes v. State, 20 S. W. 559. UTAH—People v. Butler, 2 Utah 504; People v. Sensabaugh, 2 Utah 473. ENG.—R. v. Aldridge, 4 Cox C. C. 143.

5 People v. Sensabaugh, 2 Utah 473.

6 Turner v. State, 50 Tenn. (3 Heisk.) 452.

7 CAL.—Teal v. State, 119 Ga. 102, 45 S. E. 964. IDA.—State v. Rathbone, 8 Ida. 161, 67 Pac. 186. MINN.—State v. Friend, 47 Minn. 449, 50 N. W. 692. WASH.—State v. Shuck, 38 Wash. 270, 80 Pac. 444.

horse species;"[8] and that the animal was the "corporeal personal property" of its owner need not be alleged, as the court will take judicial notice of that fact.[9] It has been said that "did steal a horse, mare, gelding, colt, filly, or mule" is a sufficient description of the animal under the Alabama code.[10] Under statutes of the first class, the animal alleged to have been stolen may be described as "a horse,"[11] for that generic term embraces "colt,"[12] "filly,"[13] "gelding,"[14] "mare,"[15] "ridgling,"[16] and "stallion;"[17] or the animal may be described as "a mare,"[18] or as "one horse of the female sex, said animal being a dark bay mare;"[19] or as "a mule."[20]

Under the second class of statutes, the legislature, by the use of the words "horse, gelding, mare, colt, ass, or mule," or any other similar enumeration, discriminates

8 Smythe v. State, 17 Tex. App. 244.

9 Damron v. State, (Tex.) 27 S. W. 7.

10 Gabriel v. State, 40 Ala. 357.

11 ARK. — State v. Gooch, 60 Ark. 218, 29 S. W. 640. GA.—Brown v. State, 86 Ga. 633, 13 S. E. 20 (under Georgia Code, § 4394, 1891, providing that the term "horse" shall include "mule" and "ass," and each animal of both sexes, without regard to alterations by artificial means). IDA.—State v. Collett, 9 Ida. 608, 75 Pac. 271. TEX.—Smythe v. State, 17 Tex. App. 244. UTAH—People v. Sensabaugh, 2 Utah 473. W. VA.—State v. Blair, 63 W. Va. 635, 60 S. E. 795.

12 See State v. Williams, 12 Ida. 483, 86 Pac. 53.

13 Lunsford v. State, 1 Tex. App. 448, 28 Am. Rep. 414.

14 People v. Monteith, 73 Cal. 7, 14 Pac. 373; Baldwin v. People, 2 Ill. 304; State v. Donnegan, 34 Mo. 67; Wiley v. State, 43 Tenn. (3 Coldw.) 362.

15 People v. Pico, 62 Cal. 50. See Davis v. State, 23 Tex. App. 210, 4 S. W. 590.

16 See Brisco v. State, 4 Tex. App. 219, 30 Am. Rep. 162.

17 Taylor v. State, 44 Ga. 263; Keesee v. State, 1 Tex. App. 298; Lunsford v. State, 1 Tex. App. 448, 28 Am. Rep. 414.

18 People v. Smith, 15 Cal. 408; State v. Rathbone, 8 Ida. 161, 67 Pac. 186; Beauchamp v. Com., 4 Ky. L. Rep. 27; State v. Friend, 47 Minn. 449, 50 N. W. 692; State v. Shuck, 38 Wash. 270, 80 Pac. 444.

"A black or brown mare or filly, branded" as described held to be a sufficient description of the animal stolen.—People v. Smith, 15 Cal. 408.

19 Teal v. State, 119 Ga. 102, 45 S. E. 964.

20 State v. King, 31 La. Ann. 147; Territory v. Valles, 15 N. M. 228, 103 Pac. 984.

between them as different species of property, and as much between a "horse" and a "mare" as between a "horse" and an "ass" or a "mule."[21] Under such a statute, the averments of the indictment or information must be equally as specific as the statute under which drawn, and where the statute divides the animals into classes or species by such an enumeration, the appropriate class or species under the statute must be averred, and the proof on the trial must correspond with the averment.[22] The word "horse" under such statutes means an unaltered horse or "stallion," and will not include any of the other classes or species of animals enumerated in the statute;[23] and the term has been said to exclude "gelding,"[24] though it includes "colt"[25] and "ridgling;"[26] it also excludes "mare,"[27] or any other classes enumerated in the statute. The word "gelding" does not include "ridgling."[28] "Mare" includes "filly,"[29] but "filly" does not include "mare."[30] Thus, it has been said that a charge of the

21 Banks v. State, 28 Tex. 644, followed in Brisco v. State, 4 Tex. App. 219, 30 **Am. Rep.** 162.

22 Brisco v. State, 4 Tex. App. 219, 30 **Am. Rep.** 162. See Hooker v. State, 4 Ohio 348; Turley v. State, 22 Tenn. (3 Humph.) 323.

23 Brisco v. State, 4 Tex. App. 219, 30 **Am. Rep.** 162. See, also, Banks v. State, 28 Tex. 644; Jordt v. State, 31 Tex. 571, 98 **Am. Dec.** 550; Swindel v. State, 32 Tex. 102; Pigg v. State, 43 Tex. 108; Keesee v. State, 1 Tex. App. 298; Lunsford v. State, 1 Tex. App. 448, 28 **Am. Rep.** 414; Johnson v. State, 16 Tex. App. 402.

24 KAN.—State v. Buckles, 26 Kan. 237. MONT.—State v. McDonald, 10 Mont. 21, 24 **Am. St. Rep.** 25, 24 Pac. 628. N. C.—State v. Royster, 65 N. C. 539. OHIO—Hooker v. State, 4 Ohio 348. TENN.—Turley v. State, 22 Tenn. (3 Humph.) 323. TEX.—Banks v. State, 28 Tex. 644; Jordt v. State, 31 Tex. 571, 98 **Am. Dec.** 550; Lunsford v. State, 1 Tex. App. 448, 28 **Am. Rep.** 414; Brisco v. State, 4 Tex. App. 219, 30 **Am. Rep.** 162; Johnson v. State, 16 Tex. App. 402.

25 See footnote 34, this section.

26 See footnote 23, this section.

27 Taylor v. State, 44 Ga. 263.

28 Brisco v. State, 4 Tex. App. 219, 30 **Am. Rep.** 162.

29 R. v. Welland, 1 Russ. & R. 367.

30 Lunsford v. State, 1 Tex. App. 448, 28 **Am. Rep.** 414. In this case the accused was charged with the larceny of "one gray filly" under a statute providing for the punishment of anyone who steals "any horse, gelding, mare, colt, ass, or mule" (Pascal's Dig., art. 2409). The court say: "From precedent and authority we feel constrained

larceny of "one gray horse colt" is a sufficient description of the animal taken, under the Idaho statute[31] prohibiting the taking of "any horse, mare, gelding," etc., the word "colt" being merely descriptive of the age of the horse.[32] Where an indictment, under the Montana statute, providing against the taking of "any mare, gelding, stallion, colt, foal or filly, mule, or ass," describing the animal alleged to have been stolen as "one iron-gray horse, a gelding," the charge is that of stealing "a gelding," and is not supported by evidence that accused took a "colt."[33] "Ridgling" being a half-gelt or half-castrated animal, is not included in "gelding," which is a fully-gelt or fully-castrated animal; and an indictment charging accused with stealing a "gelding" will not be sustained by proof of the taking of a "ridgling," even though the animal had the appearance of, and was supposed to be, a gelding.[34]

§ 836. ——— ——— ——— POULTRY OR FOWLS.[1] The general rule is that all domesticated animals, and animals of a domesticated nature, are the subjects of "property" and objects of "larceny." Within this rule, poultry, fowls, and birds are held by the courts, in the absence of any clearly-expressly statutory definition, to be "animals," not only as relates to "cruelty to animals" and "injury

to hold that the indictment under this article fixes its own meaning to the words used. Said article specially describes the different species of property by the use of the words 'horse, gelding, mare, colt, ass, or mule' and the averments in the indictment against the defendant for the theft of one of these animals must be equally specific and the proof must correspond with the averment, to sustain a judgment of conviction."

31 Rev. Stats. 1887, § 7048.

32 State v. Williams, 12 Idaho 483, 86 Pac. 53.

33 State v. McDonald, 10 Mont. 21, 24 Am. St. Rep. 25, 24 Pac. 628; Gibbs v. State, 34 Tex. 134; Brisco v. State, 4 Tex. App. 219, 30 Am. Rep. 162; Johnson v. State, 16 Tex. App. 402.

34 Brisco v. State, 4 Tex. App. 219, 30 Am. Rep. 162, following Cole v. State, a Texas unreported case.

1 As to forms of indictments for larceny of a bird, see Forms Nos. 1465, 1466.

to animals,"[2] but also as relates to larceny, under a statute punishing as larceny the taking with intent to steal the "personal property, goods, and chattels" of another;[3] and in many of the states special statutes have been passed protecting all domestic fowls, and making their larceny either a misdemeanor or a felony. Under the general rule above laid down, it has been held to be larceny to take, with intent to steal, doves in a dove-cot or in the nest before they can fly;[4] pea fowls;[5] pigeons, tamed but unconfined;[6] pheasants reared under a hen,[7] and young partridges hatched and reared under a hen;[8] a tame mocking bird,[9] and a domestic turkey.[10] An indictment or information charging the larceny of poultry, or of a fowl, must be so drawn as to show its captured or domesticated nature, and bring the act complained of within the provisions of the statute under which prosecution is had.[11] It is said that a hen may be described as a

2 Holcomb v. Van Zylen, 174 Mich. 274, Ann. Cas. 1915A, 1241, 44 L. R. A. (N. S.) 607, 140 N. W. 521. See: ILL.—Reis v. Stratton, 23 Ill. App. 314; McPherson v. James, 69 Ill. App. 337. IOWA—Marshall v. Blackshire, 44 Iowa 475. MASS.—Clark v. Keliher, 107 Mass. 406; Com. v. Turner, 145 Mass. 296, 14 N. E. 130. N. J.—Huber v. Mohn, 37 N. J. Eq. 432. FED.—Reiche v. Smythe, 80 U. S. (13 Wall.) 162, 20 L. Ed. 566. ENG.—Budge v. Parsons, 3 Best. & S. 382, 113 Eng. C. L. 382; Murphy v. Manning, 2 Exch. Div. 307, 20 Moak's Eng. Rep. 558; R. v. Brown, 24 Q. B. Div. 357.

3 **Personal property**, which may be the subject of theft, under the Texas Penal Code, art. 867, includes domesticated birds.—Hasley v. State, 50 Tex. Cr. Rep. 45, 94 S. W. 899.

4 Com. v. Chance, 26 Mass. (9 Pick.) 15, 19 Am. Dec. 348.

5 Com. v. Beaman, 74 Mass. (8 Gray) 497.

6 Com. v. Lewis, 7 Pa. Co. Ct. Rep. 558, 47 Phila. Leg. Int. 58, 25 W. N. C. 432; R. v. Brooks, 4 Car. & P. 131, 19 Eng C. L. 441; R. v. Cheafor, 2 Den. C. C. 361.

7 R. v. Head, 1 Fost. & F. 350; R. v. Granham, 8 Cox C. C. 450; R. v. Cory, 11 Cox C. C. 23.

8 R. v. Shackle, L. R. 1 C. C. 158, 38 L. J. M. C. 21.

9 Haywood v. State, 41 Ark. 479.

10 State v. Turner, 66 N. C. 618.

11 **As to sufficient allegation** under statute punishing larceny of poultry.—Wolcott (Town of) v. Stickles, 85 Conn. 322, 82 Atl. 572.

In New Jersey an indictment charging the larceny of chickens must be so drawn as to discriminate between Crimes Act, § 158 and

"chicken,"[12] and that a turkey may be described as such.[13] Value must be alleged and proved.[14]

§ 837. ——— ——— ——— SHEEP. A sheep charged to have been stolen, the indictment or information may describe the animal by the generic term "sheep," and this description will include a "ewe," a "lamb," a "ram," a "rig" or a "wether."[1]

§ 838. ——— ——— ANIMALS FERÆ NATURÆ. To acquire "property" in animals feræ naturæ so as to make them the subject of larceny, a person must bring them into control, so that he can subject them to his own will or use at pleasure, and must so maintain that possession and control as to show that he does not abandon them to the world at large.[1] Hence, it is held that where animals classed as feræ naturæ are reclaimed, confined, or dead, they are the subjects of larceny;[2] such as bees,[3] fish,[4] oysters,[5] and the like. An indictment or information charging larceny of an animal classed as feræ naturæ must bring it clearly within the conditions above laid down as to vesting property in it in some person and thus making it the subject of larceny.[6] Thus, bees must be

§ 162, the crime under the former section being a felony and under the latter a misdemeanor.—State v. Shutts, 69 N. J. L. 206, 54 Atl. 235.

12 State v. Bassett, 34 La. Ann. 1108.

13 Skelton v. State, 149 Ind. 641, 49 N. E. 901; State v. Turner, 66 N. C. 618.

14 Hasley v. State, 50 Tex. Cr. Rep. 45, 94 S. W. 899.

1 State v. Tootle, 2 Harr. (Del.) 541; R. v. Spicer, 1 Car. & K. 697, 47 Eng. C. L. 699; R. v. Stroud, 6 Car. & P. 535, 25 Eng. C. L. 563.

Compare: R. v. Bricket, 4 Car. & P. 216, 19 Eng. C. L. 351.

1 State v. Shaw, 67 Ohio St. 157, 60 L. R. A. 481, 65 N. E. 875. See State v. Repp, 104 Iowa 305, 65 Am. St. Rep. 463, 40 L. R. A. 687, 73 N. W. 829; Com. v. Chance, 26 Mass. (9 Pick.) 15, 19 Am. Dec. 348; Norton v. Ladd, 5 N. H. 203, 29 Am. Dec. 573; State v. Krider, 78 N. C. 461; R. v. Searing, 1 Russ. & R. 350.

2 State v. House, 65 N. C. 315, 6 Am. Rep. 744.

3 State v. Murphy, 8 Blackf. (Ind.) 498.

4 See footnotes 9-11, this section.

5 See footnotes 12-15, this section.

6 Haywood v. State, 41 Ark. 479; R. v. Cheafor, 15 Jur. 1065. See Com. v. Chance, 26 Mass. (9 Pick.)

alleged to be in the possession and under the control of the prosecutor;[7] the mere fact of finding wild bees in a tree on the lands of another gives the finder no right to the bees or to the tree, and vests in him no right to take the bees from the tree and put them in a hive; that is, being a mere trespasser, he can acquire no property-rights in such bees which will enable him to support a prosecution on a charge of larceny of the bees from his possession.[8] Fish enclosed in a net, or any other enclosed place which is private property, from which they may be taken at any time at the pleasure of the owner of the net or of the enclosure,—that is to say, fish reclaimed, confined, or dead, and valuable for food or otherwise,[9]—become the property of the owner of such net or enclosure, and the taking of fish therefrom, with intent to steal, constitutes larceny;[10] but an indictment or information charging the larceny of fish must set forth facts showing that the fish were reclaimed, confined, or dead.[11] Oysters[12]

15, 19 **Am. Dec.** 348, in which the description of the birds in the indictment does not appear from the reported case, but case was reversed because of insufficiency of the evidence.

7 State v. Murphy, 8 Blackf. (Ind.) 498.

Reclaimed and hived in a legal manner, the person acquires a property in the bees, but not until this is done.—Rexroth v. Coon, 15 R. I. 35, 2 **Am. St. Rep.** 863, 23 Atl. 37.

As to form of indictment charging larceny of fish, see Form No. 1473.

8 See Merrils v. Goodwin, 1 Root (Ct.) 209; State v. Repp, 104 Iowa 305, 65 **Am. St. Rep.** 463, 40 **L. R. A.** 687, 73 N. W. 829; Gillet v. Mason, 7 Johns. (N. Y.) 16; Rexroth v. Coon, 15 R. I. 35, 2 **Am. St. Rep.** 863, 23 Atl. 37.

Judge Cooley says that "bees have a local habitation, more often in a tree than elsewhere, and while there they may be said to be within control, because the tree may at any time be felled. But the right to cut the tree is in the owner of the soil, and therefore, such property as the wild bees are susceptible of is in him alone."—Cooley on Torts, p. 435. See Ferguson v. Miller, 1 Cow. (N. Y.) 243, 13 **Am. Dec.** 519; Rexroth v. Coon, 15 R. I. 35, 2 **Am. St. Rep.** 863, 23 Atl. 37.

9 State v. Krider, 78 N. C. 481.

10 State v. Shaw, 67 Ohio St. 157, 60 **L. R. A.** 481, 65 N. E. 875.

As to property in fish, see note 131 **Am. St. Rep.** 751.

11 State v. Krider, 78 N. C. 481; R. v. Hendsdon, 2 East. P. C. 611.

12 **As to form of indictment for**

or clams, being feræ domitæ, rather than feræ naturæ, do not come within the operation of the general rule as to wild animals, and whether planted[13] or unplanted,[14] are objects of "property" and subjects of "larceny."[15] An indictment charging the stealing of "eighteen bushels of oysters," has been said to be a sufficient description of the property taken.[16]

§ 839. ——— ARTICLES OF FOOD AND DRINK. Articles of food and drink may be described in an indictment or information charging larceny thereof by the names by which they are familiarly and usually known, with some designation as to quantity and value;[1] and while a minute and detailed description is not required, yet the description given should be such, numerically and specifically, as to individualize with legal certainty the property charged to have been stolen.[2] We have already seen that the generic term "meat," including as it does both the flesh of dead animals used for food and also all provisions fit for the sustenance of man, is too general and indefinite a description;[3] but a description of the property charged to have been stolen as "one ham" has been held to be a sufficient description, although not indicating the class or

larceny of oysters, see Form No. 1489.

13 State v. Taylor, 27 N. J. L. (3 Dutch.) 117, 72 Am. Dec. 347; Metzger v. Post, 44 N. J. L. (15 Vr.) 74, 43 Am. Rep. 341; Vroom v. Tilly, 99 App. Div. 516, 91 N. Y. Supp. 51; affirmed, 184 N. Y. 168, 77 N. E. 24; reargument denied, 185 N. Y. 553, 77 N. E. 117; Fleet v. Hegeman, 14 Wend. (N. Y.) 42; Desker v. Fisher, 4 Barb. (N. Y.) 592; Brinckerhoff v. Starkins, 11 Barb. (N. Y.) 248.

14 Grace v. Willets, 50 N. J. L. 414, 14 Atl. 559.

15 State v. Taylor, 27 N. J. L. (3 Dutch.) 117, 72 Am. Dec. 347; People v. Wanzer, 43 Misc. (N. Y.) 136, 18 N. Y. Cr. Rep. 341, 88 N. Y. Supp. 281; State v. Tayler, 13 R. I. 41.

16 State v. Taylor, 27 N. J. L. (3 Dutch.) 117, 72 Am. Dec. 347.

1 Com. v. Eastman, 68 Mass. (2 Gray) 76; State v. Boon, 51 N. C. (6 Jones L.) 467; Taylor v. State, 50 Tenn. (3 Heisk.) 460; State v. Hupp, 31 W. Va. 355, 9 S. E. 919; R. v. Gallears, 2 Car. & K. 981, 61 Eng. C. L. 981.

2 State v. Hoyer, 40 La. Ann. 744, 4 So. 899.

3 See, supra, § 831, footnote 6, and text going therewith.

species of animal from which taken or cut.[4] A description as "bacon,"[5] or "one ham of bacon,"[6] shows the meat was from the carcass of a hog, and is sufficient. And a charge of the larceny of "four barrels of whisky,"[7] and of "some bottled beer,"[8] has been held to be sufficient descriptions of the articles taken.

§ 840. ——— ARTICLES OF CLOTHING AND JEWELRY. As in cases of articles of food and drink,[1] articles of clothing or wearing apparel and jewelry may be described by the common name by which they are usually known. Describing by number and kind, only, sundry articles of clothing, jewelry, and household goods, alleging an aggregate value, with a statement that a more definite and certain description was to the grand jury unknown, is sufficient.[2] It has been said to be a sufficient description of an article of wearing apparel or jewelry alleged to have been stolen as "a cape," in charging larceny of a shoulder-wrap;[3] "a hat," without stating its color or the material of which composed;[4] "a pair of pants;"[5] "a suit of clothes;"[6] "fifty-five coats, each coat of the value of five dollars, fifty-five vests, each vest of the value of three dollars, sixty pairs of trousers, each of the value of five dollars, four overcoats, each of the value of ten dollars;"[7]

4 R. v. Gallears, 2 Car. & K. 981, 61 Eng. C. L. 981. See, also, supra, § 831, footnote 8.

"Two hams and two shoulders of bacon, and eight jowls," weighing a designated amount, and worth a specified sum, has been held to be sufficiently definite. — Taylor v. State, 50 Tenn. (3 Heisk.) 460.

5 See, supra, § 831, footnote 7.

6 Harris v. State, 1 Tex. App. 74.

7 State v. Bailey, 63 W. Va. 668, 60 S. E. 785.

8 State v. Hoyer, 40 La. Ann. 744, 4 So. 899.

1 See, supra, § 839.

2 Ware v. State, 2 Tex. App. 547.

3 Waller v. People, 175 Ill. 221, 51 N. E. 900.

4 State v. Martin, 82 N. C. 672.

5 State v. Johnson, 30 La. Ann. 904; State v. Curtis, 44 La. Ann. 320, 10 So. 784 (four pairs).

6 Baldwin v. State, 76 Tex. Cr. Rep. 490, 175 S. W. 701.

Describing a suit of clothes as of a specified value, is sufficient.— Baldwin v. State, 76 Tex. Cr. Rep. 490, 175 S. W. 701.

7 Sharp v. State, 61 Neb. 187, 15 Am. Cr. Rep. 462, 85 N. W. 38.

"one coat;"[8] "one finger ring, four finger rings, a brooch, a locket, a stud, three finger rings and a finger ring;"[9] "a gold-filled case watch and chain" sufficient, though the description very general;[10] "one gold watch;"[11] "one lot of jewelry;"[12] "one watch and chain;"[13] "one watch and pocket-knife;"[14] "pair of shoes;"[15] "two ladies' jackets,"[16] and the like. But the description must be definite and certain to a common intent, within the rules heretofore laid down.[17] Thus, an allegation that accused took "one certain trunk or chest, containing valuable articles of clothing, jewelry," etc., has been said to be bad for uncertainty, because it is indefinite as to property stolen, a "trunk" not being a "chest," which is an article containing or consisting of drawers.[18]

§ 841. ——— GROWING CROPS.[1] It is a general rule of law that, in the absence of a statutory provision to the contrary, such things as issue out of or grow upon the

[8] Com. v. Campbell, 103 Mass. 436.

[9] Talbert v. United States, 42 App. D. C. 1.

[10] People v. Burns, 121 Cal. 529, 53 Pac. 1096.

[11] Sufficient designation of watch, case of which is 10 carat gold, such a watch being popularly called a gold watch, though not so designated by jewelers.—Pfister v. State, 84 Ala. 432, 4 So. 395.

[12] State v. Curtis, 44 La. Ann. 320, 10 So. 784.

[13] Powell v. State, 88 Ga. 32, 13 S. E. 829; Williams v. State, 25 Ind. 150.

[14] Grissom v. State, 40 Tex. Cr. Rep. 146, 49 S. W. 93.

[15] Palmer v. State, 136 Ind. 393, 36 N. E. 130; State v. Curtis, 44 La. Ann. 320, 10 So. 784 (four pairs).

Allegation not supported where the articles taken were two shoes, both for the same foot, taken from two separate pairs.—See, supra, § 825, footnote 12 and text going therewith.

[16] McCowan v. State, 58 Ark. 17, 22 S. W. 955.

[17] See, supra, § 826.

[18] Potter v. State, 39 Tex. 388.

[1] As to forms of indictment for larceny of growing crops, see Forms Nos. 1467-1471.

A, as tenant of lands, agrees with B that if he will assist in cultivating the lands, he will divide the crop equally with him, after paying the rent, and B, after the crop is partially raised, abandons the arrangement, alleging as a reason he did not believe he could make anything out of it, the interest in the crop reverts to A, and if B should take any part of the growing or outstanding crop, he will be guilty of larceny.—Bonham v. State. 65 Ala. 456.

land—e. g., crops,[2] cultivated fruits,[3] as ripe cherries, wild grass,[4] and the like,—are not the subjects of larceny where the severance and asportation are one continuous act, such as cutting cabbage or digging potatoes and carrying them away without the lapse of an intervening instant.[5] Thus, the severance and taking away of corn growing in the field, of the value of twenty-five dollars or less, has been said not to be a criminal offense, unless it is charged in the indictment or information to have been done maliciously, and where so charged, the act is a "malicious trespass," which is a misdemeanor, but is not larceny.[6]

By statute, in many of the states, it is made larceny to take part of a growing crop in the field, or any vegetables or any other product cultivated for food or market. Under such statutes, an indictment or information charging the larceny of part of such a crop, or of such vegetables or other product, must bring the article alleged to have been stolen clearly within the provisions and prohibition of the statute under which the prosecution is had, by showing that it was part of an outstanding crop, vegetables, or other product cultivated for food or market;[7]

2 Comfort v. Fulton, 13 Abb. Pr. (N. Y.) 276, 39 Barb. 36; State v. Stephenson, 2 Bail. L. (S. C.) 334.

Compare: Simanek v. Nemitz, 120 Wis. 48, 97 N. W. 508, holding otherwise as to crops and vegetables required to be planted annually.

3 Simmons v. Willford, 60 Fla. 261, **Ann. Cas.** 1912C, 735, 53 So. 152; Bartlett v. Brown, 6 R. I. 37, 75 **Am. Dec.** 675.

See, also, note 16 **L. R. A.** 103.

4 Kirkeby v. Erickson, 90 Minn. 300, 101 **Am. St. Rep.** 411, 96 N. W. 705.

5 Holly v. State, 54 Ala. 238; Jackson v. State, 11 Ohio St. 104; Bell v. State, 63 Tenn. (4 Baxt.) 426; Harberger v. State, 4 Tex. App. 26, 30 **Am. Rep. 157.**

Any interval of time, however short, between the severance of the thing from the freehold and the asportation, the act is larceny. —People v. Williams, 35 Cal. 671; Smith v. Com., 77 Ky. (14 Bush) 31, 29 **Am. Rep.** 402; State v. Berryman, 8 Nev. 262; Harberger v. State, 4 Tex. App. 26, 30 **Am. Rep.** 157.

6 Comfort v. Fulton, 13 Abb. Pr. (N. Y.) 276, 39 Barb. 36; State v. Bragg, 86 N. C. 687; State v. Ballard, 97 N. C. 443, 1 S. E. 685; State v. Shuler, 19 S. C. 140.

7 Comfort v. Fulton, 13 Abb. Pr.

and where the statute makes the degree of the offense grand larceny, the indictment or information must state that the offense charged is grand larceny.[8] The statute making it grand larceny to steal "any part of an outstanding crop of corn or cotton," an indictment or information which substitutes "portion" for the statutory word "part," will be sufficient,[9] for the reason that these terms are used in their ordinary significance, and the words or the substantial words of the statute, or words of substantially the same meaning, are sufficient.[10] In such a statute the words "corn" and "outstanding crop," are not technical terms, but are used in their popular significance.[11] "Fifty ears of corn, the same being part of an outstanding crop of corn," is a sufficient description of the property taken.[12] The statute prohibiting stealing corn "from the field," an indictment or information charging stealing corn "in the field," has been held to be insufficient to charge the statutory offense, although it might be good as a charge of simple larceny.[13] Vegetables named in the statute prohibiting severance and asportation, alleged to have been severed and stolen, it is sufficient to designate them by name; but where not so named in the statute, the indictment or information must allege that they were cultivated for food or market.[14] On a charge of taking "grain from the field" proof that the accused took "a half bushel of peas" supports the indict-

(N. Y.) 276, 39 Barb. 36; State v. Stephenson, 2 Bail. L. (S. C.) 334.

Whether previously severed or not.—State v. Stephenson, 2 Bail. L. (S. C.) 334.

8 "One peck of corn, part of an outstanding crop, of the value of twenty-five cents," held not to be sufficient, because it failed to set out the degree of the offense.—Smitherman v. State, 63 Ala. 24.

Severance and asportation of corn, whether in a mature or an immature state, by statute made grand larceny, this covers corn which is sufficiently matured for food of man or beast.—Sullins v. State, 53 Ala. 474.

9 Holly v. State, 54 Ala. 238.

10 See, supra, § 810.

11 Sullins v. State, 53 Ala. 474.

12 Schamberger v. State, 68 Ala. 543.

13 State v. Shuler, 19 S. C. 140.

14 State v. Ballard, 97 N. C. 443, 1 S. E. 685.

ment, "peas" being included in the statutory term "and other grain;"[15] but a charge that accused stole "said cotton and lint cotton" will not justify the admission of evidence of the taking of cotton from the field.[16]

§ 842. ——— HOUSEHOLD GOODS. An indictment or information charging the larceny of household goods, kitchen ware, and the like, may describe the property alleged to have been stolen in the same manner as in charging a larceny of articles of food and drink,[1] or articles of clothing and jewelry,[2] by giving the name under which the article is usually known and popularly designated,—as "a feather bed,"[3]—and this will be a sufficient description of the article.

§ 843. ——— LOST PROPERTY. In all the jurisdictions of this country with the possible exception of Tennessee,[1] one who finds lost property is guilty of larceny on failure to restore it to its rightful owner,[2] where (1) he

15 State v. Williams, 2 Strobh. L. (S. C.) 474.

16 State v. Bragg, 86 N. C. 687.

1 See, supra, § 839.

2 See, supra, § 840.

3 State v. Parker, 47 Vt. 19.

1 Porter v. State, 8 Tenn. (Mart. & Y.) 226; Lawrence v. State, 20 Tenn. (1 Humph.) 228, 34 Am. Dec. 644.

Tennessee rule, however, seems to have been changed, at least to some extent, by statute.—Mayes v. State, 4 S. W. 659.

2 CAL.—People v. Buelna, 81 Cal. 135, 22 Pac. 396. CONN.—State v. Weston, 9 Conn. 527, 25 Am. Dec. 46; Ransom v. State, 22 Conn. 153. DEL.—Kennedy v. Woodrow, 6 Houst. 46. ILL.—Lane v. People, 10 Ill. 305. IOWA—State v. Taylor, 25 Iowa 273; State v. Dean, 49 Iowa 73, 31 Am. Rep. 143; State v. Bolander, 71 Iowa 706, 29 N. W. 602; State v. Nordman, 101 Iowa 452, 70 N. W. 621. IND.—Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182. MINN.—State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; State v. Boyd, 36 Minn. 538, 32 N. W. 780. NEV.—State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526. N. Y.—People v. Cogdell, 1 Hill 94, 37 Am. Dec. 297; People v. Swan, 1 Park. Cr. Rep. 9. OHIO—Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731. ORE.—State v. Swayze, 11 Ore. 357, 3 Pac. 574. TEX.—Reed v. State, 8 Tex. App. 40, 34 Am. Rep. 732; Robinson v. State, 11 Tex. App. 403, 40 Am. Rep. 790; Rhodes v. State, 11 Tex. App. 563. VA.—Tanner v. Com., 55 Va. (14 Gratt.) 635.

knows the owner and does not restore the property;[3] (2) has the means of knowing or ascertaining the owner, and makes no effort to find him or to restore the property;[4] or (3) feloniously intends to appropriate the property at the time he finds it[5]—a subsequent formation of such felonious intent is not sufficient.[6] But if money be found under

[3] CAL.—People v. Buelna, 81 Cal. 135, 22 Pac. 396. CONN.—State v. Weston, 9 Conn. 527, 25 Am. Dec. 46. DEL.—Kennedy v. Woodrow, 6 Houst. 46. ILL.—Lane v. People, 10 Ill. 305. IND.—Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182. IOWA—State v. Taylor, 25 Iowa 273; State v. Pratt, 20 Iowa 267; State v. Dean, 49 Iowa 73, 31 Am. Rep. 143; State v. Bolander, 71 Iowa 706, 29 N. W. 602. KY.—Hester v. Com., 16 Ky. L. Rep. 783, 29 S. W. 875. MINN.—State v. Levy, 23 Minn. 104, 23 Am. Rep. 678. NEV.—State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526. N. Y.—People v. Cogdell, 1 Hill 94, 37 Am. Dec. 297. OHIO—Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731. ORE. — State v. Swayze, 11 Ore. 357, 3 Pac. 574. PHILIPPINE—United States v. Frias, 23 Philippine 43. S. C.—State v. Posey, 88 S. C. 313, 70 S. E. 612. TEX.—Reed v. State, 8 Tex. App. 40, 34 Am. Rep. 732.

[4] ARK.—Penny v. State, 109 Ark. 343, 159 S. W. 127. CONN.—State v. Weston, 9 Conn. 527, 25 Am. Dec. 46; State v. Courtsol, 89 Conn. 564, L. R. A. 1916A, 465, 94 Atl. 973. IND.—Bailey v. State, 52 Ind. 462, 21 Am. Rep. 182. MINN.—State v. Levy, 23 Minn. 104, 23 Am. Rep. 678; State v. Boyd, 36 Minn. 538, 32 N. W. 780. NEV.—State v. Clifford, 14 Nev. 72, 33 Am. Rep. 526. N. Y.—People v. Cogdell, 1 Hill 94, 37 Am. Dec. 297. OHIO—Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731.

Diligence to ascertain owner not required.—State v. Dean, 49 Iowa 73, 31 Am. Dec. 143.

[5] ALA.—Rountree v. State, 58 Ala. 381; Weaver v. State, 77 Ala. 26; Smith v. State, 103 Ala. 40, 16 So. 12. CONN. — Ransom v. State, 22 Conn. 153; State v. Courtsol, 89 Conn. 564, L. R. A. 1916A, 465, 94 Atl. 973. DEL.—State v. Briscoe, 3 Penn. 7, 50 Atl. 271. IOWA—State v. Hayes, 98 Iowa 619, 60 Am. St. Rep. 219, 37 L. R. A. 116, 67 N. W. 673. TEX.—Martinez v. State, 16 Tex. App. 122; Warren v. State, 17 Tex. App. 207; Drummond v. State, 71 Tex. Cr. Rep. 260, 158 S. W. 549; Ellis v. Garrison, 174 S. W. 962. ENG.—Milburne's Case, Lew. C. C. 251.

As to intent as a necessary element in larceny, see, supra, § 824.

[6] N. Y.—People v. Hendrickson, 18 App. Div. 404, 12 N. Y. Cr. App. 321, 46 N. Y. Supp. 402. TEX.—Key v. State, 37 Tex. Cr. Rep. 511, 40 S. W. 296; Warren v. State, 106 S. W. 382; Crouch v. State, 52 Tex. Cr. Rep. 460, 107 S. W. 859; Worthington v. State, 53 Tex. Cr. Rep. 178, 109 S. W. 117; Rochell v. State, 55 Tex. Cr. Rep. 152, 115 S. W. 583. ENG.—R. v. Reed, 1 Car. & M. 306, 41 Eng. C. L. 170; R. v. Riley, 6 Cox C. C. 82, 1 Dears. C. C. 149, 14 Eng. L. & Eq. 544;

such circumstances that there is absolutely no clue to the ownership and no reasonable expectation that the owner can be found, the finder has a legal right to appropriate it to his own use, and will not be guilty of larceny in so doing.[7] In drawing an indictment or information charging the larceny of lost goods, the careful pleader should state the facts and circumstances so as to bring the act complained of within one or the other of the principles as above laid down, and within the provisions of the statute under which prosecution is had, in order to make out a charge of larceny; although it has been said that on an indictment or information charging the accused with grand larceny, simply, proof may be introduced to show that the accused found the property and failed to restore it to the owner, who was known to him, without such fact as to finding and knowledge of ownership being alleged in the indictment or information.[8] This holding seems to be on the principle that where there is a general statute defining and punishing larceny, and another statute defining and providing for the punishment of larceny of lost property, where the indictment is drawn under the first or general statute, proof of the facts enumerated in the latter statute establishes the crime as defined by the general statute.[9]

R. v. Christopher, 8 Cox C. C. 91; R. v. Glyde, 11 Cox C. C. 113.

Compare: Griggs v. State, 58 Ala. 425, 29 **Am. Rep.** 762, where it seems to be held to be immaterial whether the intention to steal was at the time of the finding or subsequent to the taking.

7 State v. Posey, 88 S. C. 313, 70 S. E. 612.

8 Berry v. State, 4 Okla. Cr. 202, 31 **L. R. A.** (N. S.) 849, 111 Pac. 676.

"In all the cases in the books involving the larceny of lost property, we have found none in which the opinion or statement of facts indicated that the indictment alleged the finding, etc., and none holding that such allegations were necessary."—Richardson J. in Berry v. State, 4 Okla. Cr. 202, 31 **L. R. A.** (N. S.) 849, 111 Pac. 676, citing: State v. Bolander, 71 Iowa 706, 29 N. W. 602; State v. Hayes, 98 Iowa 619, 60 **Am. St. Rep.** 219, 37 **L. R. A.** 116, 67 N. W. 673; Com. v. Titus, 116 Mass. 42, 17 **Am. Rep.** 138; United States v. Pearl, 5 Cr. C. C. 392, Fed. Cas. No. 16022.

9 Berry v. State, 4 Okla. Cr. 202, 31 **L. R. A.** (N. S.) 849, 111 Pac.

§ 844. ——— MONEY[1]—IN GENERAL. A common-law indictment charging the larceny of money, which merely describes it as a certain number of dollars in lawful money of the government, of a stated value, is too indefinite a description; the description must be so certain as to call to mind the particular coins and bills and thus identify the thing stolen;[2] and the general rule in the various jurisdictions, in the absence of statutes providing otherwise, is that the number, kind, and denomination of the money shall be given,[3] or a sufficient excuse for not doing so must be set forth;[4] but this strict rule has often been relaxed, and indictments and informations have been held sufficient although the description of the money stolen did not specify the kinds of coin or bills.[5]

By statute, in many of the jurisdictions, it is provided that it shall be sufficient for the indictment or information to describe the property taken generally as so much "money," or "coin,"[6] or "bank-notes,"[7] without speci-

676. See State v. Weston, 9 Conn. 527, 25 **Am. Dec.** 46; Flemister v. State, 121 Ga. 146, 48 S. E. 910; Brooks v. State, 35 Ohio St. 46; State v. Boyd, 36 Minn. 538, 32 N. W. 780; People v. McGarren, 17 Wend. (N. Y.) 460.

1 **As to form of indictments** charging the larceny of money, see Forms Nos. 1477-1487.

2 People v. Hunt, 251 Ill. 446, 96 N. E. 220.

3 ARK.—Barton v. State, 29 Ark. 68, 2 **Am. Crim. Rep.** 340; State v. Oakley, 51 Ark. 112, 10 S. W. 17. CAL.—People v. Ball, 14 Cal. 101, 73 **Am. Dec.** 631. ILL.—People v. Hunt, 251 Ill. 446, 36 **L. R. A.** (N. S.) 933, 96 N. E. 220. IND.—State v. Hoke, 84 Ind. 137. KAN.—State v. Tilney, 38 Kan. 714, 17 Pac. 606. MICH.—Merwin v. People, 26 Mich. 298. MINN.—State v. Hinckley, 4 Minn. 345. MISS.—Merrill v. State, 45 Miss. 651. MONT.—Terr. v. Shipley, 4 Mont. 468, 4 **Am. Cr. Rep.** 491, 2 Pac. 313. N. H.—Hamblett v. State, 18 N. H. 384; Lord v. State, 20 N. H. 404, 51 **Am. Dec.** 231. N. Y.—Low v. People, 2 Park. Cr. Rep. 37. TENN.—State v. Longbottoms, 30 Tenn. (11 Humph.) 39.

As to excusing more definite description, see, infra, § 845.

4 State v. Tilney, 38 Kan. 714, 17 Pac. 606; State v. Hinckley, 4 Minn. 345; Terr. v. Shipley, 4 Mont. 468, 4 **Am. Cr. Rep.** 491, 2 Pac. 313.

5 Johnson v. State, 119 Ga. 257, 45 S. E. 960; Daily v. State, 10 Ind. 536; Com. v. Stebbins, 74 Mass. (8 Gray) 492; Hummell v. State, 17 Ohio St. 628.

6 **As to coin,** see, infra, § 847.

7 **As to bank-notes,** see, infra, § 846.

fying the particular kind of money, or without giving the denomination of the coin or bank-bills.[8] While a statute can not dispense with a statement in the indictment or information of the essential ingredients of the crime charged against the accused, it may provide that the description of the property stolen may be general.[9]

Requisite degree of certainty not possible because the owner of the stolen property is unable to particularly describe it, the indictment or information may describe it as particularly as the testimony will permit, alleging that further particulars are unknown to the grand jury, where such is the fact, and this will be sufficient,[10] because any

[8] ARK.—State v. Boyce, 65 Ark. 82, 44 S. W. 1043; Marshall v. State, 71 Ark. 415, 14 **Am. Cr. Rep.** 496, 75 S. W. 584. IND.—Riggs v. State, 104 Ind. 261, 6 **Am. Cr. Rep.** 394, 3 N. E. 886; Hammond v. State, 121 Ind. 512, 23 N. E. 515; Randall v. State, 132 Ind. 539, 32 N. E. 305; Rains v. State, 137 Ind. 83, 36 N. E. 532. IOWA—State v. Alverson, 105 Iowa 152, 74 N. W. 770. KY.—Travis v. Com., 96 Ky. 77, 27 S. W. 863; Com. v. Mann, 12 Ky. L. Rep. 477, 14 S. W. 685. LA.—State v. Walker, 22 La. Ann. 425; State v. Green, 27 La. Ann. 598; State v. King, 37 La. Ann. 91. MASS.—Com. v. Gallagher, 82 Mass. (16 Gray) 240. MICH.—Brown v. People, 29 Mich. 232. MO.—State v. Moore, 66 Mo. 372, overruling State v. Kroeger, 47 Mo. 530. N. Y.—People v. Reavey, 38 Hun 418; re-argument denied, 39 Hun 364, 4 N. Y. Cr. Rep. 1; affirmed, 104 N. Y. 683. N. C.—State v. Carter, 113 N. C. 639, 18 S. E. 517. OHIO—McDivit v. State, 20 Ohio St. 231. S. D.—State v. Faulk, 22 S. D. 183, 116 N. W. 72. TEX.—Wofford v. State, 29 Tex. App. 536, 16 S. W. 535; Jasper v. State, 61 S. W. 392; State v. Bell, 62 S. W. 567. WASH.—State v. Johnson, 19 Wash. 410, 53 Pac. 667; State v. Palmer, 20 Wash. 207, 54 Pac. 1121.

Money unnecessarily described, it becomes necessary to prove it as laid.—Marshall v. State, 71 Ark. 415, 14 **Am. Cr. Rep.** 469, 75 S. W. 584.

Under the Arkansas statute (Sand. & H. Dig., § 1717) it is sufficient in an indictment or information to describe stolen money as "gold, silver and paper money."—State v. Boyce, 65 Ark. 82, 44 S. W. 1043; Marshall v. State, 71 Ark. 415, 14 **Am. Cr. Rep.** 469, 45 S. W. 584.

Under Indiana Revised Statutes, § 7050, coin or bank-notes current as money, sufficiently described generally without stating the denomination or the kind of bills or coin.—Riggs v. State, 104 Ind. 261, 6 **Am. Cr. Rep.** 394, 3 N. E. 886.

[9] Riggs v. State, 104 Ind. 261, 6 **Am. Cr. Rep.** 394, 3 N. E. 886.

[10] ALA.—Grant v. State, 55 Ala. 201; Leonard v. State, 115 Ala. 80, 22 So. 564. CAL.—People v. Bogart, 36 Cal. 245. FLA.—Lang v.

insufficiency in the description is cured by the allegation that a more particular description of the property is to the grand jurors unknown,—that allegation appearing from the evidence to be the fact.[11]

§ 845. ——— ——— ——— CERTAINTY AND DEFINITENESS. An indictment or information charging the larceny of money is not required to describe the property with any greater degree of certainty and precision than any other article of personal property alleged to have been stolen; but the description must always be with such a reasonable degree of certainty and definiteness as to meet the requirements heretofore pointed out as necessary in the description of property alleged to have been stolen,[1] and be such as is sufficient to identify the subject of the alleged larceny,[2] and inform the accused of the charge against him; meeting these requirements, the description is sufficient.[3] It

State, 42 Fla. 595, 28 So. 856; Enson v. State, 58 Fla. 37, 18 Ann. Cas. 940, 138 Am. St. Rep. 92, 50 So. 948. ILL.—People v. Hunt, 251 Ill. 446, 96 N. E. 220. IOWA—State v. Hoppe, 39 Iowa 468. KAN.—State v. McAnulty, 26 Kan. 533. KY.—Travis v. Com. 96 Ky. 77, 27 S. W. 863. N. Y.—Haskins v. People, 16 N. Y. 344. TEX.—Cook v. State, 4 Tex. App. 265.

Where the bills alleged to have been stolen are not sufficiently described a demurrer should be interposed to the indictment.—Roberts v. State, 83 Ga. 369, 8 Am. Cr. Rep. 474.

11 ALA.—Chisolm v. State, 45 Ala. 66. IOWA—State v. Fisher, 106 Iowa 658, 77 N. W. 456; State v. Williams, 118 Iowa 494, 14 Am. Cr. Rep. 570, 92 N. W. 652. TEX.—Ridgeway v. State, 41 Tex. 231.

1 See, supra, § 826.

2 "One hundred and thirty dollars" alleged to have been stolen, without any specific description of the kind of money, held to be bad on motion in arrest of judgment.—Barton v. State, 29 Ark. 68, 2 Am. Cr. Rep. 340; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314.

3 ALA.—Knight v. State, 39 So. 592; Davis v. State, 12 Ala. App. 147, 67 So. 770. ILL.—People v. Miller, 178 Ill. App. 492. IND.—Hammond v. State, 121 Ind. 512, 23 N. E. 515; Randall v. State, 132 Ind. 539, 32 N. E. 305. IOWA—State v. Fisher, 106 Iowa 658, 77 N. W. 456; State v. Connor, 118 Iowa 490, 14 Am. Cr. Rep. 568, 92 N. W. 654. MICH.—Brown v. People, 29 Mich. 232. MO.—State v. Miles, 174 Mo. App. 181, 156 S. W. 758. N. C.—State v. Freeman, 89 N. C. 469. PA.—Com. v. Thompson, 46 Pa. Super. Ct. 225. TENN.—State v. Longbottoms, 30 Tenn. (11 Humph.) 39; State v. Stephens, 127 Tenn. 282, 154 S. W.

is true that the precise amount in the various kinds of coin, bills, notes, and certificates would, under most circumstances, be impossible to prove with any certainty, and, if it should be necessary to make the allegation thus particular, prosecutions for theft of money would ordinarily be abortive.[4] And this is the reason that money may be described as "goods and chattels," or simply as so many dollars, "the goods and chattels of" a named person, of a designated value;[5] and where the money is otherwise sufficiently described, the phrase "goods and chattels of" may be disregarded as surplusage.[6] We have already seen that there is a diversity of holding in the various jurisdictions as to the necessity of describing the money by giving the kind of coin or bills and the denomination of the separate pieces;[7] and the rule in the particular jurisdiction where the prosecution is had will govern the pleader as to the degree of certainty and definiteness which he shall incorporate into the indictment or information. But an indictment or information charging the larceny of money, which simply describes it as "one hundred and thirty dollars," or other similar general description, without specific description as to the kind of money, or the sovereignty by which issued, is bad on motion in arrest of judgment,[8] because where the money is not described as coin or currency of the United States, or current as money of the United States, it is insufficient.[9] Yet it has been said, on the other hand, that a charge of

1149. TEX.—Burrus v. State, 76 Tex. Cr. Rep. 120, 172 S. W. 981.

4 State v. Connor, 118 Iowa 490, 14 Am. Cr. Rep. 568, 92 N. W. 654. See Randall v. State, 132 Ind. 539, 32 N. E. 305; State v. Alverson, 105 Iowa 152, 74 N. W. 770; State v. Fisher, 106 Iowa 658, 77 N. W. 456; State v. Hanshew, 3 Wash. 12, 27 Pac. 1029.

5 State v. Parker, 1 Houst. Cr. Cas. (Del.) 9; Garfield v. State, 74 Ind. 60; Whitson v. State, 160 Ind. 510, 67 N. E. 265; State v. King, 95 Md. 125, 51 Atl. 1102.

6 R. v. Radley, 2 Car. & K. 974, 3 Cox C. C. 460, 1 Den. C. C. 450, 61 Eng. C. L. 974.

7 See, supra, § 844.

8 Barton v. State, 29 Ark. 68, 2 Am. Cr. Rep. 340; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314.

9 Adams v. State, (Tex.) 172 S. W. 792.

larceny of "money," means the lawful money of the United States;[10] and hence, a charge of stealing "ten dollars good and lawful money of the state of Tennessee," is an insufficient description of the money.[11]

Instances of sufficient description, without attempting to classify them according to the liberal or the strict rule as to description, are: "Current money of the United States,"[12] of specified denominations;[13] "four hundred dollars good and lawful money of the United States, the personal property of" a person named;[14] "fourteen dollars lawful money of the United States, the notes and coin composing said sum being to the inquest aforesaid unknown;"[15] "lawful money of the United States" of specified denominations;[16] "one dollar and eight cents of the lawful money of the United States, of the value of one dollar and eight cents;"[17] "twenty dollars of lawful money of the United States;"[18] and the like.

10 Sims v. State, 64 Tex. Cr. Rep. 435, 142 S. W. 752.

11 State v. Longhottoms, 30 Tenn. (11 Humph.) 39.

12 State v. Connor, 118 Iowa 490, 14 Am. Cr. Rep. 568, 92 N. W. 654.

"Of the United States" in the description is material and must be proved.—Marshall v. State, 71 Ark. 415, 14 Am. Cr. Rep. 469, 45 S. W. 584.

13 Davis v. State, 12 Ala. App. 147, 67 So. 770.

14 State v. Stephens, 127 Tenn. 282, 154 S. W. 1149.

15 Com. v. Thompson, 46 Pa. Super. Ct. 225.

As to unknown description, see, supra, § 844, footnotes 3, 10, 11.

16 Davis v. State, 12 Ala. App. 147, 67 So. 770.

"Nine dollars lawful money of the United States of America of the value of nine dollars," held not to set forth the offense with sufficient certainty under a statute requiring an information to set forth the offense with reasonable certainty, substantially as required in an indictment. — People v. Miller, 178 Ill. App. 492.

17 State v. Miles, 74 Mo. App. 181, 156 S. W. 758.

18 Burrus v. State, 76 Tex. Cr. Rep. 120, 172 S. W. 981.

"Three thousand dollars lawful money of the United States," held to be an insufficient description.—People v. Ball, 14 Cal. 101, 73 Am. Dec. 631.

"Twenty-two dollars and fifty cents in lawful money of the United States, of the value of twenty-two dollars and fifty cents," while not sufficient at common law, is sufficient under statutes modifying the common law as to requisites of minute description.—Hammond v. State, 121 Ind. 512, 23 N. E. 515; Randall v. State, 132

§ 846. ——— ——— ——— BANK-BILLS AND BANK-NOTES. As in the case of other moneys,[1] an indictment or information charging the larceny of bank-bills or bank-notes is not required to be more specific and certain in the description of the property stolen than on a charge of larceny of any other species of chattels alleged to have been stolen; a reasonably certain identification of the property being all that is required.[2] They may be described as "money," although as yet in the hands of the bank unissued;[3] as "promissory notes;"[4] or simply as notes issued by a bank and circulating as money, as bank-bills,[5]

Ind. 539, 32 N. E. 305; State v. Fisher, 106 Iowa 658, 77 N. W. 456; Brown v. People, 29 Mich. 232; State v. Freeman, 89 N. C. 469.

1 See, supra, § 845.

2 Wilson v. State, 66 Ga. 591; People v. Jackson, 8 Barb. (N. Y.) 637; Bravo v. State, 20 Tex. App. 177.

3 R. v. West, 7 Cox C. C. 183, 1 Dears. & B. 119.

4 IOWA—State v. Bond, 8 Iowa 540. MASS.—Com. v. Butts, 124 Mass. 449; Com. v. Gallagher, 126 Mass. 54; Com. v. Collins, 138 Mass. 483, 5 **Am. Cr. Rep.** 345. MISS.—Damewood v. State, 2 Miss. (1 How.) 262. N. C.—State v. Fulford, 61 N. C. (Phill. L.) 563. PA.—Com. v. Boyer, 1 Bin. 201; Com. v. Henry, 2 Brewst. 566; Com. v. Byerly, 2 Brewst. 568. S. C.—State v. Wilson, 3 Brev. L. 196. VT.—State v. Emery, 1 Brayt. 131.

As to bank-bills or promissory notes, see note, 52 **Am. Dec.** 447.

Silver certificates can not be so described. See, infra, § 848, footnote 21.

5 CONN.—Salisbury v. State, 6 Conn. 101. GA.—Bulloch v. State, 10 Ga. 47, 54 **Am. Dec.** 369; Wilson v. State, 66 Ga. 591. IND.—Crawford v. State, 2 Ind. 132; State v. Hayes, 21 Ind. 176; Hart v. State, 55 Ind. 599. IOWA—Munson v. State, 4 G. Greene 483. MASS.—Eastman v. Com., 70 Mass. (4 Gray) 416; Com. v. Stebbins, 74 Mass. (8 Gray) 492; Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 **Am. Dec.** 666. MICH.—People v. Kent, 1 Doug. 42. MINN.—State v. Hinckley, 4 Minn. 345. N. H.—State v. Mahanna, 48 N. E. 377. N. Y.—Low v. State, 2 Park. Cr. Rep. 37. S. C.—State v. Smart, 4 Rich. L. 356, 55 **Am. Dec.** 683. TENN.—Baldwin v. State, 33 Tenn. (1 Sneed.) 411; Pyland v. State, 36 Tenn. (4 Sneed.) 357. VT.—State v. Emery, 1 Brayt. 131.

"Sundry bank-bills, amounting together" to a certain sum named, and of the value of that sum, was held to be fatally defective and that a conviction and judgment could not be sustained.—Hamblett v. State, 18 N. H. 384.

or bank-notes,[6] these terms being synonymous.[7] The rules applicable to the description of stolen coin[8] apply also to bank-bills and bank-notes, and it is sufficient to allege a theft of "sundry bank-bills or bank-notes respectively, to the grand jurors unknown, of the amount and value of" a stated number of dollars.[9] An indictment or information charging larceny of bank-bills or bank-notes eo nomine, which states their number, denomination, and value,[10] is sufficient even in those jurisdictions in which, under statute, a less particular description is necessary; and there need be no distinction drawn between treasury-notes,[11]

6 ALA.—State v. Williams, 19 Ala. 15, 54 **Am. Dec.** 184. GA.—Bell v. State, 41 Ga. 589. IOWA—State v. Bond, 8 Iowa 540; State v. Hockenberry, 30 Iowa 504; State v. Graham, 65 Iowa 617, 22 N. W. 897. MD.—State v. Cassel, 2 Harr. & G. 407. MASS.—Com. v. Richards, 1 Mass. 337. MICH.—People v. Kent, 1 Doug. 42. N. Y.—People v. Jackson, 8 Barb. 637. N. C.—State v. Rout, 10 N. C. 618; State v. Brown, 53 N. C. 443. PA.—Com. v. Boyer, 1 Bin. 201; Com. v. McDowell, 1 Browne 359; McLaughlin v. Com., 4 Rawle 464. TEX.—Simpson v. State, 10 Tex. App. 681. VA.—Com. v. Moseley, 4 Va. (2 Va. Cas.) 154. W. VA.—Frederick v. State, 3 W. Va. 695. FED.—United States v. McDaniel, 4 Cr. C. C. 721, Fed. Cas. No. 15666.

7 State v. Hayes, 21 Ind. 176; Munson v. State, 4 G. Greene (Iowa) 483; Eastman v. Com., 70 Mass. (4 Gray) 416; Roth v. State, 10 Tex. App. 27.

8 See, infra, § 847.

9 IND.—McQueen v. State, 82 Ind. 73. KAN.—State v. McAnulty, 26 Kan. 536. MASS.—Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 **Am. Dec.** 666; Com. v. Strangford, 112 Mass. 292. TEX.—Cook v. State, 4 Tex. App. 267.

Larceny of several bank-notes charged, it is not necessary to state the number nor to allege the value of each, it being sufficient to allege a larceny of divers bank-notes of an aggregate value.—Com. v. Stebbins, 74 Mass. (8 Gray) 492; Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 **Am. Dec.** 666; Com. v. Gallagher, 82 Mass. (16 Gray) 240; Com. v. Hussey, 111 Mass. 432; Com. v. Butts, 124 Mass. 449; Com. v. Collins, 138 Mass. 483, 5 **Am. Cr. Rep.** 345.

10 ALA.—State v. Williams, 19 Ala. 15, 54 **Am. Dec.** 184. IND.—Crawford v. State, 2 Ind. 132; Hart v. State, 55 Ind. 599. MICH.—People v. Kent, 1 Doug. 42. MONT.—Territory v. Shipley, 4 Mont. 472, 2 Pac. 313. N. H.—Hamblett v. State, 18 N. H. 384; McKean v. Cutler, 48 N. H. 370. N. Y.—Low v. People, 2 Park. Cr. Rep. 37. TENN.—Pyland v. State, 36 Tenn. (4 Sneed.) 357.

11 See, infra, § 848.

and bank-notes.[12] It has been said not to be essential to a conviction that the bank-bills or bank-notes stolen should be particularly described in the indictment,[13] or identified by the evidence on the trial, provided the jury are satisfied to a reasonable certainty as to the identity of the property stolen;[14] although it has been held in other jurisdictions that a description of the property alleged to have been stolen as "sundry bank-bills, issued on the authority of the United States, usually known as 'greenbacks,' amounting in all to the sum of five hundred and eighty-nine dollars," is not a sufficient description to support an indictment, or to enable the jury to determine that the stolen chattels described in the evidence were the same as those referred to in the indictment; that the number, kind, and denomination of the bills ought to be given, or a good and sufficient excuse for not so doing set forth in the indictment or information.[15]

§ 847. ——— ——— ——— COIN, COPPER OR GOLD OR SILVER. An indictment or information charging the larceny of coin current as money properly describes it as so many pieces of current[1] copper,[2] gold, or silver coin, specifying the respective species or kind of coin,[3] and the denomina-

12 Sallie v. State, 39 Ala. 691.

13 GA.—Berry v. State, 10 Ga. 511. IND.—Riggs v. State, 104 Ind. 261, 6 Am. Cr. Rep. 394, 3 N. E. 886. IOWA—Munson v. State, 4 G. Greene 483. KY.—Jones v. Com., 76 Ky. (13 Bush) 356. MASS.—Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 Am. Dec. 666. N. Y.—People v. Evans, 69 Hun 226, 10 N. Y. Cr. Rep. 469, 23 N. Y. Supp. 717; affirmed 143 N. Y. 638, 37 N. E. 823. VA.—Adams v. Com., 64 Va. (23 Gratt.) 949.

14 Wilson v. State, 66 Ga. 591.

15 Territory v. Shipley, 4 Mont. 468, 4 Am. Cr. Rep. 491, 2 Pac. 313.

"One lot of Kentucky bank-notes," without a specification of the bank, is too indefinite for the identification of the thing taken, or any part thereof.—Rhoons v. Com., 63 Ky. (2 Duv.) 159.

1 "Current" coin need not be alleged.—See People v. Green, 15 Cal. 512; Crafton v. State, 79 Ga. 584, 4 S. E. 333; Com. v. Gallagher, 82 Mass. (16 Gray) 240.

2 Com. v. Gallagher, 82 Mass. (16 Gray) 240.

3 ALA.—Chisolm v. State, 45 Ala. 66. CAL.—People v. Green, 15 Cal. 512. FLA.—Porter v. State, 26 Fla. 56, 7 So. 145. GA.—Berry v. State, 10 Ga. 511. IND.—Daily v. State, 10 Ind. 536; McKane v. State, 11 Ind. 195; Barker v. State,

tions;[4] but, if the species of the coin be unknown to the grand jury, they may so state in lieu of such specification.[5] In this respect the law does not require greater certainty than the nature of the case affords,[6] and especially is this true in those jurisdictions in which, by statute, the description of the kind of money is dispensed with.[7] Coin alleged to have been stolen may be described, in some jurisdictions, simply as "money,"[8] or "coin;"[9]

48 Ind. 163. IOWA—Munson v. State, 4 G. Greene 483. MASS.—Com. v. Gallagher, 82 Mass. (16 Gray) 240. N. H.—Lord v. State, 20 N. H. 404, 51 Am. Dec. 231. N. Y.—Miller v. People, 21 Hun 443. TEX.—Lavarre v. State, 1 Tex. App. 685; Bryant v. State, 16 Tex. App. 144. W. VA.—State v. Jackson, 26 W. Va. 250. FED.—United States v. Rigsby, 2 Cr. C. C. 364, Fed. Cas. No. 16163; United States v. Barry, 4 Cr. C. C. 606, Fed. Cas. No. 14530.

"Sundry pieces of silver coin, of the value of twenty-five dollars" has been held to be too vague.—United States v. Kurtz, 4 Cr. C. C. 674, Fed. Cas. No. 15546.

4 ALA.—State v. Murphy, 6 Ala. 845; Chisolm v. State, 45 Ala. 66. MASS.—Com. v. Sawtelle, 65 Mass. (11 Cush.) 142. N. H.—Lord v. State, 20 N. H. 404, 51 Am. Dec. 231. TENN.—State v. Longbottoms, 30 Tenn. (11 Humph.) 39. TEX.—Lavarre v. State, 1 Tex. App. 685.

Money should be specified as so many pieces of the current gold or silver coin of the realm; and the species of coin must be stated by its appropriate name.—People v. Ball, 14 Cal. 101, 75 Am. Dec. 631; Territory v. Shipley, 4 Mont. 468, 4 Am. Cr. Rep. 491, 2 Pac. 313; State v. Longbottoms, 30 Tenn. (11 Humph.) 39.

5 ALA.—Carden v. State, 89 Ala. 130, 7 So. 801; Leonard v. State, 115 Ala. 80, 22 So. 564. CAL.—People v. Bogart, 36 Cal. 245. FLA.—Long v. State, 42 Fla. 595, 28 So. 856. GA.—Ray v. State, 4 Ga. App. 67, 60 S. E. 816. IND.—Hamilton v. State, 60 Ind. 193, 28 Am. Rep. 653. IOWA—State v. Williams, 118 Iowa 494, 14 Am. Cr. Rep. 570, 92 N. W. 652. KAN.—State v. McAnulty, 26 Kan. 533. MICH.—Brown v. People, 29 Mich. 232. MO.—State v. Burks, 150 Mo. 568, 60 S. W. 1100. TEX.—Lavarre v. State, 1 Tex. App. 685; Ware v. State, 2 Tex. App. 547; Berry v. State, 46 Tex. Cr. Rep. 420, 80 S. W. 630.

See, also, supra, § 844, footnotes 4, 10, and 11.

6 People v. Bogart, 36 Cal. 245.

As to certainty of description, see, supra, §§ 844, 845.

7 See State v. Fogerty, 105 Iowa 32, 74 N. W. 754.

8 DEL.—State v. Parker, 1 Houst. Cr. Cas. 9. IND.—Terry v. State, 13 Ind. 70; Barker v. State, 48 Ind. 163. MD.—State v. Evans, 7 Gill. & J. 290. TEX.—Menear v. State, 30 Tex. App. 475, 17 S. W. 1082.

9 Com. v. Gallagher, 82 Mass. (16 Gray) 240.

and it has been said that in charging a larceny of several pieces of coin of the same kind, it is not necessary to state the number, or to allege the value, of each article, it being sufficient to allege a larceny of divers of the coins of an aggregate value.[10] Accordingly it has been said that an allegation, in an indictment or information charging 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 can not give, as they have no means of knowledge," is a sufficient description.[11] But simply describing the coin alleged to have been taken, as so many dollars, or as so many dollars in money, without further particularization, has been said to be insufficient,[12] although the contrary has been held in some jurisdictions;[13] and in Alabama it has been said that to describe the money taken simply as "sundry pieces of silver coin, made current by law, usage, and custom within the state of Alabama, amounting to the sum of five hundred and thirty dollars and fifteen cents, of the value of five hundred and thirty dollars and fifteen cents," is an insufficient description.[14] The most general form of allegation in the vari-

10 Com. v. Collins, 138 Mass. 483, 5 Am. Cr. Rep. 345. See Com. v. Stebbins, 74 Mass. (8 Gray) 492; Com. v. Grimes, 76 Mass. (10 Gray) 470, 71 Am. Dec. 666; Com. v. Gallagher, 82 Mass. (16 Gray) 240; Com. v. Hussey, 111 Mass. 432; Com. v. Butts, 124 Mass. 449.

11 Com. v. Sawtelle, 65 Mass. (11 Cush.) 142; Com. v. Collins, 138 Mass. 483, 5 Am. Cr. Rep. 345.

12 See ALA.—Sallie v. State, 39 Ala. 691; Grant v. State, 55 Ala. 201. ARK.—Barton v. State, 29 Ark. 68. CAL.—People v. Ball, 14 Cal. 101, 73 Am. Dec. 631. MD.—Randall v. State, 132 Ind. 539, 32 N. E. 305. KY.—Jones v. Com. 76 Ky. (13 Bush) 356. MASS.—Com. v. O'Connell, 96 Mass. (14 Allen) 451. MICH.—Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; Brown v. People, 29 Mich. 232. MO.—State v. Kroeger, 47 Mo. 530. N. C.—State v. Fulford, 61 N. C. (Phill. L.) 563. S. C.—State v. Evans, 15 Rich. L. 31. TENN.—State v. Longbottoms, 30 Tenn. (11 Humph.) 39. VA.—Leftwich v. Com. 61 Va. (20 Gratt.) 716. WIS.—McEntee v. State, 24 Wis. 43.

13 State v. Walker, 22 La. Ann. 425; State v. Carro, 26 La. Ann. 377; State v. Shonhausen, 26 La. Ann. 421; State v. Green, 27 La. Ann. 598; McDivit v. State, 20 Ohio St. 231.

14 State v. Murphy, 6 Ala. 846.

ous jurisdictions, and which has repeatedly been held sufficient, is the taking of so many dollars of the current gold coin, or silver coin, of the United States,[15] although it has been said that it is unnecessary to allege that the money was "lawful money" of the United States,[16] but that if alleged to be either "current" or "lawful money," the prosecution will be required to prove it as such on the trial.[17]

§ 848. ——— ——— ——— FEDERAL CURRENCY, TREASURY, AND NATIONAL BANK-NOTES. United States paper currency, treasury-notes, and national bank-bills or bank-notes are all governed, as to the description thereof in an indictment or information charging their larceny, by the rules above laid down respecting other kinds or classes of money, and with the same variances in the different jurisdictions as to specific and general description. Thus, it has been said that such money is properly described as "lawful currency of the United States;"[1] "lawful money;"[2] "lawful money of the United States;"[3]

15 McKune v. State, 11 Ind. 195; R. v. Radley, 2 Car. & K. 974, 3 Cox C. C. 460, 1 Den. C. C. 450, 61 Eng. C. L. 974.

In McKune v. State, supra, the court say: "We have a piece of money of the gold coin called a dollar and is it not just as intelligible to say 'sixty dollars of the gold coin,' as to say 'sixty pieces of gold coin called sixty dollars'? In our opinion the indictment is unobjectionable."

16 People v. Winkler, 9 Cal. 234.

17 Snelling v. State, 57 Tex. Cr. Rep. 416, 123 S. W. 610; Maxey v. State, 58 Tex. Cr. Rep. 118, 124 S. W. 927; Rogers v. State, 58 Tex. Cr. Rep. 146, 124 S. W. 920.

1 Blount v. State, 76 Ga. 17.

2 Rains v. State, 137 Ind. 83, 36 N. E. 532; People v. Reavey, 38 Hun (N. Y.) 418; re-argument denied, 39 Hun 364, 4 N. Y. Cr. Rep. 1; affirmed 104 N. Y. 683; State v. Blanchard, 11 Wash. 116, 39 Pac. 377; State v. Palmer, 20 Wash. 207, 54 Pac. 1121.

3 Carden v. State, 89 Ala. 130, 7 So. 801; State v. Fisher, 106 Iowa 658, 77 N. W. 456; State v. Moore, 66 Mo. 372.

"United States currency" alleged, the article taken must be proved to be such currency; proof of the taking of Canadian bills will not support the indictment.—State v. Phillips, 27 Wash. 364, 67 Pac. 608.

"bills,"[4] although there is authority to the contrary;[5] "current paper money of the United States;"[6] "gold certificates;"[7] "greenbacks;"[8] "greenbacks, currency of the United States;"[9] or simply as "money,"[10] in some jurisdictions, but not in others;[11] "national-bank currency,"[12] or "national-bank currency and treasury notes;"[13] "na-

[4] **Money described as bills** of certain denominations and value, paper currency of the United States, and as silver coins of the United States of certain value, all of a certain aggregate value, a sufficient description.—Lane v. State, 69 Tex. Cr. Rep. 65, 152 S. W. 897.

No evidence on the trial to show that the property taken was bank-bills.—Johnson v. State, 119 Ga. 257, 45 S. E. 960.

"One hundred dollars in greenback bills of the value of one hundred dollars," is sufficient after verdict.—Roberts v. State, 83 Ga. 369, 8 Am. Cr. Rep. 474.

Bills not sufficiently described in the indictment or information, objection thereto should be raised by demurrer.—Roberts v. State, 83 Ga. 369, 8 Am. Cr. Rep. 474.

[5] Sallie v. State, 39 Ark. 691; State v. Oakley, 51 Ark. 112, 10 S. W. 17; Diaz v. State, 62 Tex Cr. Rep. 317, 137 S. W. 377.

"Fifty dollars in paper currency of the value of fifty dollars," held not to be vulnerable to indictment for failure to allege that it was money, or if not money, to describe it more specifically.—Diaz v. State, 62 Tex. Cr. Rep. 317, 137 S. W. 377.

"Two ten dollar bills of the United States currency," held to be too indefinite a description.—State v. Oakley, 51 Ark. 112, 10 S. W. 17.

[6] ALA.—Thomas v. State, 117 Ala. 84, 23 So. 659. GA.—Cody v. State, 100 Ga. 105, 23 S. E. 106. IOWA—State v. Connor, 118 Iowa 490, 92 N. W. 564; State v. Williams, 118 Iowa 494, 14 Am. Cr. Rep. 570, 92 N. W. 652. KY.—Jones v. Com., 76 Ky. (13 Bush) 356. LA. —State v. Ziord, 30 La. Ann. 867; State v. Monroe, 30 La. Ann. 1241. MD.—State v. King, 95 Md. 125, 51 Atl. 1102. S. C.—State v. Evans, 15 Rich. L. 31. VA.—Dull v. Com., 66 Va. (25 Gratt.) 965.

[7] People v. Dunn, 53 Hun 381, 7 N. Y. Cr. Rep. 173, 6 N. Y. Supp. 805.

[8] Levy v. State, 79 Ala. 259; Turner v. State, 124 Ala. 59, 27 So. 272; State v. Hockenberry, 30 Iowa 504; State v. Graham, 65 Iowa 617, 22 N. W. 897.

[9] Levy v. State, 79 Ala. 259.

Greenbacks are included in the term "treasury notes."—Duvall v. State, 63 Ala. 12; Hickey v. State, 23 Ind. 21.

[10] People v. Winkler, 9 Cal. 234.

Constitutionality of statute permitting such a description has been questioned.—See Brown v. People, 29 Mich. 232.

[11] Lavarre v. State, 1 Tex. App. 685.

[12] State v. Henry, 24 Kan. 457.

[13] State v. Henry, 24 Kan. 457. See, also, footnotes 20 and 22, this section.

tional currency;"[14] "notes;"[15] "paper currency;"[16] "promissory notes of the United States;"[17] "treasury notes;"[18] "United States currency;"[19] "United States treasury notes."[20] But it has been said that a "silver certificate" can not be described as a "bank-note;"[21] and that a description as "one lot of treasury notes," without any specification of denomination, number, or value, is too indefinite for the identification of the thing taken, or of any part thereof.[22]

§ 849. ——— ORE. Ore in place, savoring of the realty, is not the subject of larceny, in the absence of a statute so providing;[1] but where the ore has been once severed from the realty, it becomes personal property, and is the subject of larceny. Hence, an indictment or information charging the larceny of ore must specifically state that the ore had been previously severed from the soil and left on the freehold. Thus, where the indict-

14 DuBois v. State, 50 Ala. 139; Territory v. Anderson, 6 Dak. 300, 50 N. W. 124.

15 See footnote 17, this section.

"Three notes of the United States currency, of the value of" a sum named, held to be a sufficient description, in Holly v. Com., 113 Va. 769, 75 S. E. 88.

16 State v. Boyce, 65 Ark. 82, 44 S. W. 1043.

"Paper currency of the United States," held to be an insufficient description, in State v. Hoke, 84 Ind. 137, and Coskey v. State, (Tex.) 50 S. W. 703.

17 Hummel v. State, 17 Ohio St. 628. See, also, footnote 15, this section.

18 See footnotes 13 and 20, this section.

Proof of authorization by United States essential.—Sallie v. State, 39 Ala. 691.

19 Bailey v. Com., 22 Ky. L. Rep. 512, 58 S. W. 425.

In Virginia, description held to be insufficient for indefiniteness and uncertainty.—Leftwich v. Com., 61 Va. (20 Gratt.) 716.

20 **Kind need not be stated.**—Randall v. State, 53 N. J. L. 485, 22 Atl. 45; Hummel v. State, 17 Ohio St. 628.

21 Stewart v. State, 62 Md. 412.

22 Rhoons v. Com., 86 Ky. (2 Duv.) 159. See, also, footnotes 13, 18 and 20, this section.

1 People v. Williams, 35 Cal. 671. See Brandon v. West, 28 Nev. 508, 83 Pac. 329; Emmerson v. Anderson, 1 Mod. 89, 86 Eng. Repr. 755.

As to property savoring of realty, see Holly v. State, 54 Ala. 238; Harberger v. State, 4 Tex. App. 26, 30 Am. Rep. 157.

See, also, supra, § 841, and note, 88 Am. St. Rep. 590.

ment charged that the accused "did unlawfully and feloniously take, steal, and carry away fom the mining claim of A, fifty pounds of gold-bearing quartz-rock, etc., of the value of four hundred dollars," on objection to the sufficiency of the indictment because the property alleged to have been stolen savored of the realty, the court, in upholding the objection, said that the indictment was "entirely silent as to whether the rock was a part of the ledge and was broken off and immediately carried away by the defendant, or whether finding it already severed, he afterwards removed it," and for that reason it was insufficient.[2] Where the accused was charged with the larceny of "a quantity of specimens of gold and silver ore, of one hundred and fifty pounds in weight, of the value of five hundred dollars," to an objection that the indictment failed to charge the offense of larceny because the property alleged to have been stolen savored of the realty, the court, in upholding the indictment, said that it was not charged that the ore was taken from any ledge or mining claim, and that the phrase "specimens of gold and silver ore" showed that the ore had been previously severed from the ledge.[3] And where an indictment charged accused with the larceny of "six hundred and ten pounds of silver-bearing ore, of the value of eight hundred dollars," on similar objection to the sufficiency of the indictment on the ground that the property alleged to have been stolen savored of the realty, the court, in upholding the indictment, said that the words "silver-bearing ore," as used in the indictment, had reference to a portion of vein-matter which had been extracted from a load and assorted, separated from the mass of waste rock and earth, and thrown aside for milling or sməltering purposes, or taken away from the ledge, and for that reason, the indictment showed the property alleged to have been stolen was personal property, and was sufficient.[4]

[2] People v. Williams, 35 Cal. 671.

[3] People v. Freeman, 1 Ida. 322.

[4] People v. Berryman, 8 Nev. 262.

§ 850. ——— POCKET-BOOK AND CONTENTS. An indictment or information charging the larceny of a pocket-book, either by appropriating one that is dropped or by larceny from the person, need not describe it in any more particular manner, or in any different way, from the description employed in the case of the larceny of other property.[1] Thus, it has been said that a charge of stealing a "pocket-book containing one ten dollar bill and two five dollar bills, of the aggregate value of twenty dollars good and lawful money of the United States,"[2] or other similar description as to the money,[3] is sufficient. Under the Iowa statute providing that an indictment shall not be considered insufficient because of any matter that was formerly considered essential, which does not tend to prejudice the substantial rights of the accused on the merits, the description as "a certain dark-colored pocket-book and its contents, consisting of one hundred and ten dollars of current money of the United States, and of the value of one hundred and ten dollars, a more particular description of which is to the grand jurors unknown," is a sufficient description,[4] and that if there was any insufficiency in the description, it would be cured by the allegation that a more particular description is to the grand jury unknown.[5]

§ 851. ——— RAILROAD TICKETS. At common law railroad tickets were not the subject of larceny, but they have been made such by special statutory provision in many of the states of the Union[1] as well as in Eng-

1 People v. Long, 44 Mich. 296, 6 N. W. 673.

2 Sims v. State, 64 Tex. Cr. Rep. 435, 142 S. W. 752.

3 DuBois v. State, 50 Ala. 139; Johnson v. State, 32 Ark. 181.

4 State v. Williams, 118 Iowa 494, 14 Am. Cr. Rep. 570, 92 N. W. 652.

5 Id.

1 See: IOWA—State v. Wilson, 95 Iowa 341, 64 N. W. 266. MINN.—State v. Musgang, 51 Minn. 556, 53 N. W. 874. ORE.—State v. Wilson, 63 Ore. 344, Ann. Cas. 1914D, 646, 127 Pac. 980. TEX.—Patrick v. State, 50 Tex. Cr. Rep. 496, 123 Am. St. Rep. 861, 14 Ann. Cas. 177, 98 S. W. 840. WASH.—McCarty v. State, 1

land,[2]—are regarded as "property,"[3] and recognized as included within the statutory phrase "goods and chattels," in some jurisdictions.[4] The general rule is, however, that a railroad ticket is not "a thing of value" until it has been duly filled out, signed, and stamped, and is capable of being used for transportation between the points named therein, and, therefore, until then is not a subject of larceny,[5] although it is different under the peculiar wording of some of the statutes;[6] but railroad tickets taken up and punched by a conductor have been said to be "accountable receipts" which may be stolen.[7] An indictment or information charging the larceny of railroad tickets must fully state facts and circumstances which will bring the case

Wash. 377, 22 Am. St. Rep. 152, 25 Pac. 299; State v. Holmes, 9 Wash. 528, 37 Pac. 283.

Railroad tickets are that class of property which is a subject of theft under the Texas statute.—Patrick v. State, 50 Tex. Cr. Rep. 496, 123 Am. St. Rep. 861, 14 Ann. Cas. 177, 98 S. W. 840.

2 R. v. Boulton, 2 Car. & K. 917, 3 Cox C. C. 576, 61 Eng. C. L. 917.

See, also, footnote 4, this section.

3 **Railroad tickets property,** held by the civil courts.—International & G. N. R. Co. v. Ing, 29 Tex. Civ. App. 398, 68 S. W. 722.

Railroad tickets issued by a railroad company more properly speaking are simply tokens authorizing the owner to be transported between certain points on such railroad or its connecting lines, and are quasi-property.—Jannin v. State, 42 Tex. Cr. Rep. 631, 96 Am. St. Rep. 821, 53 L. R. A. 349, 51 S. W. 1126.

4 **Railroad ticket is a "chattel,"** where issued to a passenger, within the meaning of the statute.—R. v. Chapman, 74 J. P. 360; R. v. Boulton, 1 Den. C. C. 508; R. v. Morrison, 1 Bell Cr. Cas. 158; R. v. Kilham, L. R. 1 C. C. 261.

5 State v. Hill, 1 Houst. Cr. Cas. (Del.) 420; State v. Musgang, 51 Minn. 556, 53 N. W. 874; McCarty v. State, 1 Wash. 377, 22 Am. St. Rep. 152, 25 Pac. 299.

Railroad passenger ticket completed and ready for sale, the subject of larceny under Minnesota Penal Code, § 423.—State v. Musgang, 51 Minn. 556, 53 N. W. 874.

Railroad tickets which are not stamped and issued by the company, and are not in the condition authorizing transportation, are not of equivalent value to a ticket regularly issued by the company.—Patrick v. State, 50 Tex. Cr. Rep. 496, 123 Am. St. Rep. 861, 14 Ann. Cas. 177, 98 S. W. 840.

6 **Railroad ticket, though not yet stamped** or delivered to a passenger, is a "railroad ticket," and also within the term "any goods or chattels," within the Oregon statute (L. O. L., § 1947).—State v. Wilson, 63 Ore. 344, Ann. Cas. 1914D, 646, 127 Pac. 980.

7 State v. Wilson, 95 Iowa 341,

clearly within the provisions of the particular statute under which prosecution is had; but charging the larceny of a railroad ticket in the language of a statute specially making such property a subject of larceny, is sufficient;[8] and it has been said that charging accused with the larceny of "divers and sundry genuine railroad passenger tickets, prepared for sale to passengers and after the sale thereof the personal property of and issued by" a named railroad, coupled with the further allegation that a more particular description was unknown, has been held to be a sufficient description of a railroad ticket under the Minnesota statute;[9] but an indictment which fails to state that the ticket was stamped, dated, and signed and entitling to transportation from a point stated to another point designated, and issued by a named railroad company, fails to show that the alleged ticket was a subject of larceny,[10] and is, therefore, fatally defective.[11] Thus, an information charging accused with taking "ninety-three railroad tickets," of an aggregate value named, was held not to state facts sufficient to constitute the crime of larceny, it being necessary that the information should allege the value of each ticket, and should show that they were genuine and effective railroad tickets at the time of the taking.[12]

§ 852. ——— ——— WRITTEN INSTRUMENTS—IN GENERAL. Papers of intrinsic value, and all classes of written instruments generally, may be described in the same manner as

64 N. W. 266; State v. Musgang, 51 Minn. 556, 53 N. W. 874; Miller v. State, 83 Tenn. (15 Lea) 179.

8 State v. Wilson, 63 Ore. 344, Ann. Cas. 1914D, 646, 127 Pac. 980.

9 See State v. Brln, 30 Minn. 522, 16 N. W. 406; State v. Musgang, 51 Minn. 556, 53 N. W. 874; Patrick v. State, 50 Tex. Cr. Rep. 496, 123 Am. St. Rep. 861, 14 Ann. Cas. 177, 98 S. W. 840.

10 McCarty v. State, 1 Wash. 377, 22 Am. St. Rep. 152, 25 Pac. 299; State v. Holmes, 9 Wash. 528, 37 Pac. 283.

11 Patrick v. State, 50 Tex. Cr. Rep. 496, 123 Am. St. Rep. 861, 14 Ann. Cas. 177, 98 S. W. 840.

12 McCarty v. State, 1 Wash. 377, 22 Am. St. Rep. 152, 25 Pac. 299; State v. Holmes, 9 Wash. 528, 37 Pac. 283.

other personal property, and the description is not required to be any more particular, specific, and certain than as to other classes of personal property alleged to have been stolen;[1] all that is required is the definiteness and certainty above pointed out,[2] such as shall be sufficient to apprise the accused of the particular thing he is charged with having taken, enabling him to make his defense,[3] and a copy of the instrument is not required to be set out;[4] but failing in this certainty, the indictment or information is insufficient. Thus, alleging that accused stole "certain papers" of a designated value, without otherwise describing such papers, is fatally defective;[5] and where it was charged in the first count of an indictment that the thing stolen was "a certain writ of fi. fa. belonging to the superior court," in a second count as "a certain process of and belonging to the superior court," and in a third count as "a certain record of and belonging to the superior court," the indictment was held to be bad because of indefiniteness and uncertainty.[6] Where the statute enumerates various kinds of written instruments and prohibits and punishes their larceny, it is sufficient to describe the instrument by the statutory name, no more minute description being required than was required at common law in an indictment for the larceny of an ordinary chattel.[7] Thus, a "deed" charged to have been stolen, the indictment or information need not set

1 State v. Pierson, 59 Iowa 272, 13 N. W. 291; Whalen v. Com., 90 Va. 544, 19 S. E. 182.

2 See, supra, § 826.

3 State v. Kroeger, 47 Mo. 530; State v. Hall, 85 Mo. 669; Fredrick v. State, 3 W. Va. 695.

"A certain instrument in writing, containing evidence of an existing contract for the conveyance of real estate, to wit, a lot in A," of a given value, held to be a sufficient description of the instrument on a motion in arrest of judgment.—Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670.

Larceny of a written instrument charged, it is not required that it be described with the same particularity as an indictment charging the forgery of such an instrument.—State v. Hall, 85 Mo. 669.

4 State v. Kroeger, 47 Mo. 530.

5 Robinson v. Com., 73 Va. (32 Gratt.) 866.

6 State v. McLeod, 50 N. C. 318.

7 State v. Hall, 85 Mo. 669.

forth the grantee's name, or allege the deed to be of any value;[8] a "voucher" described under that name in alleging its larceny, will be sufficient, it not being necessary to aver that the instrument is subsisting, or remains unsatisfied;[9] a "warehouse receipt" charged to have been stolen, alleged to have been issued by a railroad company, the name of which is set out, is sufficient without alleging that such railroad company had legal authority under its charter to issue such receipt.[10] Papers of value and written instruments are sufficiently described by the name and designation by which they are usually understood and known,[11]—e. g., bank-check,[12] bill of exchange,[13] county warrant,[14] coupon,[15] draft,[16] mileage-book,[17] pay-check,[18]

8 State v. Hall, 85 Mo. 669.

9 State v. Hickman, 8 N. J. L. (3 Halst.) 299.

"Voucher" within the meaning of such a statute consists of any instrument which attests, maintains, warrants, or bears witness. —State v. Hickman, 8 N. J. L. (3 Halst.) 299.

10 State v. Loomis, 27 Minn. 521, 8 N. W. 758.

11 Young v. People, 193 Ill. 236, 61 N. E. 1104; Fredrick v. State, 3 W. Va. 695.

12 See, infra, § 853.

13 Id.

14 **County warrant** charged to have been stolen, designating the number of such warrant and stating its value, the personal property of the county issuing it, is a sufficient description of the property and designation of the owner. —State v. Morgan, 109 Tenn. 157, 69 S. W. 970.

County orders alleged to have been stolen, the instrument is sufficiently described by stating the amount and value of each order, and that they were drawn by the county auditor on the county treasurer. — Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494.

15 **Without describing the bond** to which attached and from which cut.—State v. Wade, 66 Tenn. (7 Baxt.) 22.

Charging accused with the larceny of coupons taken from "the bonds of the state," is sufficient as meaning ex vi termini, lawful and valid bonds of the state.—State v. Wade, 66 Tenn. (7 Baxt.) 22.

16 See, infra, § 853.

17 **Mileage-book** of a designated railroad, alleged to have been stolen, the property of the prosecuting witness, sufficiently describes the property. — State v. Spenser, 2 Penn. (Del.) 225, 45 Atl. 399.

—**Book stamped** need not be averred, where it has been paid for and partly used. — State v. Spenser, 2 Penn. (Del.) 225, 45 Atl. 399.

18 **Pay-check** of a designated railroad company, alleged to have been stolen, giving the number and date of the same, the sum for which issued and the party to

pension-check,[19] promissory note,[20] and the like. A post-office order is sufficiently described as a warrant for the payment of money.[21]

§ 853. ——— ——— ——— BANK-CHECKS, BILLS OF EXCHANGE, DRAFTS, PROMISSORY NOTES, ETC. Bank-checks, bills of exchange, drafts, promissory notes, and like instruments for the payment of money, were not subjects of larceny at common law,[1] but are made such by statute in the various states, and an indictment or information charging the larceny of either may describe the instrument alleged to have been stolen in the language, or substantially in the language, of the particular statute under which the prosecution is had;[2] it may also be described by the name under which enumerated in the statute, or by the name by which commonly known and designated,[3]—e. g., "bill of exchange,"[4] "due bill,"[5] and the like.

Bank-check alleged to have been stolen, may be described as such,[6] or simply as "a check,"[7] but the indict-

whom issued, alleging the value thereof, is a sufficient description. —Gaines v. State, (Tex.) 77 S. W. 10.

19 State v. Bishop, 98 N. C. 773, 4 S. E. 357.

20 See, infra, § 853.

21 R. v. Gilchrist, 1 Car. & M. 224, 41 Eng. C. L. 126.

1 See People v. Cook, 2 Park. Cr. Rep. (N. Y.) 12.

2 See, supra, § 810.

3 See, supra, § 852.

4 **Bill of exchange** alleged to have been stolen, described as directing the payment of money and alleged the value thereof, setting out the same in its very words, but without averring that there was any money due upon the same, or secured thereby, or remaining unsatisfied thereon, or which might, in some contingency be collected thereon, was held to be sufficient. —Phelps v. People, 6 Hun 401; affirmed, 72 N. Y. 334, 2 Con. Cr. Rep. 383.

5 **"One due bill"** is sufficient description. — Com. v. Henry, 2 Brewst. (Pa.) 566; Com. v. Byerly, 2 Brewst. (Pa.) 568.

6 State v. Pierson, 59 Iowa 271, 13 N. W. 291; People v. Lovejoy, 37 App. Div. 52, 13 N. Y. Cr. Rep. 411, 55 N. Y. Supp. 543; Whalen v. Com., 90 Va. 544, 19 S. E. 182.

"Bank-check," with allegation as to date, owner, place of payment and value, is sufficient.—State v. Pierson, 59 Iowa 271, 13 N. W. 291.

7 See State v. Kroeger, 47 Mo. 530; People v. Lovejoy, 37 App. Div. 52, 13 N. Y. Cr. Rep. 411, 55 N. Y. Supp. 543; Whalen v. Com., 90 Va. 544, 19 S. E. 182.

Bank-check described as "a written instrument commonly called a

ment or information must conform to any peculiarities of the statute under which prosecution is had.[8] It has been said that an indictment or information charging the larceny of a bank-check should describe the property stolen as a check for a designated amount of money on a specified bank, and should contain such further descriptive matter as will inform the accused of the specific check intended.[9]

Promissory note alleged to have been stolen, may be designated as such,[10] or it may be designated simply as

check or bill of exchange, which was wholly unsatisfied," and of a stated value, held to sufficiently describe the check. — People v. Lovejoy, 37 App. Div. (N. Y.) 52, 13 N. Y. Cr. Rep. 411, 55 N. Y. Supp. 543.

—**Or** as "one paper purporting to be a check for the payment of one hundred and twenty-five dollars, of the value of one hundred and twenty-five dollars, the goods and chattels of one A," sufficiently identifies the thing alleged to have been stolen.—Whalen v. Com., 90 Va. 544, 19 S. E. 182.

But describing the property as "one check for five thousand dollars on the Traders Bank, of the value of five thousand dollars, five thousand dollars in money of the value of five thousand dollars," held to be insufficient as against the demurrer.—State v. Kroeger, 47 Mo. 530.

8 Com. v. Shissler, 7 Pa. Dist. Ct. Rep. 341.

9 State v. Kroeger, 47 Mo. 530.

10 Com. v. Brettun, 100 Mass. 206, 97 Am. Dec. 95; Com. v. Gallagher, 126 Mass. 54; Com. v. Henry, 2 Brewst. (Pa.) 566; Com. v. Byerly, 2 Brewst. (Pa.) 568.

"A promissory note" of a designated value, without alleging by whom the note was executed, the amount for which it was made, or the date of its execution or maturity, held to be insufficient.—Calentine v. State, 50 Tex. Cr. Rep. 154, 123 Am. St. Rep. 837, 94 S. W. 1161.

Described as "a certain promissory note dated November 6, 1872, signed by the accused, for the payment to A or order of," stating the amount and the date when due, for value received, "a more full description of which is to the attorneys for the state unknown," a sufficient description.—State v. Fenn, 41 Conn. 590, 1 Am. Cr. Rep. 378.

Where accused wrongfully takes and destroys a promissory note, he can not be permitted to say that it is not described with the utmost particularity. — State v. Fenn, 41 Conn. 590, 1 Am. Cr. Rep. 378.

"Divers promissory notes" with proper averments as to value, ownership, and possession (Com. v. Collins, 138 Mass. 483, 5 Am. Cr. Rep. 345), "a more particular description of which is to the jurors unknown," is sufficiently definite. —Com. v. Butts, 124 Mass. 449.

"a note,"[11] with appropriate allegations as to value,[12] ownership,[13] and possession; it need not be alleged that it was for the payment of money,[14] that it was valid and binding,[15] or that the maker was bound to pay it.[16]

§ 854. VALUE—IN GENERAL. At common law it was always necessary to allege the true value of the property charged to have been stolen, in order to distinguish between grand and petit larceny,[1] and in those states in which the jurisdiction of the offense, or the penalty to be inflicted upon conviction, depends upon the value of the thing stolen, the value must be alleged in order to confer jurisdiction or to show the grade or degree of the offense.[2] In those jurisdictions in which the common-law

Charging accused "stole, took, and carried away sundry promissory notes for the payment of money to the value of eighty dollars, the chattels of A," held to be too indefinite and uncertain.—Stewart v. Com., 4 Serg. & R. (Pa.) 194.

11 DuBois v. State, 50 Ala. 139; Young v. People, 193 Ill. 236, 61 N. E. 1104.

"One vendor's lien note for the payment of" a designated amount, of the value of the amount designated, is a sufficient description.—Pye v. State, (Tex.) 171 S. W. 741.

12 As to allegation of value of promissory note or other commercial paper, see, post, § 854.

13 Young v. People, 193 Ill. 236, 61 N. E. 1104; Com. v. Brettun, 100 Mass. 206, 97 Am. Dec. 95; Com. v. Collins, 138 Mass. 483, 5 Am. Cr. Rep. 345.

14 Com. v. Brettun, 100 Mass. 206, 97 Am. Dec. 95; Phelps v. People, 6 Hun (N. Y.) 401; affirmed, 72 N. Y. 334, 2 Con. Cr. Rep. 383.

15 State v. Hickman, 8 N. J. L. (3 Halst.) 299.

16 State v. Wade, 66 Tenn. (7 Baxt.) 22.

1 ALA.—Sheppard v. State, 42 Ala. 531; McDowell v. State, 61 Ala. 176. GA.—Davis v. State, 40 Ga. 229; Walthour v. State, 114 Ga. 75, 39 S. E. 872. ILL.—McDaniels v. People, 118 Ill. 301, 8 N. E. 687. MASS.—Com. v. Smith, 1 Mass. 245; Hope v. Com., 50 Mass. (9 Metc.) 134. MICH.—Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314. N. H.—State v. Goodrich, 46 N. H. 186. N. Y.—Howell v. People, 2 Hill 281. TEX.—Lopez v. State, 20 Tex. 780. WASH.—State v. Young, 13 Wash. 584, 43 Pac. 881. ENG.—R. v. Morris, 9 Car. & P. 349, 38 E. C. L. 148.

2 ALA.—Wilson v. State, 1 Port. 118; State v. Garner, 8 Port. 447; Sheppard v. State, 42 Ala. 531; Maynard v. State, 45 Ala. 85; Gregg v. State, 55 Ala. 116; McDowell v. State, 61 Ala. 176. COLO.—Chestnut v. People, 21 Colo. 512, 42 Pac. 656. FLA.—

distinction between grand and petit larceny has been abolished, the value of the article charged to have been stolen need not be alleged;[3] and the same is true in those jurisdictions in which the statute makes it a distinct crime to steal any class or species of property, and fixes the punishment therefor without regard to, and independently of, the value of the thing taken;[4] or where the statute denounces and punishes, without regard to, and indepen-

Mizell v. State, 38 Fla. 20, 20 So. 769. ILL.—People v. Silbertrust, 236 Ill. 144, 86 N. E. 203; People v. Purcell, 269 Ill. 467, 109 N. E. 1007. LA.—State v. Hill, 46 La. Ann. 736, 15 So. 145. ME.—State v. Perley, 86 Me. 427, 41 Am. St. Rep. 564, 9 Am. Cr. Rep. 504, 30 Atl. 74. MASS.—Hope v. Com., 50 Mass. (9 Metc.) 134. MICH.—Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; People v. Belcher, 58 Mich. 325, 25 N. W. 303. MO.—State v. Daniels, 32 Mo. 558; State v. Pedigo, 71 Mo. 443; State v. Sharp, 106 Mo. 106, 17 S. W. 225. N. H.—State v. Good, 46 N. H. 186. TEX.—Boyle v. State, 37 Tex. 359; Thompson v. State, 43 Tex. 268; Sheppard v. State, 1 Tex. App. 522, 28 Am. Rep. 422; Meyer v. State, 4 Tex. App. 121; Bennett v. State, 16 Tex. App. 236; Collins v. State, 20 Tex. App. 197; Melton v. State, 20 Tex. App. 202. WIS.—Frazier v. Turner, 76 Wis. 562, 45 N. W. 411.

3 State v. Whatson, 3 R. I. 114; R. v. Morris, 9 Car. & P. 347, 38 Eng. C. L. 148.

4 ALA. — Sheppard v. State, 42 Ala. 531; Maynard v. State, 45 Ala. 85; Gregg v. State, 55 Ala. 116; McDowell v. State, 61 Ala. 176. ARK.—Houston v. State, 13 Ark. 66; Shepherd v. State, 44 Ark. 39; Sanders v. State, 55 Ark. 365. CAL.—People v. Townsley, 39 Cal. 405; People v. Barnes, 65 Cal. 16, 2 Pac. 493; People v. Chuey Wing Git, 100 Cal. 437, 34 Pac. 1080. COLO. — Chestnut v. People, 21 Colo. 512, 42 Pac. 656; Quinn v. People, 32 Colo. 135, 75 Pac. 396. FLA.—Mizell v. State, 38 Fla. 20, 20 So. 769; Mathis v. State, 70 Fla. 194, 69 So. 697. ILL.—McDaniels v. People, 118 Ill. 301, 8 N. E. 687. IND.—Short v. State, 63 Ind. 376. LA.—State v. Wells, 25 La. Ann. 372; State v. Hill, 46 La. Ann. 736, 15 So. 145; State v. Lebleu, 137 La. 1007, 69 So. 808. MASS.—Com. v. Drohan, 210 Mass. 445, 97 N. E. 89. MO.—State v. Daniels, 32 Mo. 558; State v. Pedigo, 71 Mo. 443; State v. Lawn, 80 Mo. 241; State v. Hall, 85 Mo. 669; State v. Riley, 100 Mo. 496, 13 S. W. 1063; State v. Sharp, 106 Mo. 106, 17 S. W. 225. MONT.—Territory v. Pendry, 9 Mont. 67, 22 Pac. 760. NEB.—Wells v. State, 11 Neb. 409. N. M.—State v. Lucero, 17 N. M. 484, 131 Pac. 491. OKLA.—Herd v. United States, 13 Okla. 512, 75 Pac. 291; affirmed in Brown v. United States, 77 C. C. A. 173, 146 Fed. 975; Woodring v. Territory, 14 Okla. 250, 2 Ann. Cas. 855, 78 Pac. 85; Howard v. Territory, 15 Okla. 199, 79 Pac. 773. TEX.—Lopez v. State, 20 Tex. 780; Johnson v. State, 29 Tex. 492; Davis v. State, 40 Tex. 134; Watts v. State, 6 Tex. App. 264; Will-

dently of value, the larceny of any animal,[5] or from a building,[6] or from the person,[7] and the like.

Value required to be alleged, it must be stated definitely and certainly,[8] should be the market value of the property at the time of the taking,[9] and be in money; but it need not be averred to be "lawful money of the United States," or other similar designation as to the money in which the value is alleged.[10]

iams v. State, 10 Tex. App. 8; Beard v. State, 45 Tex. Cr. Rep. 522, 78 S. W. 348; Campbell v. State, 61 Tex. Cr. Rep. 509, 135 S. W. 548. WASH. — State v. Young, 13 Wash. 584, 43 Pac. 881; State v. Kyle, 14 Wash. 550, 45 Pac. 147.

An indictment for the larceny of a deed need not aver that the deed had any value.—State v. Hall, 85 Mo. 669.

5 ALA.—Adams v. State, 60 Ala. 52. ARK.—Houston v. State, 13 Ark. 66; State v. Walker, 50 Ark. 532, 8 S. W. 939. CAL.—People v. Townsley, 39 Cal. 405. COLO.—Chestnut v. People, 21 Colo. 512, 42 Pac. 656; Quinn v. People, 32 Colo. 135, 75 Pac. 396. FLA.—Mizell v. State, 38 Fla. 20, 20 So. 769. KAN.—State v. Small, 26 Kan. 209. LA.—State v. Wells, 25 La. Ann. 372; State v. Thomas, 28 La. Ann. 827; State v. Hill, 46 La. Ann. 736, 15 So. 145. MO.—State v. Daniels, 32 Mo. 558; State v. Lawn, 80 Mo. 241. MONT.—Territory v. Pendry, 9 Mont. 67, 22 Pac. 760. OKLA.—Woodring v. Territory, 14 Okla. 250, 2 Ann. Cas. 855, 78 Pac. 85; Howard v. Territory, 15 Okla. 199, 79 Pac. 773. TEX.—Lopez v. State, 20 Tex. 780; Johnson v. State, 29 Tex. 492; Beard v. State, 45 Tex. Cr. Rep. 522, 78 S. W. 348. WASH.—State v. Young, 13 Wash. 584, 43 Pac. 881; State v. Kyle, 14 Wash. 550, 45 Pac. 147. W. VA. — State v. Sparks, 30 W. Va. 101, 3 S. E. 40.

6 State v. Beckworth, 68 Mo. 82; State v. Castor, 93 Mo. 242, 5 S. W. 906; State v. Sharp, 106 Mo. 106, 17 S. W. 225.

7 Bennett v. State, 16 Tex. App. 236; Shaw v. State, 23 Tex. App. 493, 5 S. W. 317; Green v. State, 28 Tex. App. 493, 13 S. W. 784.

8 ALA. — Williams v. State, 44 Ala. 396. CAL.—People v. Righetti, 66 Cal. 184, 4 Pac. 1063, 1185. FLA. — Baldwin v. State, 46 Fla. 115, 35 So. 220. MD.—Gardner v. State, 25 Md. 146. N. Y.—People v. Peckens, 12 App. Div. 626, 43 N. Y. Supp. 1160; affirmed, 153 N. Y. 576, 12 N. Y. Cr. Rep. 433, 47 N. E. 883.

9 State v. James, 58 N. H. 67; Clark v. State, 23 Tex. App. 612, 5 S. W. 178.

10 People v. Winkler, 9 Cal. 234; People v. Righetti, 66 Cal. 184, 4 Pac. 1063, 1185.

"Current money" is sufficient.—Gardner v. State, 25 Md. 146.

"$3." held to be sufficiently plain and intelligible under requirement that value shall be expressed "in plain and intelligible words." — Earl v. State, 33 Tex. Cr. Rep. 570, 28 S. W. 469.

Money charged to have been stolen, it need not be stated to be of any particular value, where it is current in the jurisdiction;[11] and written instruments representing or calling for the payment of money, where the species and denomination or amount called for or represented on the face thereof is set out in the indictment or information, this will be a sufficient allegation as to their value,[12] under statutes providing that the money called for, due or represented in such written instruments shall be deemed the value thereof. Where a specific value is alleged in such cases, such allegation becomes material and must be proved as laid.

§ 855. —— SUFFICIENCY OF ALLEGATION OF VALUE—AGGREGATE VALUE. In those cases in which the indictment or information charges, in one count, the larceny of different articles, or of different groups of articles, at the same time and as a part of the same transaction, the value thereof may be alleged in either of two ways, (1) by stating the aggregate value of the articles,[1] or the

11 ALA. — Turner v. State, 124 Ala. 59, 27 So. 272. CAL.—People v. Green, 15 Cal. 512. LA.—State v. King, 37 La. Ann. 91. N. Y.—People v. Evans, 69 Hun 222, 10 N. Y. Cr. Rep. 469, 23 N. Y. Supp. 717; affirmed, 143 N. Y. 638, 37 N. E. 823. TENN.—State v. Wainwright, 128 Tenn. 544, Ann. Cas. 1915C, 333, 162 S. W. 853. TEX.—Bagley v. State, 3 Tex. App. 163; Kelley v. State, 34 Tex. Cr. Rep. 412, 31 S. W. 174.

That the indictment in its statement of the value omitted the dollar mark and contained an elongated decimal point under the two naughts did not render it fatally defective. — State v. Wainwright, 128 Tenn. 544, Ann. Cas. 1915C, 333, 162 S. W. 583.

12 State v. Pierson, 59 Iowa 271, 13 N. W. 291; State v. O'Connell, 144 Mo. 387, 46 S. W. 175; Phelps v. People, 6 Hun 401; affirmed, 72 N. Y. 334, 2 Con. Cr. Rep. 383.

1 ALA.—See Grant v. State, 55 Ala. 201. CAL.—People v. Robles, 34 Cal. 391; People v. Righetti, 66 Cal. 184, 4 Pac. 1063, 1185. GA.—Bone v. State, 120 Ga. 866, 48 S. E. 356. IND.—Clifton v. State, 5 Blackf. 224; State v. Murphy, 8 Blackf. 498; Edson v. State, 148 Ind. 283, 47 N. E. 625. IOWA—State v. Hart, 29 Iowa 268. ME.—State v. Hood, 51 Me. 363. MASS.—Com. v. Sawtelle, 65 Mass. (11 Cush.) 143; Com. v. O'Connell, 94 Mass. (12 Allen) 451; Com. v. Hussey, 111 Mass. 432; Com. v. Green, 122 Mass. 333; Com. v. Butts, 124 Mass. 449; Com. v. Collins, 138 Mass. 483, 5 Am. Cr. Rep.

aggregate value of the articles in each group of articles,[2] alleged to have been stolen, or (2) by stating the separate value of each individual article alleged to have been stolen,[3] in which case the aggregate value need not be given;[4] which latter method is the usual and the better practice, because where the aggregate value of the articles, or of the group of articles, only, is given, the prosecution must prove on the trial the whole larceny charged —that is, must prove the theft of all the articles charged to have been stolen—in order to warrant a conviction;[5]

345. MO.—State v. Beatty, 90 Mo. 143, 2 S. W. 215; State v. O'Connell, 144 Mo. 387, 46 S. W. 175; State v. Dudley, 245 Mo. 177, 149 S. W. 449. NEV.—State v. En, 10 Nev. 277. ORE.—State v. Kelliher, 32 Ore. 240, 50 Pac. 532. TENN.—State v. Shelton, 90 Tenn. 539, 18 S. W. 253. TEX.—Thompson v. State, 43 Tex. 268; Meyer v. State, 4 Tex. App. 121; Doyle v. State, 4 Tex. App. 253; Moore v. State, 24 S. W. 900. WASH.—State v. Brew, 4 Wash. 95, 31 Am. St. Rep. 904, 29 Pac. 762.

There need be no statement of the aggregate value where each value is separately stated.—State v. Kelliher, 32 Ore. 240, 50 Pac. 532.

2 People v. Righetti, 66 Cal. 184, 4 Pac. 1063, 1185; Edson v. State, 148 Ind. 283, 47 N. E. 625.

3 ALA.—Grant v. State, 55 Ala. 201; Jackson v. State, 69 Ala. 249. ARK.—Reeder v. State, 87 Ark. 341, 111 S. W. 272. CAL.—People v. Robles, 34 Cal. 591. MO.—State v. Koplan, 167 Mo. 298, 66 S. W. 967. TEX.—Meyer v. State, 4 Tex. App. 121; Doyle v. State, 4 Tex. App. 253. WASH.—State v. Brew, 4 Wash. 95, 31 Am. St. Rep. 904, 29 Pac. 762.

4 State v. Kelliher, 32 Ore. 240, 50 Pac. 532.

5 See: ALA.—Grant v. State, 55 Ala. 201; Jackson v. State, 69 Ala. 249. CAL.—People v. Robles, 34 Cal. 391. GA.—Bone v. State, 120 Ga. 866, 48 S. E. 356. IND.—Clifton v. State, 5 Blackf. 224; Edson v. State, 148 Ind. 283, 47 N. E. 625. IOWA—State v. Hart, 29 Iowa 268. ME.—State v. Buck, 46 Me. 531; State v. Hood, 51 Me. 363. MASS.—O'Connell v. Com., 48 Mass. (7 Metc.) 460; Hope v. Com., 50 Mass. (9 Metc.) 134; Com. v. Lavery, 101 Mass. 209. MO.—State v. Beatty, 90 Mo. 143, 2 S. W. 215; State v. O'Connell, 144 Mo. 387, 46 S. W. 175; State v. Koplan, 167 Mo. 298, 66 S. W. 967. OHIO—State v. Mook, 40 Ohio St. 588. S. C.—State v. Windman, 1 Chev. L. 75. TENN.—State v. Shelton, 90 Tenn. 539, 18 S. W. 253. TEX.—Thompson v. State, 43 Tex. 268; Ware v. State, 2 Tex. App. 547; Meyer v. State, 4 Tex. App. 121; Doyle v. State, 4 Tex. App. 253; Moore v. State, 24 S. W. 900. WASH.—State v. Brew, 4 Wash. 95, 31 Am. St. Rep. 904, 29 Pac. 762.

whereas, under the second method of allegation as to value, a conviction can be had upon the proof of the larceny of any one of the articles charged to have been stolen.[6]

§ 856. OWNERSHIP—IN GENERAL. As ownership in some person other than the accused is an essential element in the crime of larceny, an indictment or information charging that crime must allege the ownership of the property charged to have been stolen, at the time of the taking,[1] showing such ownership, either the general ownership or a special ownership entitling to possession,[2] to have been in a person other than the accused,[3] to the end that the court may judicially determine that

6 Com. v. Lavery, 101 Mass. 207; State v. Kelliher, 32 Ore. 240, 50 Pac. 532.

1 ALA. — Turner v. State, 124 Ala. 59, 27 So. 272. CAL.—People v. Piggott, 126 Cal. 509, 59 Pac. 31. DEL. — State v. Fitzpatrick, 9 Houst. 385, 32 Atl. 1072. GA.—Buffington v. State, 124 Ga. 24, 52 S. E. 19. IOWA—State v. Wasson, 126 Iowa 320, 101 N. W. 1125; State v. Loomis, 129 Iowa 141, 105 N. W. 397. KY.—Reed v. Com., 70 Ky. (7 Bush) 641; McBride v. Com., 76 Ky. (13 Bush) 337. MD.—State v. Tracy, 73 Md. 447, 21 Atl. 366. MICH.—In re Leddy, 11 Mich. 197. MISS.—Hughes v. State, 74 Miss. 368, 20 So. 838. MO.—State v. Ellis, 119 Mo. 437, 24 S. W. 1017. MONT. — State v. DeWolfe, 29 Mont. 415, 74 Pac. 1084; State v. Moxley, 41 Mont. 402, 110 Pac. 83. S. C.—State v. Dwyre, 2 Hill L. 287. TEX.—Williams v. State, 33 Tex. 345; Gadson v. State, 36 Tex. 350; Culberson v. State, 2 Tex. App. 324. VA.—Barker v. Com., 4 Va. (2 Va. Cas.) 122.

Ownership unknown, an allegation of that fact will be sufficient. See, infra, § 877.

2 **As to general and special ownership**, see, infra, § 861.

3 ALA.—Harris v. State, 60 Ala. 50; Underwood v. State, 72 Ala. 220; Bowen v. State, 106 Ala. 178, 17 So. 335. CAL.—People v. Hanselman, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425. DEL.—State v. Fitzpatrick, 9 Houst. 385, 32 Atl. 1072. GA.—Thomas v. State, 96 Ga. 311, 22 S. E. 956. KY.—Hensley v. Com., 64 Ky. (1 Bush) 11, 89 Am. Dec. 604. MICH.—People v. Stewart, 44 Mich. 484, 7 N. W. 71. N. C.—State v. Hadcock, 3 N. C. (2 Hayw. L.) 287. S. C.—State v. Dwyre, 2 Hill L. 287. TEX.—Stone v. State, 12 Tex. App. 103; Ganoway v. State, 21 S. W. 46; Pitts v. State, 22 S. W. 410. VA.—Baker v. Com., 4 Va. (2 Va. Cas.) 122; Alexander v. Com., 90 Va. 811, 20 S. E. 782. FED.—United States v. McNamara, 2 Cr. C. C. 45, Fed. Cas. No. 15701.

As to property partly belonging to accused, see, infra, § 860.

the property alleged to have been stolen was not in fact the property of the accused, that he was not entitled to the possession[4] thereof, and that the taking and carrying away were wrongful;[5] and, also, for the further purpose of apprising the accused of the exact offense with which he is charged,[6] and to enable him to prepare to meet it on the trial.[7]

Several articles of personal property, belonging either to one or to several different owners, alleged to have been stolen at the same time and place, the act is a single transaction and may be charged in one indictment in a single count;[8] but, in order to avoid duplicity,[9] the indictment or information must set forth facts showing that all the property was taken at one time and place, and as a part of the same transaction.[10] Where divers articles

4 **As to possession** and the right of possession, see, infra, § 878.

5 People v. Hanselman, 76 Cal. 460, 9 **Am. St. Rep.** 238, 18 Pac. 425; Thomas v. State, 96 Ga. 311, 22 S. E. 956; State v. McCoy, 89 N. C. 466.

6 See, supra, § 825.

7 State v. Fitzpatrick, 9 Houst. (Del.) 385, 32 Atl. 1072.

8 CAL.—People v. De la Guerra, 31 Cal. 416. GA.—Lowe v. State, 57 Ga. 171, 2 **Am. Cr. Rep.** 344. ILL.—Schintz v. People, 178 Ill. 320, 52 N. E. 903. IND.—Joslyn v. State, 128 Ind. 160, 25 **Am. St. Rep.** 425, 27 N. E. 492; Furnace v. State, 153 Ind. 93, 54 N. E. 441. IOWA—State v. Larson, 85 Iowa 659, 52 N. W. 539. KY.—Nichols v. Com., 78 Ky. 180. MD.—State v. Warren, 77 Md. 121, 39 **Am. St. Rep.** 401, 26 Atl. 500. MICH.—People v. Johnson, 81 Mich. 573, 45 N. W. 1119. MISS.—State v. Dalton, 44 So. 802; State v. Quintini, 51 So. 276. MO.—State v. Morphin, 37 Mo. 373. MONT.—State v. Mjelde, 29 Mont. 490, 75 Pac. 87. NEV.—State v. Douglas, 26 Nev. 196, 99 **Am. St. Rep.** 688, 65 Pac. 802. N. H.—State v. Merrill, 44 N. H. 624. OHIO—State v. Hennessey, 23 Ohio St. 339, 13 **Am. Rep.** 253. ORE.—State v. Clark, 46 Ore. 140, 80 Pac. 101. PA.—Fulmer v. Com., 97 Pa. St. 503. TEX.—Clark v. State, 28 Tex. App. 189, 19 **Am. St. Rep.** 817, 12 S. W. 729; Peck v. State, 54 Tex. Cr. Rep. 81, 16 **Ann. Cas.** 583, 111 S. W. 1119. VT.—State v. Newton, 42 Vt. 537. VA.—Alexander v. Com., 90 Va. 809, 20 S. E. 782. WASH.—State v. Butts, 42 Wash. 455, 85 Pac. 33.

9 **As to duplicity,** see, infra, § 888.

10 IND.—Joslyn v. State, 128 Ind. 160, 25 **Am. St. Rep.** 425, 27 N. E. 492; Furnace v. State, 153 Ind. 93, 54 N. E. 441. MONT.—State v. Mjelde, 29 Mont. 490, 75 Pac. 87. ORE.—State v. Clark, 46 Ore. 140, 80 Pac. 101. TEX.—Peck v. State, 54 Tex. Cr. Rep. 81, 16 **Ann. Cas.** 583, 111 S. W. 1119. VT.—State v.

of personal property, belonging to different persons, owned in severalty, are all stolen at the same time and place, and as a part of the same transaction, but by separate acts of taking, the particular ownership of each of such articles must be averred,[11] it not being permissible to lay the ownership of all of such articles in one of the owners of a part thereof.[12]

A building, entering into the essential elements of and aggravating the offense,—e. g., larceny from a dwelling-house, or from any of specified buildings,—the ownership of the building must be laid in some person other than the accused,[13] even in those cases in which the general owner of the building may be charged with having entered it while in the possession and occupancy of one having a present right to such occupancy at the time of the act complained of, in which case it is thought that the ownership may be laid in the occupant.[14]

§ 857. —— As to sufficiency of allegation of ownership. In alleging ownership of personal property charged to have been stolen, the careful pleader will do so directly and unequivocally,[1] as of the time of the commission of the offense.[2] It is not necessary, however, to allege the ownership in the language of the statute under which the prosecution is had, or in any special

Newton, 42 Vt. 537. WASH.—State v. Bliss, 27 Wash. 463, 68 Pac. 87; State v. Butts, 42 Wash. 455, 85 Pac. 33.

11 DEL. — State v. Frame, 4 Harr. 569. FLA.—McNealy v. State, 17 Fla. 198. IOWA—State v. Congrove, 109 Iowa 66, 80 N. W. 227. N. C.—State v. Edwards, 86 N. C. 666. TEX.—Dodd v. State, 10 Tex. App. 370.

12 IDA.—People v. Frank, 1 Ida. 200. MASS.—Com. v. Trimmer, 1 Mass. 476. MISS. — McDowell v. State, 68 Miss. 348, 8 So. 508. N. H.—State v. McCoy, 14 N. H. 464. N. C.—State v. Burgess, 74 N. C. 272. S. C.—State v. London, 3 S. C. 230.

13 Com. v. Perris, 108 Mass. 3; R. v. White, 1 Leach C. C. 252.

See, also, supra, §§ 478 et seq., 482, 483.

14 See Adams v. State, 45 N. J. L. (16 Vr.) 448.

1 State v. Sharp, 106 Mo. 106, 17 S. W. 225; Pitts v. State, (Tex.) 22 S. W. 410.

2 People v. Lewis, 64 Cal. 401, 1 Pac. 490; People v. Arras, 89 Cal. 223, 26 Pac. 766.

or set form, providing only the idea of ownership is clearly carried and the ownership fixed by the words used. Thus, it has been held to be a sufficient allegation of ownership to describe the property according to any of the following forms and words: "Being the property of" a named person;[3] "belonging to" a person named;[4] "corporeal personal property of" a person named;[5] "goods and chattels of" a person named;[6] "personal goods and chattels of" a person named;[7] "personal property of" a person named;[8] or simply describing as "the property of" a named person.[9] Charging accused took "from the money drawer of said deponent's store" a stated sum of money, held to be a sufficient allegation of the ownership of such money;[10] and charging that the property "was taken from the possession of A, the owner thereof," is a sufficient allegation as to the ownership;[11] but it has been said that charging accused "did fraudulently take and steal a horse from the possession of A"

3 People v. Piggott, 126 Cal. 509, 59 Pac. 31.

4 State v. Griffin, 79 Iowa 568, 44 N. W. 813; State v. Ware, 62 Mo. 597; Dimmick v. United States, 70 C. C. A. 141, 135 Fed. 257.

5 Williams v. State, 33 Tex. 345.

6 Garber v. State, 94 Ind. 219; State v. Vanderlip, 4 La. Ann. 444; People v. Kent, 1 Dug. (Mich.) 42; People v. Holbrook, 13 Johns. (N. Y.) 90. But see State v. King, 95 Md. 125, 51 Atl. 1102.

"Of" omitted between the words "goods and chattels" and the name of the owner thereof does not affect its validity.—Bennett v. State, 73 Ark. 386, 84 S. W. 483.

7 Evans v. State, 150 Ind. 651, 50 N. E. 820.

8 ALA.—Turner v. State, 124 Ala. 59, 27 So. 272. IND.—Skelton v. State, 149 Ind. 641, 49 N. E. 901. KY.—Hall v. Com., 14 Ky. L. Rep. 731, 21 S. W. 353. S. D.—State v. Montgomery, 17 S. D. 500, 97 N. W. 716.

9 People v. Goggins, 80 Cal. 229, 22 Pac. 206; People v. Arras, 89 Cal. 223, 26 Pac. 766; Choen v. State, 85 Ind. 209.

Especially after a plea of guilty. —People v. Goggins, 80 Cal. 229, 22 Pac. 206.

10 People v. Smith, 86 Hun 485, 33 N. Y. 989.

11 Mathews v. State, 17 Tex. App. 472.

does not allege ownership of the horse,[12] although it has been held otherwise in some cases.[13]

§ 858. —— NECESSITY OF LAYING OWNERSHIP IN TRUE OWNER. The ownership must be properly laid, and supported as laid, by the evidence on the trial, except in those jurisdictions, like New York, where it is provided by statute[1] that an erroneous allegation in an indictment or information as to the person injured shall not affect the indictment, under which a charge of the ownership of property alleged to have been stolen laid in another than the rightful owner, is immaterial.[2] Ownership is generally properly laid in the rightful owner, though not always so. Thus, it has been said that where lost property[3] is alleged to have been stolen, ownership and possession of such property are properly laid in the rightful owner, although he did not have the control and custody at the time;[4] and ownership of bank-bills,[5] stolen before issued, is properly laid in the bank;[6] county bonds placed for safe keeping charged to have been stolen, ownership may be laid either in the owner or in the lawful custodian;[7] clothes charged to have been stolen from a room, ownership thereof may be laid in a woman owning and using the clothes as her own, although such woman is a minor;[8] whiskey stored in a government warehouse, alleged to

12 People v. Hanselman, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425; State v. Ellis, 119 Mo. 437, 24 S. W. 1017; Maddox v. State, 14 Tex. 447.

13 Hugo v. State, 110 Ga. 476, 36 S. E. 60.

1 New York Crim. Proc., § 281.

2 People v. Kellogg, 105 App. Div. (N. Y.) 505, 94 N. Y. Supp. 617.

Under South Dakota Comp. Laws, § 7246, same holding.—State v. Vincent, 16 S. D. 62, 91 N. W. 347.

3 As to lost property, see, supra, § 843.

4 Martin v. State, 44 Tex. Cr. Rep. 538, 72 S. W. 386; Suggs v. State, 65 Tex. Cr. Rep. 67, 143 S. W. 186.

5 As to bank-bills and bank-notes, see, supra, § 846.

6 People v. Wiley, 3 Hill (N. Y.) 194.

7 State v. Cunningham, 51 Mo. 479. See, also, infra, §§ 861, 863, footnote 6.

8 See, infra, § 867.

have been stolen, ownership is properly laid in person having right to take it away on payment of the taxes.[9] An indictment or information charging ownership in the rightful owner, which fails to give the Christian name of such owner, or to state that such name is to the grand jury unknown, has been said to be bad because of such omission.[10] On a charge of the larceny of a coffin after burial, it has been said that the property may be laid in the person who furnished such coffin and buried deceased.[11] Where the general owner of property is charged with larceny of such property from his bailee or other person having a special ownership therein, ownership is properly laid in the special owner;[12] and where a constable has collected money for a creditor, he has such special property therein that on its theft from him ownership may be laid in him.[13] Ownership may also be laid in the ostensible or apparent owner,[14] or in the person having the lawful possession,[15] custody and control

9 State v. Harmon, 104 N. C. 792, 10 S. E. 474.

10 Johnson v. State, 59 Ala. 34, 3 Am. Cr. Rep. 256; Crittenden v. State, 134 Ala. 145, 32 So. 273; Lowe v. State, 134 Ala. 154, 32 So. 273.

But see, infra, § 862, footnote 8, and text going therewith.

11 State v. Doepke, 68 Mo. 208, 30 Am. Rep. 785.

12 Adams v. State, 45 N. J. L. (16 Vr.) 448; State v. McCoy, 89 N. C. 466.

13 See, infra, § 873.

14 State v. Everage, 33 La. Ann. 120; State v. Lewis, 49 La. Ann. 1202, 22 So. 327; State v. Acebal, 110 La. 129, 34 So. 303.

15 ALA.—Higdon v. State, 1 Ala. App. 174, 56 So. 13; Williams v. State, 5 Ala. App. 112, 59 So. 528. CAL.—People v. Buelna, 81 Cal. 135, 22 Pac. 396 (an agistor). IND.—State v. Tillett, 173 Ind. 133, 140 Am. St. Rep. 246, 20 Ann. Cas. 1262, 89 N. E. 589. KAN.—State v. Pigg, 80 Kan. 481, 18 Ann. Cas. 521, 103 Pac. 121. ME.—State v. Somerville, 21 Me. 14, 38 Am. Dec. 248 (one having property to do some work on it). N. M.—State v. Lucero, 17 N. M. 484, 131 Pac. 491. S. C. —State v. Phillips, 73 S. C. 236, 53 S. E. 370. TEX.—Price v. State, 55 Tex. Cr. Rep. 157, 115 S. W. 586; Scuggs v. State, 65 Tex. Cr. Rep. 67, 143 S. W. 186.

Actual status of the legal title is no concern of the thief. The title may be laid in the owner or the person in possession, even though the latter had stolen it from some one else.—State v. Pigg, 80 Kan. 481, 18 Ann. Cas. 521, 103 Pac. 121.

Ownership may be laid in a

thereof,[16] and also one in possession asserting title.[17] Other instances in which ownership may properly be laid in a person other than the rightful owner will be given in the discussion in subsequent sections, to which a general reference is hereby made.

§ 859. —— NEGATIVING OWNERSHIP OF ACCUSED. It has already been pointed out that it is an essential element in the crime of larceny that the ownership of the property alleged to have been stolen shall have been in another than the accused at the time of the taking.[1] An indictment or information charging larceny should specifically and clearly negative ownership in the accused of the property alleged to have been taken, and this negative must meet the varying or peculiar requirements of the statute under which the prosecution is had;[2] but the ownership of accused is sufficiently negatived by alleging that the property, at the time it was taken, belonged to another and a named person,[3] or to an unknown owner.[4] Ownership alleged to be unknown, it is not necessary to negative ownership of accused.[5]

§ 860. —— PART OF PROPERTY BELONGING TO ACCUSED. While a man can not be convicted of the larceny of property of which he is the rightful owner and entitled to

mortgagor after condition broken.—State v. Stokes, 84 S. C. 579, 66 S. E. 993.

Possession by servant is possession of master. See, infra, § 471.

16 State v. Bishop, 98 N. C. 773, 4 S. E. 357; State v. Addington, 1 Bail. L. (S. C.) 310.

17 Morning Star v. State, 52 Ala. 405.

1 See, supra, § 856.

2 People v. Hanselman, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425; State v. Ravenscraft, 62 Mo. App. 109; Long v. State, 6 Tex. App. 642.

Omission to negative accused's ownership is fatally defective, and a judgment of conviction rendered thereon will be reversed.—People v. Hanselman, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425.

3 See, supra, § 858.

4 Thompson v. State, 9 Tex. App. 301.

As to allegation of ownership where owner unknown, see, infra, § 877.

5 See, infra, § 877, footnote 5.

the present possession,[1] yet where a person owning and entitled to the present possession of a portion of the property alleged to have been stolen, takes more of that property than he is entitled to have and receive, he is guilty of a larceny of the balance. Thus, a barkeeper receiving a fifty-dollar bill in payment for a drink of whiskey, refusing to return the change;[2] a person receiving in payment of a bill, by mistake, money in excess of the amount actually due, and refusing to return the excess;[3] or receiving an excess sum paid by a bank on a check, which he refuses to refund;[4] and an attorney to whom a fee is due from a client for services who keeps a larger sum out of moneys in his hands, belonging to his client, than the amount coming to him for services[5]—is each guilty of larceny. A person having filled his cart at a coal yard with a load of soft coal, then covered the top over

1 See, supra, § 856.

2 Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435, 1 Cow. Cr. Rep. 600.

3 Agar v. Haines, 11 N. Y. St. Rep. 644.

4 Bergeron v. Peyton, 106 Wis. 477, 80 Am. St. Rep. 333, 82 N. W. 291.

5 Com. v. Lannan, 153 Mass. 287, 25 Am. St. Rep. 269, 11 L. R. A. 450, 26 N. E. 858.

Mr. Justice Holmes says: "The defendant has the right to retain ten dollars out of the moneys in his hands; and it may be argued that it is impossible to particularize the bills which were stolen, seeing that the defendant appropriated bills to the amount of one hundred and ninety-five dollars all at once, without distinguishing between the ten dollars he had a right to select and the one hundred and eighty-five dollars to which he had no right. This argument appears to have troubled some of the English judges in one case, although they avoided resting their decision on that ground (R. v. Thompson, Leigh & C. 233, 236, 238). If the argument be sound, it might cause a failure of justice by the merest technicality. . . . The later English cases seem to admit that a man may be liable for the larceny of a sovereign given him in payment of a debt for a less amount in expectation of receiving change, as well as in cases like [citing] Com. v. Berry, 99 Mass. 428, 96 Am. Dec. 767, where there is nothing due the defendant." — R. v. Gumble, L. R. 2 C. C. 1, 12 Cox C. C. 248; R. v. Bird, 12 Cox C. C. 257, 260. See, further, Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435, 1 Cow. Cr. Rep. 600.

with slack coal and paid for the whole load at the rate charged for slack coal, which was much less than that which he would have been required to pay for the soft coal, was held guilty of a larceny of the soft coal.[6] Likewise a person having a contract for the purchase from a manufacturing company of a portion of the accumulated ashes of the company's works, paying therefor an agreed price per ton, upon the understanding that the amount of his purchase in each instance should be determined by the weight as ascertained by the company's weigher, who, through collusion with such weigher, had a fraudulent return made of 31 tons and 3 cwt., only, on a delivery of 32 tons, 13 cwt., was held rightly charged with the larceny of 1 ton, 10 cwt.[7] A person entitled to receive a share of a crop for his services may be guilty of larceny in carrying away a portion thereof;[8] but an indictment or information charging such a larceny, laying the title to the property jointly in the landlord and such tenant, will be bad.[9] An indictment or information charging accused with the larceny of property of which he is entitled to the ownership and present possession of a portion, should state the facts of the case fully and distinctly, stating the amount the accused was entitled to have and receive, and the amount he was not entitled to have and receive, and lay the ownership of the latter portion in the person entitled to have and receive the same.

§ 861. —— General and special ownership. In a prosecution charging larceny of property the ownership may be described as that of the real owner,[1] or the person

6 R. v. Bramley, 8 Cox C. C. 468, Leigh & C. C. C. 21.

7 R. v. Tideswell, [1905] 2 K. B. 273, 1 British Rul. Cas. 997.

8 State v. Webb, 87 N. C. 558; State v. Gray, 1 Hill L. (S. C.) 364.

9 State v. McCoy, 89 N. C. 466.

1 See, supra, § 858.

in possession,[2] as bailee,[3] agent,[4] trustee,[5] executor or administrator;[6] and such bailee, agent, trustee, executor or administrator may be described as the owner, individually, by name, without describing his trust character.[7] Ownership, however, can not be laid in a mere servant, as we shall see presently.[8] In those cases in which the person from whom the property is taken has a special ownership therein in the relations above pointed out, or as having the actual care, control and management thereof,[9] the title may be laid either in the general owner or in such special owner;[10] but when the general owner

2 See, supra, § 858, footnote 15.

3 See, infra, § 863.

4 GA.—Jackson v. State, 5 Ga. App. 179, 82 S. E. 771. IDA.—State v. Farris, 5 Ida. 666, 51 Pac. 772. IND. — State v. Tillett, 173 Ind. 133, 140 **Am. St. Rep.** 246, 20 **Ann. Cas.** 1262, 89 N. E. 589. N. Y.—People v. McDonald, 43 N. Y. 61, 1 Cow. Cr. Rep. 275. S. C.—State v. Washington, 15 Rich. L. 39; State v. Phillips, 73 S. C. 236, 53 S. E. 370. S. D.—State v. Vincent, 16 S. D. 62, 91 N. W. 347. TEX.—Kersh v. State, 45 Tex. Cr. Rep. 451, 77 S. W. 790; Shelton v. State, 52 Tex. Cr. Rep. 611, 108 S. W. 679.

5 State v. Tillett, 173 Ind. 133, 140 **Am. St. Rep.** 246, 20 **Ann. Cas.** 1262, 89 N. E. 589.

6 Id.

7 Id.

8 See, infra, § 871.

9 ALA.—Morning Star v. State, 52 Ala. 405. IDA.—State v. Farris, 5 Ida. 666, 51 Pac. 772. N. C.—State v. Hardison, 75 N. C. 203; State v. Bishop, 98 N. C. 773, 4 S. E. 357. TEX.—Moore v. State, 8 Tex. App. 496; Dreyer v. State, 11 Tex. App. 503; Morrow v. State, 22 Tex. App. 239, 2 S. W. 624; Swink v. State, 32 Tex. Cr. Rep. 530, 24 S. W. 893; Ledbetter v. State, 35 Tex. Cr. Rep. 195, 32 S. W. 903.

10 ALA.—Jones v. State, 13 Ala. 153; Ellis v. State, 76 Ala. 91. DEL. — State v. Fitzpatrick, 9 Houst. 385, 32 Atl. 1072. FLA.—Kennedy v. State, 31 Fla. 428, 12 So. 858. ILL.—Murphy v. State, 104 Ill. 528. IND. TER.—Murray v. United States, 1 Ind. Ter. 28, 35 S. W. 241. ME.—State v. Somerville, 21 Me. 14, 38 **Am. Dec.** 248. MASS.—Com. v. Butts, 124 Mass. 449. N. Y.—People v. Bennett, 37 N. Y. 117, 93 **Am. Dec.** 551, 4 Abb. Pr. N. S. 89, 1 Cow. Cr. Rep. 1, 4 Trans. App. 32. TENN.—Yates v. State, 18 Tenn. (10 Yerg.) 549; Renfro v. State, 65 Tenn. (6 Baxt.) 517. TEX.—Langford v. State, 8 Tex. 115; Dignowitty v. State, 17 Tex. 521, 67 **Am. Dec.** 670; Billard v. State, 30 Tex. 367, 94 **Am. Dec.** 317; Gatlin v. State, 39 Tex. 130; Moseley v. State, 42 Tex. App. 78; Cox v. State, 43 Tex. 101; Blackburn v. State, 44 Tex. 457; Gaines v. State, 4 Tex. App. 330; Jinks v. State, 5 Tex. App. 68; Fore v. State, 5 Tex. App. 251; Frafton v. State, 5 Tex. App. 480; Crockett v. State, 5 Tex. App. 526; Duren v.

fraudulently and wrongfully takes such property from the possession of the special owner, who is entitled to the present possession, even as against the general owner, the ownership must be laid in such special owner.[11]

§ 862. ——JOINT OWNERSHIP—PARTNERSHIP. At common law and in this country in the absence of statutory provisions to the contrary, an indictment or information charging the larceny of property owned jointly by two or more persons,—e. g., as partners, as joint tenants, or as tenants in common,—the names of all such joint owners were required to be set out;[1] laying the ownership in one of such joint owners is an insufficient description,[2] except in those cases in which one of the owners have a special ownership by reason of his being in charge, control, and management of the joint property; in which case the indictment, stating the facts, can lay the ownership in such owner in charge and control;[3] but where

State, 15 Tex. App. 624; Littleton v. State, 20 Tex. App. 168.

Ownership may be laid in the general owner and not in the special owner from whom property taken.—State v. Fitzpatrick, 9 Houst. (Del.) 385, 32 Atl. 1072.

11 Adams v. State, 45 N. J. L. (16 Vr.) 448; Palmer v. People, 10 Wend. (N. Y.) 166, 25 Am. Dec. 551; State v. McCoy, 89 N. C. 466.

See, also, supra, § 858, footnote 12.

1 ARK.—Scott v. State, 42 Ark. 73; McCowan v. State, 58 Ark. 17. CAL.—People v. Bogart, 36 Cal. 245. DEL.—State v. Frame, 4 Harr. 569. FLA.—McNealy v. State, 17 Fla. 198. ILL.—Wallace v. People, 63 Ill. 451; Hix v. People, 157 Ill. 382, 41 N. E. 862. IND.—Hogg v. State, 3 Blackf. 326. MASS.—Com. v. Trimmer, 1 Mass. 476; Com. v. O'Brien, 94 Mass. (12 Allen) 183. MISS.—McDowell v. State, 68 Miss. 348, 8 So. 508. N. H.—State v. McCoy, 14 N. H. 364. N. C.—State v. Patterson, 68 N. C. 292; State v. Edwards, 86 N. C. 666. ORE.—State v. Wilson, 6 Ore. 428. S. C.—State v. Ryan, 4 McC. L. 16, 17 Am. Dec. 702; State v. Owens, 10 Rich. L. 169; State v. London, 3 S. C. 230. TEX.—Samora v. State, 4 Tex. App. 508; Dodd v. State, 10 Tex. App. 370.

2 IDAHO—People v. Frank, 1 Idaho 200. See, however, State v. Rathbone, 8 Idaho 72, 67 Pac. 189; State v. Ireland, 9 Idaho 690, 75 Pac. 257, and State v. Rooke, 10 Idaho 404, 79 Pac. 88. MASS.—Com. v. Trimmer, 1 Mass. 476. MISS.—McDowell v. State, 68 Miss. 348, 8 So. 508. N. H.—State v. McCoy, 14 N. H. 364. N. C.—State v. Burgess, 74 N. C. 272. S. C.—State v. Owens, 10 Rich. L. 169; State v. Langdon, 3 S. C. 230.

3 ARK.—Scott v. State, 42 Ark.

there is not such bona fide charge, control and managership on the part of one of the owners, the mere temporary absence of one or more of the joint owners does not warrant the laying of the ownership in the one present and in temporary charge and control.[4] In some of the states of the Union the common-law rule has been changed by statute so that the ownership may be laid in a firm by the firm name, without giving the names of the persons composing the firm,[5] or in one of the joint owners composing a firm,[6] or in one of the joint owners by name, adding "and others";[7] while in yet other jurisdictions it must be alleged that the owner is a part-

73; McCowan v. State, 58 Ark. 17; Merritt v. State, 73 Ark. 32, 83 S. W. 330. CAL.—People v. Schwartz, 32 Cal. 160; People v. Aunley, 142 Cal. 105, 75 Pac. 676. IND.—Hogg v. State, 3 Blackf. 326. MASS.—Com. v. Trimmer, 1 Mass. 476. N. M.—Territory v. Chavez, 6 N. M. 460, 30 Pac. 904. ORE.—State v. Wilson, 6 Ore. 428. TEX.—Henry v. State, 45 Tex. 84; Wilson v. State, 3 Tex. App. 206; Samora v. State, 4 Tex. App. 508; Calloway v. State, 7 Tex. App. 585; Hannohan v. State, 7 Tex. App. 664.

4 Merritt v. State, 73 Ark. 32, 83 S. W. 330.

5 People v. Ah Sing, 19 Cal. 594; People v. Barnes, 65 Cal. 16, 2 Pac. 493; People v. Goggins, 80 Cal. 229, 22 Pac. 206; Reed v. Com., 70 Ky. (7 Bush) 641; Porter v. Com. 22 Ky. L. Rep. 1657, 61 S. W. 16.

6 ALA.—Williams v. State, 67 Ala. 187; White v. State, 72 Ala. 195 (Ala. Code, § 4909); Brown v. State, 79 Ala. 51; Smith v. State, 133 Ala. 145, 91 Am. St. Rep. 21, 30 So. 806; Payne v. State, 140 Ala. 148, 37 So. 74; Taylor v. State, — Ala. App. —, 72 So. 557 (under Code 1907, § 7147). IDAHO—State v. Ireland, 9 Idaho 686, 75 Pac. 257. IND.—Widner v. State, 25 Ind. 234; Marcus v. State, 26 Ind. 101; Wantland v. State, 145 Ind. 38, 43 N. E. 931. IOWA—State v. Cunningham, 21 Iowa 433. KY.—Porter v. Com., 22 Ky. L. Rep. 1657, 61 S. W. 16. MASS.—Com. v. Arrance, 87 Mass. (5 Allen) 517; Com. v. O'Brien, 94 Mass. (12 Allen) 183. MO.—State v. Riley, 100 Mo. 493, 13 S. W. 1063. OHIO—Lasure v. State, 19 Ohio St. 43. TENN.—State v. Connor, 45 Tenn. (5 Coldw.) 311. TEX.—Terry v. State, 15 Tex. App. 66; Clark v. State, 26 Tex. App. 486, 9 S. W. 767; Coates v. State, 31 Tex. Cr. Rep. 257, 20 S. W. 585.

Where, however, the ownership is alleged in one person when it in fact belongs to a partnership of which he is a member, the indictment is defective.—State v. Wilson, 6 Ore. 428.

7 State v. Harper, 64 N. C. 130; State v. Patterson, 68 N. C. 292; State v. Capps, 71 N. C. 96; State v. Edwards, 86 N. C. 666.

nership, alleging the partnership name and giving the names of the individuals composing the partnership.[8] Where the ownership of the property is laid in two joint owners, it has been said that the omission of the Christian name of one will not vitiate the indictment;[9] but this holding was under the peculiar provisions of a local statute, and is in contravention of the rule already laid down regarding such an omission.[10]

§ 863. —— BAILOR AND BAILEE. In those cases in which the property alleged to have been stolen was taken from the rightful possession of a bailee,—e. g., an agent;[1] an agister;[2] a borrower of the property;[3] a cashier of a

[8] McCowan v. State, 58 Ark. 17, 22 S. W. 955; People v. Bogart, 36 Cal. 248; Buffington v. State, 124 Ga. 24, 52 S. E. 19.

Arkansas statute (Kirby's Dig., § 2233) so modifies the rule that if the partnership name is properly given, an error in the name of an individual member of such partnership will not vitiate the indictment.—Porter v. State, 123 Ark. 519, 185 S. W. 1090.

[9] State v. Riley, 100 Mo. 493, 13 S. W. 1063.

[10] See, supra, § 858, footnote 10.

[1] ALA.—Viberg v. State, 138 Ala. 100, 100 Am. St. Rep. 22, 35 So. 53. GA.—Jackson v. State, 5 Ga. App. 179, 82 S. E. 771. IDA. —State v. Farris, 5 Ida. 666, 51 Pac. 772. N. Y.—People v. Smith, 1 Park. Cr. Rep. 329. TEX.—Fore v. State, 5 Tex. App. 251; Kersh v. State, 45 Tex. Cr. Rep. 451, 77 S. W. 790; McDonald v. State, 70 Tex. Cr. Rep. 80, 156 S. W. 209; Lewis v. State, 73 Tex. Cr. Rep. 44, 164 S. W. 5; Tyler v. State, 180 S. W. 687; Pierson v. State, 180 S. W. 1080.

Lard stolen from railroad car in railroad yards, ownership of property properly laid in local freight agent in charge of yard.—Pierson v. State, (Tex.) 180 S. W. 1080. See McDonald v. State, 70 Tex. Cr. Rep. 80, 156 S. W. 209.

Where goods were stolen from a railroad company the ownership can not be laid in the depot-agent who had possession and control, because the agent was not a bailee. —State v. Jenkins, 78 N. C. 478, 4 Am. Cr. Rep. 336.

Railroad car stolen from railroad yards, ownership properly laid in station agent.—Tyler v. State, (Tex.) 180 S. W. 687.

[2] People v. Buelna, 81 Cal. 135, 22 Pac. 396; McKnight v. State, 70 Tex. Cr. Rep. 470, 156 S. W. 1188.

As to lien of agister, see footnote 12, this section.

[3] State v. Wisdom, 8 Port. (Ala.) 511; Yates v. State, 18 Tenn. (10 Yerg.) 549; Moseley v. State, 42 Tex. 78.

Compare: Emmerson v. State, 33 Tex. Cr. Rep. 89, 25 S. W. 289.

bank or corporation;[4] a cestui que trust;[5] a common carrier;[6] a consigner of property while in the hands of a common carrier, whether he selected the carrier or not;[7] a custodian[8] or a depositary for safe keeping;[9] a hirer of the property in possession;[10] an innkeeper;[11] a lienor in possession;[12] an officer levying a writ of attachment or a writ of execution on the property;[13] one in possession

4 Com. v. Butts, 124 Mass. 449.

5 State v. Addington, 1 Bail. L. (S. C.) 310.

6 ALA.—Rountree v. State, 58 Ala. 381; Allen v. State, 134 Ala. 159, 32 So. 318. KY.—Williams v. Com., 152 Ky. 610, 153 S. W. 961; Bryant v. Com., 24 Ky. L. Rep. 447, 68 S. W. 846. TEX.—Radford v. State, 35 Tex. 15. VT.—State v. Casavant, 64 Vt. 405, 23 Atl. 636. FED.—Kasle v. United States, 147 C. C. A. 552, 233 Fed. 878.

As to laying property in station agent when car or property from car in yards is stolen, see footnote 1, this section.

Owner's name need not be alleged.—Williams v. Com., 152 Ky. 610, 153 S. W. 961.

7 Com. v. Sullivan, 104 Mass. 552.

8 **Custody of keeper of garage** where machine left, held not to have such a special ownership in the machine as will justify laying property in such keeper on a charge of larceny of the machine. —Stoha v. State, (Tex.) 151 S. W. 543.

9 Kennedy v. State, 31 Fla. 428, 12 So. 858; Skipworth v. State, 8 Tex. App. 135; Otero v. State, 30 Tex. App. 450, 17 S. W. 1081; United States v. Burroughs, 3 McL. 405, Fed. Cas. No. 14695.

See, also, supra, § 858, footnote 7.

Notes sent to depositary by mail, from which they are stolen, ownership may be laid in the depositary.—United States v. Burroughs, 3 McL. 405, Fed. Cas. No. 14695.

10 Com. v. Lawless, 103 Mass. 425.

See, also, footnote 3, this section.

Horse in stable of owner at time of theft, to which it was returned each night, on a hiring for a week, property must be laid in the owner and not in the hirer.—R. v. Kendall, 12 Cox C. C. 598.

11 R. v. Wymer, 4 Car. & P. 391, 19 Eng. C. L. 569.

12 McKnight v. State, 70 Tex. Cr. Rep. 470, 156 S. W. 1188; R. v. Todd, 1 Leach C. C. 357.

Cattle placed with agister for pasture, he having a lien for their keep, indictment for their larceny should allege general ownership in real owner, and special ownership in the agister, under Tex. Rev. Civ. Stats. 1911, § 5664.—McKnight v. State, 70 Tex. Cr. Rep. 470, 156 S. W. 1188.

See, also, footnote 21, this section.

13 State v. Pullen, 3 Penn. (Del.) 184, 50 Atl. 538; Hill v. State, 38 Tenn. (1 Head) 454.

See, also, infra, § 865, footnotes 4-6.

Bailee of sheriff levying writ of attachment has no such ownership

for purpose of making repairs or of doing work upon the property,[14] as a manufacturer under contract to take the raw material and turn out a manufactured article for the owner, either as to the raw material or the manufactured product;[15] one in possession under a contract to purchase the property;[16] a pledgee in possession;[17] a receiver,[18] even of stolen property,[19] and the like,—in which case the possession may be properly laid either in the bailor,[20] or in the bailee;[21] and according to some holdings, the ownership may be laid in the owner, in one count,

in the property as will support an indictment charging the larceny of it from his possession.—Com. v. Morse, 14 Mass. 217; Norton v. People, 8 Cow. (N. Y.) 137; Brooks v. State, 64 Tenn. (5 Baxt.) 607.

14 R. v. Taylor, 2 East. P. C. 653, 1 Leach C. C. 356; R. v. Parker, 1 Leach C. C. 357.

15 State v. Ayer, 23 N. H. 301; State v. Brown, 72 N. J. L. 354, 60 Atl. 1117.

16 Fowler v. State, 100 Ala. 96, 14 So. 860; State v. Pettis, 63 Me. 124; State v. Ayer, 23 N. H. 301.

17 Com. v. O'Hara, 76 Mass. (10 Gray) 469; Smith v. State (Tex.) 29 S. W. 785.

See, also, footnote 12, this section.

18 State v. Rivers, 60 Iowa 381, 13 N. W. 73, 14 N. W. 738.

See, also, infra, § 865, footnote 1.

19 Com. v. Bowers, 3 Brewst. (Pa.) 350.

20 Garling v. State, 2 Tex. App. 44.

Name of bailor need not be alleged.—See McKinney v. State, 12 Ala. App. 155, 68 So. 518.

Payee of check stolen from the possession of another who had no interest in it, ownership may be laid in such payee.—Com. v. Lawless, 103 Mass. 425.

21 ALA.—Jones v. State, 18 Ala. 153; Allen v. State, 134 Ala. 159, 32 So. 318; Viberg v. State, 138 Ala. 100, 100 Am. St. Rep. 22, 35 So. 53; Higdon v. State, 1 Ala. App. 174, 56 So. 13; McKinney v. State, 12 Ala. App. 155, 68 So. 518. DEL.—State v. Fitzpatrick, 9 Houst. 385, 32 Atl. 1072; State v. Pullen, 3 Penn. 184, 50 Atl. 538. FLA.—Kennedy v. State, 31 Fla. 428, 12 So. 858; Long v. State, 42 Fla. 509, 28 So. 775. ILL.—Barnes v. People, 18 Ill. 52, 65 Am. Dec. 699. IND.—Edson v. State, 148 Ind. 283, 47 N. E. 625; State v. Tillett, 173 Ind. 133, 140 Am. St. Rep. 246, 20 Ann. Cas. 1262, 89 N. E. 589. IOWA—State v. Mullen, 30 Iowa 203. KY.—Green v. Com., 12 Ky. L. Rep. 750 (either in bailor or bailee). MASS.—Com. v. Morse, 14 Mass. 217; Com. v. O'Hara, 76 Mass. (10 Gray) 469. MINN.—State v. Whitman, 103 Minn. 92, 114 N. W. 363. MO.—State v. Hall, 85 Mo. 669; State v. Moore, 101 Mo. 316, 14 S. W. 182; State v. O'Connell, 144 Mo. 387, 46 S. W. 175. N. H.—State v. Ayer, 23 N. H. 301; State v. Gorham, 55 N. H. 152. N. Y.—Phelps v. People, 6 Hun

and in the bailee, in another count.[22] On an indictment against a bailee for the larceny of property in his possession, the name of the bailor and the purpose or use for which the property was entrusted to the bailee must be alleged.[23]

§ 864. —— CORPORATION. The court decisions are in irreconcilable conflict—doubtless owing, to some extent at least, to differences in the various statutory provisions—as to the proper and sufficient method in which to allege corporate capacity in charging the ownership of stolen property. In Arkansas,[1] Illinois,[2] Missouri,[3] and Texas,[4] it is required that the name of the corporation shall be stated in full, with the further allegation that the company is incorporated. The reason for this rule

401, affirmed 72 N. Y. 334, 2 Con. Cr. Rep. 383; People v. Smith, 1 Park. Cr. Rep. 239. N. C.—State v. Hardison, 75 N. C. 203; State v. Bishop, 98 N. C. 773, 4 S. E. 357; State v. Powell, 103 N. C. 424, 14 Am. St. Rep. 821, 4 L. R. A. 291, 9 S. E. 627; State v. McRea, 111 N. C. 665, 16 S. E. 173. S. C.—State v. Addington, 1 Bail. L. 310; State v. Phillips, 73 S. C. 236, 53 S. E. 370. TENN.—Owen v. State, 25 Tenn. (6 Humph.) 330; Hill v. State, 38 Tenn. (1 Head) 454. TEX.—State v. Stephens, 32 Tex. 155; Hill v. State, 41 Tex. 157; Moseley v. State, 42 Tex. 78; Blackburn v. State, 44 Tex. 457; Skipworth v. State, 8 Tex. App. 135; Duren v. State, 15 Tex. App. 624; Collins v. State, 56 Tex. Cr. Rep. 385, 118 S. W. 1038; Ledbetter v. State, 35 Tex. Cr. Rep. 195, 32 S. W. 903. FED.—United States v. Burroughs, 3 McL. 405, Fed. Cas. No. 14695; Kasle v. United States, 147 C. C. A. 552, 233 Fed. 878.

As to laying property in station agent of railroad from whose yards, under care of such agent, is stolen, see footnote 1, this section.

22 State v. Wisdom, 8 Port. (Ala.) 511; Kennedy v. State, 31 Fla. 428, 12 So. 858; Owen v. State, 25 Tenn. (6 Humph.) 330.

23 State v. Schoemperien, 101 Minn. 8, 111 N. W. 577.

1 McCowan v. State, 58 Ark. 17, 22 S. W. 955.

2 Wallace v. People, 63 Ill. 451.

3 State v. Kelley, 206 Mo. 693, 12 Ann. Cas. 691, 105 S. W. 606; State v. Clark, 223 Mo. 48, 18 Ann. Cas. 1120, 122 S. W. 665; State v. Henschel, 250 Mo. 263, 157 S. W. 311.

Under Mo. Rev. Stats., § 1298, it was held indictment charging larceny from a railroad depot need not allege the incorporation of the railroad company, nor the ownership of the depot building.—State v. Shields, 89 Mo. 259, 6 Am. St. Rep. 98.

4 White v. State, 24 Tex. App. 231, 5 Am. St. Rep. 879, 5 S. W. 857; Thurmond v. State, 30 Tex. App. 540, 17 S. W. 1098.

has been said to be the fact that the indictment or information should always be sufficiently certain to enable the accused to prepare his defense, and also to plead, in bar, his acquittal or conviction successfully in case he should be again indicted for the same offense.[5] On the other hand, a contrary doctrine is held in Alabama,[6] California,[7] Delaware,[8] Georgia,[9] Iowa,[10] Louisiana,[11] Nebraska,[12] New Jersey,[13] New Mexico,[14] New York,[15] North

5 McCowan v. State, 58 Ark. 17, 22 S. W. 955.

6 Johnson v. State, 65 Ala. 204.

Jackson v. State, 14 Ala. App. 99, 71 So. 977.

"Birmingham Packing Company, a corporation," sufficiently alleges that the owner was a corporation. —Jackson v. State, 14 Ala. App. 99, 71 So. 977.

7 See People v. Henry, 77 Cal. 445, 19 Pac. 830 (a case of burglary, but the principle is the same); People v. McDonald, 80 Cal. 288, 13 **Am. St. Rep.** 163 (counterfeiting notes of the "Bank of England").

8 State v. Fitzpatrick, 9 Houst. (Del.) 388, 32 Atl. 1072; State v. Rollo, 3 Penn. (Del.) 421, 54 Atl. 683. (Del. Gen. Sess., 1901.)

Correct name of corporation not required to be alleged in Delaware. —State v. Rollo, 3 Penn. (Del.) 421, 54 Atl. 683.

9 Mattox v. State, 115 Ga. 212, 41 S. E. 709.

Name importing corporation, it is not necessary to allege the incorporation in Georgia.—Mattox v. State, 115 Ga. 212, 41 S. E. 700.

10 State v. Fogerty, 105 Iowa 32, 74 N. W. 754. See State v. Watson, 102 Iowa 655, 72 N. W. 283.

11 State v. Accardo, 129 La. 666, 56 So. 631 (the railroad company being well known in the state).

12 Braithwaite v. State, 28 Neb. 832, 45 N. W. 247.

13 Fisher v. State, 40 N. J. L. (11 Vr.) 169.

14 Territory v. Garcia, 12 N. M. 87, 75 Pac. 34; Territory v. Walker, 16 N. M. 607, 120 Pac. 336.

15 People v. Mead, 20 N. Y. 15, 140 **Am. St. Rep.** 616, 25 N. Y. Cr Rep. 179, 92 N. E. 1051, affirming 125 App. Div. 7, 22 N. Y. Cr. Rep. 225, 109 N. Y. Supp. 163. See Noakes v. People, 25 N. Y. 380; McCarney v. People, 83 N. Y. 408 (obiter), point omitted in 38 **Am. Rep.** 456; People v. McClasky, 5 Park. Cr. Rep. 57.

Corporation named, further allegation that it was incorporated under laws of the state, when it was a national bank incorporated under federal laws, variance said to be immaterial, as it was not necessary to allege as to the incorporation (obiter).—McCarney v. People, 83 N. Y. 408, obiter point omitted in 38 **Am. Rep.** 456.

"Gulf Brewing Company" sufficient description of corporate capacity (in burglary).—People v. McClasky, 5 Park. Cr. Rep. 57 (though special objection that indictment did not charge that it was a corporation does not seem to have been taken).

"Meridan Cutlery Company" sufficient designation of corporate ca-

Carolina,[16] and the same seems to be true under the English statute.[17] Where incorporation is required to be averred, it is not necessary to allege that the incorporation was under the general laws or a private statute;[18] where incorporation is not required to be averred, and the indictment or information gives the full name of the corporation, that will be sufficient; and where it is alleged in addition thereto that the incorporation was had under the state laws, when in fact it was under the federal laws, the variance will be immaterial,[19] because such additional allegation may be treated as surplusage. In those cases where the business of a corporation is not conducted under the corporate name, but under one that has been assumed, the ownership of property stolen from the house where such business was conducted, and of the house in which conducted, may be described by such assumed name.[20]

§ 865. —— CUSTODIA LEGIS, PROPERTY IN. Where the property charged to have been stolen is rightly in the custody of an officer of the court, either on process or under an order of the court, the ownership of the property may be laid in such officer on a charge of larceny from his possession; such as a receiver appointed by the court,[1] a constable who has collected money for a creditor[2] or levied an attachment, and the indictment or information may allege the property to be his property,

pacity.—Noakes v. People, 25 N. Y. 380.

16 State v. Grant, 104 N. C. 908, 10 S. E. 554. See Stanly v. Richmond & D. R. Co., 89 N. C. 331.

17 See R. v. Stokes, 8 Car. & P. 151, 34 Eng. C. L. 333.

18 State v. Loomis, 27 Minn. 521, 8 N. Y. 758.

19 See McCarney v. People, 83 N. Y. 408 (obiter), point omitted in 38 Am. Rep. 456.

20 Jackson v. State, 93 Ga. 165, 18 S. E. 436.

1 State v. Rivers, 60 Iowa 381, 13 N. W. 73, 14 N. W. 738; State v. Hall, 97 Iowa 400, 66 N. W. 725.

Ownership in general owner may be charged, though the larceny was from the possession of a receiver.—State v. Cross, 12 Wash. 673, 42 Pac. 127.

2 Hill v. State, 38 Tenn. (1 Head) 454.

without the addition of the words "as constable";[3] an officer levying a writ of attachment[4] or a writ of execution,[5] where the writ and the execution thereof are valid and the officer has actually taken the property into his possession under such writ, but not otherwise;[6] and we have already seen that the bailee of such officer to whom he delivers possession of the property on the promise to return it on demand, acquires no such ownership in the property.[7] Hence, it has been held that a deputy sheriff who is simply appointed to watch in the building from which property is stolen, and is there on the night and at the time of the larceny complained of, has not the custody of the property in the legal sense, acquires no interest therein, and can not be alleged to have any kind of ownership in the property stolen.[8]

§ 866. —— HUSBAND AND WIFE. At common law the title to all the personal property, choses in action, and paraphernalia the wife had at the time of marriage, or which was acquired by her after marriage by purchase or by devise or bequest, passed at once to and vested in the husband. And at common law on a charge of the larceny of any of such property, the ownership must be laid in the husband;[1] but property of the wife in the

3 State v. Pullen, 3 Penn. (Del.) 184, 50 Atl. 538.

4 IOWA—State v. Clapper, 59 Iowa 279, 13 N. W. 294. MASS.—Com. v. Morse, 14 Mass. 217. N. Y.—Norton v. People, 3 Cow. 137; Palmer v. People, 10 Wend. 165, 25 Am. Dec. 551. ORE.—State v. Cornelius, 5 Ore. 46. TENN.—Brooks v. State, 64 Tenn. (5 Baxt.) 607.

5 State v. Pullen, 3 Penn. (Del.) 184, 50 Atl. 538; Hill v. State, 38 Tenn. (1 Head) 454.

6 State v. Cornelius, 5 Ore. 46; Brooks v. State, 64 Tenn. (5 Baxt.) 607.

7 See, supra, § 863, footnote 13.

8 Linhart v. State, 33 Tex. Cr. Rep. 504, 27 S. W. 260.

1 ALA.—Ellis v. State, 76 Ala. 90. IND.—State v. Hays, 21 Ind. 176. MASS.—Com. v. Collins, 1 Mass. 116; Com. v. Davis, 63 Mass. (9 Cush.) 283. UTAH—People v. McCarty, 5 Utah 280, 17 Pac. 734. VA.—Hughes v. Com., 58 Va. (17 Gratt.) 565, 94 Am. Dec. 498. FED.—United States v. Murphy, 4 Cr. C. C. 681, Fed. Cas. No. 15838. ENG.—R. v. White, 9 Car. & P. 429, 38 Eng. C. L. 175.

An indictment for larceny of the wife's wearing apparel is properly laid in her husband.—Pratt v.

use of the husband and his family in the ordinary way might be laid in either the husband or the wife,[2] although there are cases to the contrary.[3] Under statute in this country, conferring upon women the right to own and hold separate property, the ownership of such separate property of the wife, alleged to have been stolen, must be laid in the wife in some jurisdictions,[4] while in others it may be laid either in the husband or the wife.[5] The ownership of community property may be laid in the husband,[6] or in the wife,[7] except that where the husband has abandoned the wife, community property stolen from her should be alleged to be her property.[8] It has been said that where a married woman, owning property in her

State, 35 Ohio St. 514, 35 Am. Rep. 617.

2 Petre v. State, 35 N. J. L. (6 Vr.) 64.

3 State v. Dredden, 1 Marv. (Del.) 522, 41 Atl. 925; Merriweather v. State, 33 Tex. 789; Wilson v. State, 3 Tex. App. 206.

4 ALA.—Johnson v. State, 100 Ala. 55, 14 So. 627. IND.—Stevens v. State, 44 Ind. 469. S. C.—State v. Pitts, 12 S. C. 180, 32 Am. Rep. 508. ENG.—R. v. Murray, 2 K. B. 385, 95 L. T. N. S. 295, 6 Ann. Cas. 161, 3 British Rul. Cas. 775.

An indictment alleging the ownership of the separate property in the husband is invalid.—Rollins v. State, 98 Ala. 79, 13 So. 280.

5 DEL.—State v. Jackson, 1 Houst. Cr. Cas. 561. UTAH—People v. McCarty, 5 Utah 280, 17 Pac. 734. TEX.—Wilson v. State, 3 Tex. App. 206; Alexander v. State, 9 Tex. App. 48; Holmes v. State, 42 S. W. 979.

Cattle of wife alleged to have been stolen, which were under the exclusive control of her husband, and taken without the consent of such husband, or of his wife, ownership thereof may be laid in the husband.—Bert v. State, 7 Tex. App. 578.

6 People v. Swalm, 80 Cal. 46, 13 Am. St. Rep. 96, 8 Am. Cr. Rep. 477, 22 Pac. 67; State v. Gaffery, 12 La. Ann. 265; Merriweather v. State, 33 Tex. 790.

Personal ornaments purchased by wife on credit of husband, without his authority and sanction previously obtained, which he afterwards pays for, but never gives to the wife, as her separate property, though she retains possession and use of the same, remain community property, and a taking from the wife, with her consent, by a person knowing the facts, constitutes a larceny thereof, and ownership may be laid in the husband.—People v. Swalm, 80 Cal. 46, 13 Am. St. Rep. 96, 22 Pac. 67. See People v. Schuyler, 6 Cow. (N. Y.) 572.

7 Miles v. State, 51 Tex. Cr. Rep. 587, 103 S. W. 854.

8 Ware v. State, 2 Tex. App. 547.

own right, which was stolen, and she thereafter remarries before indictment found, the property may be laid in her name at the time of the act complained of.[9] In the absence of a statute to the contrary, a wife can not be guilty of stealing the goods and chattels of her husband,[10] and another woman, even though she act animus furandi, is not guilty of larceny where acting conjointly with the wife in taking the same;[11] but where a husband takes the personal property of his wife under circumstances which, were he a third person, would constitute larceny, he is guilty of the crime of larceny.[12]

§ 867. —— PARENT AND CHILD. There is a sad lack of harmony in the decisions, which seem to have been made upon no settled principle of law, regarding in whom ownership is to be laid on a charge of larceny of property provided by a parent for his minor child, who is living with him and under his care at the time of the larceny complained of, some of the cases holding that the ownership should be laid in the minor[1] and not in the parent,[2] others that it should be laid in the parent,[3] and still others hold that it may be laid in either the minor or the parent.[4] It has been said that in those cases in which the property is under the joint control of the minor and

9 State v. Lobertew, 55 Kan. 674, 41 Pac. 945.

10 Lamphier v. State, 70 Ind. 317.

11 Id.

12 Beasley v. State, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35.

Contra: Watkins v. State, 60 Miss. 323.

1 DEL.—State v. Koch, 4 Harr. 570. TENN.—Phillips v. State, 85 Tenn. 551, 7 Am. Cr. Rep. 318, 3 S. W. 434. TEX.—Olibare v. State, 48 S. W. 69. ENG.—R. v. Forsgate, 1 Leach C. C. 463.

Larceny of clothes from room, ownership may be laid in a woman, though a minor, wearing and using the clothes as her own.—Phillips v. State, 85 Tenn. 551, 7 Am. Cr. Rep. 318, 3 S. W. 434.

2 State v. Koch, 4 Harr. (Del.) 570.

3 State v. Williams, 2 Strobh. L. (S. C.) 229; Bazan v. State (Tex.) 24 S. W. 100; Wright v. State, 35 Tex. Cr. Rep. 470, 34 S. W. 273; R. v. Hughes, 1 Car. & M. 593, 41 Eng. C. L. 323.

4 Jackson v. State, 47 Tex. Cr. Rep. 85, 79 S. W. 521; affirmed on rehearing, 80 S. W. 631; People v. McCarty, 5 Utah 280, 17 Pac. 731.

his parent at the time of the theft, the ownership may be laid in either the minor or in the parent,[5] but that where the possession is in the parent, the child having access to and use of the property, the ownership must be laid in the parent.[6] Property belonging to a widow and her children, who are minors and under her control, the ownership thereof is properly laid in the widow in an indictment or information charging its larceny.[7]

§ 868. —— GUARDIAN AND WARD. We have already seen that where property is in custodia legis, that is, in possession of an officer of the court on process issuing out of, or on order made by, the court—e. g., on writ of attachment or execution,[1] a receiver,[2] and the like—on a charge of the larceny of the property, ownership is to be laid in the person in possession thereof as such officer or representative of the court; and an indictment or information charging the larceny of the money or property of a ward from his guardian, who is an officer of the court, the ownership of the property is properly laid in such guardian.[3]

§ 869. —— LANDLORD AND TENANT. As in the case of the larceny of the property of a minor,[1] so in the case of larceny where the relation of landlord and tenant exists, the cases are not harmonious in their holdings as to the person in whom ownership should be laid on a charge of larceny. In those cases in which a tenant occupies a building, on a charge of larceny from the building, ownership is properly laid in the tenant in possession;[2] but where the property stolen consists of the crop,

5 Bazan v. State, (Tex.) 24 S. W. 100.

6 Wright v. State, 35 Tex. Cr. Rep. 470, 34 S. W. 273; Olibare v. State, (Tex.) 48 S. W. 69.

7 Crockett v. State, 5 Tex. App. 526.

1 See, supra, § 865, footnotes 4 and 5.

2 See, supra, § 863, footnote 18.

3 Thomasson v. State, 22 Ga. 499.

1 See, supra, § 867.

2 State v. Golden, 49 Iowa 48. See, supra, § 861, footnote 2; also §§ 478 et seq., 482.

or of a portion of the crop raised, the decisions do not agree in whom the ownership should be laid. In Alabama[3] and Georgia,[4] where the relation of landlord and tenant or cropper exists, on a prosecution for stealing a growing crop, or a portion of a growing or grown crop, the ownership must be laid in the landlord, and not in the tenant or cropper;[5] but in Texas, on a charge of larceny of property in possession of a tenant, where the value is under fifty dollars, ownership must be laid in the owner's agent, and special ownership in the tenant, or ownership in the agent or in the tenant.[6] Where the tenant has pledged the crop to his landlord, an indictment charging the larceny thereof, ownership is properly laid jointly in the landlord and tenant under the Arkansas statute.[7] Where a flouring mill was leased on shares, and by the terms of the lease the tenant was to receive one-third of the tolls taken as his compensation for keeping the mill, an indictment or information alleging the larceny of flour made from the undivided toll-wheat should charge the ownership of the property to have been in the landlord.[8] Where land is cropped on shares, on a charge of a larceny of the crop, or a portion of the crop, the ownership should be laid in the landlord in Louisiana,[9] and in the tenant and landlord jointly

3 **Larceny of growing crop** charged, ownership thereof may be alleged in any one or more of the owners under Alabama Code, § 4800.—Harris v. State, 60 Ala. 50.

4 Betts v. State, 6 Ga. App. 773, 65 S. E. 841.

5 **As to larceny of growing crop,** see, supra, § 841.

Contract to pay portion of crop raised as compensation for services rendered in tilling the crop, no title to the crop passes to such tenant or servant until the crop has been divided.—State v. Saunders, 52 S. C. 580, 30 S. E. 616.

6 Lewis v. State, 73 Tex. Cr. Rep. 44, 164 S. W. 5.

7 Wells v. State, 102 Ark. 627, 145 S. W. 531.

8 **There being two landlords,** A and B, the indictment should have laid the property in "A and others."—State v. Edwards, 86 N. C. 666.

9 State v. Jacobs, 50 La. Ann. 447, 23 So. 608.

in Delaware[10] and Florida,[11] and not merely as the property of the tenant.[12] Ungathered corn charged to have been stolen from the field of a tenant who rents for agricultural purposes, the indictment or information laying the ownership of the stolen grain in the tenant, is sufficient in North Carolina, notwithstanding the fact that section 1754 of the code provides that the ownership shall be in the landlord, that provision being merely for the benefit of the landlord, the possession in the tenant being good as against third parties.[13] Where turpentine was charged to have been stolen from the boxes under the trees, the trees being rented to A, who rented the boxes from B, to whom he was to pay one-third of the turpentine as rental, the ownership of the property stolen was said to have been properly laid in A.[14] Where a portion of the crop which was raised by the tenant of a receiver is alleged to have been stolen, the ownership of the property is properly laid in the receiver, because the possession of the tenant is the possession of the receiver.[15] Where an indictment charging a tenant with the larceny of a portion of the crop lays the possession jointly in the landlord and tenant, it is bad,[16] for the reason that a man can not be charged with the larceny of his own property.[17]

§ 870. —— PRINCIPAL AND AGENT. In those cases in which an agent is in full charge of property of the owner, invested with such an interest as would enable him to maintain an action in trespass for an injury thereto, he has such a special ownership in the property that he may be laid as its owner in an indictment or information charging the larceny of the property;[1] but where a per-

10 State v. Frame, 4 Harr. (Del.) 569.

11 McNealy v. State, 17 Fla. 198.

12 State v. Frame, 4 Harr. (Del.) 569.

13 State v. Higgins, 126 N. C. 1112, 30 S. E. 113.

14 State v. King, 98 N. C. 648.

15 State v. Rivers, 60 Iowa 381, 13 N. W. 73, 14 N. W. 738.

16 State v. McCoy, 89 N. C. 466.

17 See, supra, § 860.

1 See, supra, §§ 861, 863.

son is temporarily in possession of the property of his principal or employer for the purpose of use merely, and the like, and does not have such an interest therein as would enable him to maintain an action in trespass for injury thereto, on a charge of larceny of the property the ownership should be alleged to be in the principal,[2] and to have been taken from the principal.[3] Thus, where meat belonging to a railroad company was in the possession and control of a depot-agent of that company at the time when it was stolen, for the purpose of feeding employees, it was said that the ownership of the property must be laid in the railroad company and not in the depot-agent, the agent in such a case not being a bailee.[4] It has been said that where a superintendent is in charge of a ranch or a plantation from which a part of the crop has been stolen, the indictment or information should charge the ownership of the property to be in the principal, that alleging it in such superintendent or servant is insufficient;[5] on the other hand, it has been said that where a foreman of a cattle ranch is in full charge and control of the interests of the owner, the indictment charging larceny of the cattle, or a portion thereof, should lay the ownership of the cattle stolen in such foreman.[6] The difference in the results arrived at in such cases seems to depend upon the character in which the person in charge of the property is regarded, whether as that of an agent with an interest or merely as that of a servant. The position and interest of the latter are treated in the next section.

§ 871. —— MASTER AND SERVANT. A servant in temporary charge of his master's or employer's property

2 State v. Beaty, 62 Kan. 266, 62 Pac. 658; Thomas v. State, 1 Tex. App. 289.

See, also, infra, § 871.

3 Thomas v. State, 1 Tex. App. 289.

4 State v. Jenkins, 78 N. C. 478, 4 Am. Cr. Rep. 3361.

See, however, supra, § 863, footnote 1.

5 Heygood v. State, 59 Ala. 49.

6 State v. Vincent, 16 S. D. 62,

for the purpose of use, and the like, his interest therein is subordinate to that of his master or employer, or to that of the person having the actual care and control of such property for the master or employer, and his possession is simply the possession of the master, or of the person in actual control,[1] and on a charge of larceny of the property, the ownership can not be laid in such servant,[2] but must be laid in the actual owner,[3] or in the person actually in the control and possession of the property.[4]

§ 872. —— UNINCORPORATED SOCIETY BEING OWNER. An indictment or information charging the larceny of property belonging to an unincorporated association, should allege the ownership of the property stolen to be in certain named persons as composing the association,[1] except that in the case of churches and benevolent and fraternal societies having officers and trustees, or other gov-

91 N. W. 347; Barnes v. State, 46 Tex. Cr. Rep. 513, 81 S. W. 735.

1 Com. v. Rubin, 165 Mass. 453, 43 N. E. 200; Thomas v. State, 1 Tex. App. 289; Clark v. State, 23 Tex. App. 612; Crook v. State, 39 Tex. Cr. Rep. 252, 45 S. W. 720.

2 ALA.—Heygood v. State, 59 Ala. 49. IND. TER.—Murray v. United States, 1 Ind. Ter. 28, 35 S. W. 240. IOWA—State v. Rivers, 60 Iowa 381, 13 N. W. 73, 14 N. W. 738. KAN.—State v. Beaty, 62 Kan. 266, 62 Pac. 658; State v. Rice, 62 Kan. 868, 63 Pac. 737. N. C.—State v. Jenkins, 78 N. C. 478. TENN.—Lowry v. State, 113 Tenn. 220, 81 S. W. 373.

3 Kersh v. State, 45 Tex. Cr. Rep. 451, 77 S. W. 790.

4 ALA.—Heygood v. State, 59 Ala. 49. IND. TER.—Murray v. United States, 1 Ind. Ter. 28, 35 S. W. 240. IND.—Wilson v. State, 28 Ind. 393. MASS.—Com. v. Morse, 14 Mass. 217; Com. v. Lawless, 103 Mass. 425; Com. v. Rubin, 165 Mass. 453, 43 N. E. 200. N. Y.—People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551, 4 Abb. Pr. N. S. 89, 1 Cow. Cr. Rep. 1, 4 Trans. App. 32. N. C.—State v. Jenkins, 78 N. C. 478, 4 Am. Cr. Rep. 336. TEX.—Thomas v. State, 1 Tex. App. 289; Garling v. State, 2 Tex. App. 44. ENG.—R. v. Ashley, 1 Car. & K. 198, 47 Eng. C. L. 198; R. v. Green, 37 Eng. L. & Eq. 507.

1 ARK.—McCowan v. State, 58 Ark. 17, 22 S. W. 955. CAL.—People v. Schwartz, 32 Cal. 160; People v. Bogart, 36 Cal. 245. GA.—Buffington v. State, 124 Ga. 24, 52 S. E. 19. ILL.—Wallace v. People, 63 Ill. 451. IND.—Hogg v. State, 3 Blackf. 326; Bingle v. State, 161 Ind. 369, 68 N. E. 645. MASS.—Com. v. Trimmer, 1 Mass. 476. S. C.—State v. Owens, 10 Rich. L. 169.

erning body, in which case the ownership may be laid in such officers, board of trustees,[2] or governing body, such as the churchwardens,[3] or the vicar and churchwardens,[4] and the like; but ownership can not be laid in "the parishioners of such church."[5] And it is thought that under some statutes regulating in case of joint ownership, the ownership may be laid in one member of the association "and others."[6]

§ 873. —— PUBLIC PROPERTY AND PUBLIC SERVANTS. In the case of larceny of public property, ownership thereof may be properly laid in the subdivision of government, or of the public, to which it belongs, or of the public officer who had it in possession at the time of the act complained of. Thus, the property may be described as the property of the United States,[1] the state,[2] or of the county,[3] where the property is taken from a public officer. Where property is stolen from a person employed to

2 State v. Livingston, 1 Houst. Cr. Cas. (Del.) 71; Gibson v. State, 13 Ga. App. 67, 78 S. E. 829; Bingle v. State, 161 Ind. 369, 68 N. E. 645; R. v. Ashley, 1 Car. & K. 198, 47 Eng. C. L. 198; R. v. Boulton, 5 Car. & P. 537, 24 Eng. C. L. 445; R. v. O'Brien, 13 Up. Can. Q. B. 437.

"Morning Star Colored Baptist Church" alleged to be the owner of a church held charged to have been stolen, insufficient as against objection the church incapable of such ownership.—Gibson v. State, 13 Ga. App. 67, 78 S. E. 829.

3 R. v. Garlick, 1 Cox C. C. 52.

4 R. v. Worthley, 2 Car. & K. 283, 2 Cox C. C. 32, 1 Den. C. C. 162, 61 Eng. C. L. 283.

5 Reg. v. O'Brien, 13 U. C. Q. B. 436 (some designated person must be named).

6 R. v. Boulton, 5 Car. & P. 537, 24 Eng. C. L. 445.

As to joint ownership, see, supra, § 682.

1 **"Belonging to"** the United States, is a sufficient allegation of ownership under act of March 3, 1875, ch. 144, 18 Stats. at L. 479, 4 Fed. Stats. Ann. (1st ed.) p. 790.—Dimmick v. United States, 70 C. C. A. 141, 135 Fed. 257. See State v. Ware, 62 Mo. 597; McBride v. United States, 42 C. C. A. 38, 101 Fed. 821.

2 **Ownership in the state**, or in the public officer having the custody of the property, seems to be the holding in Phelps v. People, 6 Hun (N. Y.) 401; affirmed 72 N. Y. 334, 2 Con. Cr. Rep. 383.

3 State v. Rollins, 28 Ind. 390; People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551, 4 Abb. Pr. N. S.

carry the mails, ownership thereof may be laid either in the sender,[4] or in the person to whom addressed.[5]

§ 874. —— STOLEN PROPERTY RESTOLEN. In a case where property originally stolen from the true owner is again stolen from the thief, or from the person to whom the original thief disposed of the property, an indictment or information charging the second larceny may lay the ownership of the property restolen in the original thief, where the property was taken from him,[1] in the purchaser from the original thief,[2] or in the original owner;[3] for it is a rule of law well known and well established that the possession of the true owner can not be divested by a tortious taking, and that if a person unlawfully take the goods of another, and a second person take them again from him, the original owner may have the second taker indicted for the larceny, and the indictment may allege that the property taken was his property, because the act of the thefts did not change the true ownership.[4]

§ 875. —— PROPERTY OF ESTATE OF DECEDENT. In those cases in which the property alleged to have been stolen belonged, during his lifetime, to a person who is dead

89, 1 Cow. Cr. Rep. 1, 4 Trans. App. 32.

4 United States v. Burroughs, 3 McL. 405, Fed. Cas. No. 14695.

5 See United States v. Jackson, 29 Fed. 503; United States v. Jones, 31 Fed. 718.

1 ARIZ.—Maxwell v. Territory, 10 Ariz. 1, 85 Pac. 116. ARK.—Gooch v. State, 60 Ark. 5. N. Y.—Ward v. People, 3 Hill (N. Y.) 395; affirmed 6 Hill 144, approved in People v. Bennett, 37 N. Y. 117, 131, 93 Am. Dec. 551, 4 Abb. Pr. N. S. 89, 1 Cow. Cr. Rep. 1, 4 Trans. App. 32. N. C.—State v. Wincroft, 76 N. C. 40.

2 Gooch v. State, 60 Ark. 5; Com. v. Bowers, 3 Brewst. (Pa.) 350; King v. State, 43 Tex. 351.

3 Ward v. People, cited in footnote 1, this section; King v. State, 43 Tex. 351.

Larceny by child under ten years of age, who is incapable of crime, custody remains in the true owner, and on larceny from such child, ownership may be laid in the rightful owner.—Rice v. State, 118 Ga. 48, 98 Am. St. Rep. 99, 44 S. E. 805.

4 R. v. Wilkins, 1 Leach C. C. 522.

at the time of the return of the indictment or the presentation of the information, ownership should be laid in the executor or administrator of such decedent,[1] and not in the deceased,[2] or in his estate,[3] in the absence of a statute permitting this to be done.[4] Laying the ownership in the administrator and the heirs has been said to be erroneous.[5] Where no executor or administrator has been appointed, and the property of the decedent remains in the hands of the widow, the ownership may be laid in the widow,[6] even though there are minor children.[7]

§ 876. —— ESTRAYS. The larceny of estrays has been already discussed;[1] it remains but to add in this place that an indictment or information charging the larceny of an estray may lay the ownership in the true owner,[2]

1 GA.—State v. Lockhart, 24 Ga. 420; State v. Woodley, 25 Ga. 235. IND.—State v. Tillett, 173 Ind. 133, 20 Ann. Cas. 1262, 89 N. E. 589. N. M.—Territory v. Valles, 15 N. M. 228, 103 Pac. 984. N. C.—State v. Davis, 4 N. C. 271.

2 United States v. Mason, 2 Cr. C. C. 410, Fed. Cas. No. 15738.

3 People v. Hall, 19 Cal. 425; but this has in effect been overruled by People v. Smith, 112 Cal. 333, 44 Pac. 663; State v. Woodley, 25 Ga. 235; State v. Cutlip, — W. Va. —, 88 S. E. 829; United States v. Mason, 2 Cr. C. C. 410, 26 Fed. Cas. No. 15738.

An information laying the ownership in the estate of the deceased is not fatally defective.—People v. Prather, 120 Cal. 660, 53 Pac. 259.

Ownership may properly be laid in decedent's estate as such designation sufficiently identifies the illegal act.—State v. Sherman, 71 Ark. 349, 74 S. W. 293.

Under the civil law in Louisiana the ownership is properly laid in the succession of the deceased, and not in the administrator as long as the administration exists.—State v. Brown, 32 La. Ann. 1020.

4 State v. Sherman, 71 Ark. 349, 74 S. W. 293; People v. Prather, 120 Cal. 660, 53 Pac. 259.

5 Walker v. State, 111 Ala. 29, 20 So. 612.

6 Crockett v. State, 5 Tex. App. 526; State v. Heaton, 23 W. Va. 773.

7 State v. Heaton, 23 W. Va. 773.

1 See, supra, § 833.

2 Maxwell v. Territory, 10 Ariz. 1, 85 Pac. 116; Jinks v. State, 5 Tex. App. 68; Swink v. State, 32 Tex. Cr. Rep. 530, 24 S. W. 893.

Cattle running on accustomed range, on a prosecution for larceny thereof, are to be considered in the possession of their owner.—Murray v. United States, 1 Ind. Ter. 28, 35 S. W. 240.

Information charging larceny of strayed mare laying ownership in a person named, and on the trial,

or in the person taking up the estray and having it in his possession at the time of the act complained of,[3] even though no special ownership attaches except through compliance with the estray laws.[4] An estray taken up as such, the ownership should not be alleged as unknown;[5] but where an estray is running with the cattle of another on the latter's ranch, which is in the charge of a servant of a lessee, ownership of the estray can not be laid in the owner of the ranch.[6] Where the ownership of the estray is unknown,[7] it may be so alleged; but if the evidence should show, in fact, a special ownership, the variance will be fatal.[8]

§ 877. —— UNKNOWN OWNERS. An indictment or information charging the larceny of property may lay the ownership in a person unknown,[1] where the indict-

his son testified that he owned a half interest in the mare, and the father on being recalled, said that it was an arrangement with his son whereby the latter was to have one-half of all that he could gather up of certain horses of which the mare in question was one, it was held that this arrangement did not constitute an ownership in the son until the horses were gathered up.—State v. Cotterel, 12 Idaho 572, 86 Pac. 527.

3 State v. Golden, 49 Iowa 48.

4 Baxter v. State (Tex.), 43 S. W. 87.

5 Swink v. State, 32 Tex. Cr. Rep. 530, 24 S. W. 893.

6 Palmer v. State, 70 Neb. 136, 97 N. W. 235.

7 As to unknown ownership, see infra, § 877.

8 Swink v. State, 32 Tex. Cr. Rep. 532, 24 S. W. 893; Thomason v. State (Tex.), 34 S. W. 121.

1 CONN.—State v. Wilson, 30 Conn. 500. GA.—Thomas v. State, 96 Ga. 311, 22 S. E. 956. IND. TER.—Oxier v. United States, 1 Ind. Ter. 85, 38 S. W. 331. IOWA—State v. McIntire, 59 Iowa 264, 13 N. W. 286. KY.—Reed v. Com., 70 Ky. (7 Bush) 641. LA.—State v. McDuffy, 131 La. 695, 60 So. 80. ME.—State v. Polland, 53 Me. 124. MASS.—Com. v. Morse, 14 Mass. 217. MO.—State v. Casteel, 53 Mo. 124; State v. Stowe, 132 Mo. 199, 33 S. W. 799; State v. Wiseback, 139 Mo. 214, 40 S. W. 946. N. C.—State v. Bell, 65 N. C. 313. PA.—Com. v. O'Brien, 2 Brewst. 566. TEX.—Culberson v. The State, 2 Tex. App. 324; Taylor v. State, 5 Tex. App. 1; Jorasco v. State, 6 Tex. App. 238; Smith v. State, 7 Tex. App. 382; Lowe v. State, 11 Tex. App. 253; Mackey v. State, 20 Tex. App. 603; McVey v. State, 23 Tex. App. 659, 5 S.W. 174; Swink v. State, 32 Tex. Cr. Rep. 530, 24 S. W. 893; McCarty v. State, 36 Tex. Cr. Rep. 135, 35 S. W. 994; Clements v. State, 43 Tex. Cr. Rep.

ment alleges that the name of the owner is to the grand jury unknown,[2] when that is the fact,[3] after reasonable deliberation on the part of the grand jury to ascertain the name of the owner;[4] but an estray taken up as such, ownership should not be alleged to be unknown simply because the name of the rightful owner is unknown, and can not be ascertained by the jury;[5] it should be laid in the person taking up the estray.[6] Where the actual ownership is unknown and there is no special ownership, it is not necessary to negative the ownership of the accused.[7] Under a statute providing that where the own-

400, 66 S. W. 301; Landreth v. State, 44 Tex. Cr. Rep. 239, 70 S. W. 758. VA.—Baker v. Com., 4 Va. (2 Va. Cas.) 122.

2 State v. Bell, 65 N. C. 313; Taylor v. State, 5 Tex. App. 1; Atkinson v. State, 19 Tex. App. 462; Mackey v. State, 20 Tex. App. 603; McVey v. State, 23 Tex. App. 659, 5 S. W. 174.

Allegation property of some person to grand jury unknown, tantamount to an allegation that the name of the owner is to the grand jury unknown, and is sufficient.—Milton v. State, (Tex.) 56 S. W. 67.

3 Oxier v. United States, 1 Ind. Ter. 85, 38 S. W. 331; Boren v. State, 23 Tex. App. 28, 4 S. W. 468; Dawson v. State, (Tex.) 61 S. W. 489; Williams v. State, 47 Tex. Cr. Rep. 536, 84 S. W. 829.

4 ALA.—Underwood v. State, 72 Ala. 200. CONN.—State v. Wilson, 30 Conn. 500. GA.—Thomas v. State, 96 Ga. 311, 22 S. E. 956. IND. TER. — Oxier v. United States, 1 Ind. Ter. 85, 38 S. W. 331. IND.—Widner v. State, 25 Ind. 234. KY.—Reed v. Com., 70 Ky. (7 Bush) 641. ME.—State v. Polland, 53 Me. 124. MASS.—Com. v. Morse, 14 Mass. 217; Com. v. Manley, 29 Mass. (12 Pick.) 173. MISS. — Unger v. State, 42 Miss. 642. MO.—State v. Stowe, 132 Mo. 199, 33 S. W. 799; State v. Wiseback, 139 Mo. 214, 40 S. W. 946. N. C.—State v. Hadcock, 3 N. C. (2 Hayw.) 162, 2 Am. Dec. 623. TEX.—Jorasco v. State, 6 Tex. App. 238; Swink v. State, 32 Tex. Cr. Rep. 530, 24 S. W. 893. VA.—Baker v. Com., 4 Va. (2 Va. Cas.) 122. ENG.—R. v. Robinson, 1 Holt 595, 3 Eng. C. L. 233.

"Whose surname is José, but whose surname is to the grand jury unknown," sufficient where the grand jury exercised due diligence to ascertain the surname, but not otherwise.—Shockley v. State, 38 Tex. Cr. Rep. 458, 42 S. W. 972.

5 Swink v. State, 32 Tex. Cr. Rep. 530, 24 S. W. 893.

6 See, supra, § 876, footnote 3.

Partial compliance with estray laws does not confer on one taking up an estray a special ownership, and the ownership should, in such cases, be alleged as unknown.—Lowe v. State, 11 Tex. App. 253.

7 Thompson v. State, 9 Tex. App.

ership of property charged to have been stolen is unknown, the ownership may be laid in the state, an indictment or information alleging that the accused stole a horse, the property of the state, is not bad by reason of its failure to allege the fact of the unknown ownership of the horse.[8]

§ 878. Possession and custody of property. At common law, and in the absence of a statutory provision so requiring, the possession of property charged to have been stolen at the time of the taking, is not of the essence of the crime, and it need not be alleged that the property was taken from the possession of the owner or of another person;[1] but under statute, in many, if not most, of the jurisdictions, actual or constructive possession in the owner, or in some one for him, is an essential element of the offense of larceny; and possession, as well as ownership, is required to be alleged in some jurisdictions,[2] with specific allegation as to the person from whom possession of the property was taken;[3] although

301; Reed v. State, 32 Tex. Cr. Rep. 139, 22 S. W. 403.

As to necessity of negativing ownership of accused, see, supra, § 859.

8 State v. Eddy, 46 Wash. 494, 90 Pac. 641.

1 Thompson v. Com., 4 Va. (2 Va. Cas.) 135; Angel v. Com., 4 Va. (2 Va. Cas.) 228.

2 **As in Texas:** Alexander v. State, 4 Tex. App. 261; Duren v. State, 15 Tex. App. 624; Bailey v. State, 18 Tex. App. 426; Frazier v. State, 18 Tex. App. 441; Tinney v. State, 24 Tex. App. 112, 5 S. W. 831; Alexander v. State, 24 Tex. App. 126, 5 S. W. 840; Connor v. State, 24 Tex. App. 245, 6 S. W. 138; Williams v. State, 26 Tex. App. 131, 9 S. W. 357.

3 Garcia v. State, 26 Tex. 209, 82 Am. Dec. 605; Gadson v. State, 36 Tex. 350; Garner v. State, 36 Tex. 693; Thomas v. State, 1 Tex. App. 289; Watts v. State, 6 Tex. App. 263; O'Brien v. State, 27 Tex. App. 448, 11 S. W. 459; Thurmond v. State, 30 Tex. App. 539, 17 S. W. 1098.

Possession may be laid in the owner or in a person holding the property for him.—Gadson v. State, 36 Tex. 350.

An indictment charging the property alleged to have been stolen to have been taken from the possession of A and B, A and B being different persons, and the indictment alleging that the property was taken "without the consent of the owner or either of

it has been held that an indictment or information charging theft may allege the ownership in one person and the possession or control thereof in another, and lay the possession from which the property was taken on the larceny in the person having the control, without further alleging that he held the property for the owner.[4] In some jurisdictions it has been said, however, that the fact of possession is a matter of evidence rather than a matter of pleading, and that an indictment or information may be valid without a statement as to the possession.[5] Under these statutes, an allegation that property was taken from the possession of another has been said not to be a sufficient allegation that the property was taken from the possession of such other,[6] although there is authority to the contrary;[7] but an allegation that accused "took the money from the drawer of said deponent's store," is a sufficient allegation that he took the money from deponent's possession;[8] and charg-

them" was held to be sufficient.—Dodd v. State, 10 Tex. App. 370.

—Corporation's property alleged to have been stolen, the indictment must aver that the property was taken from the possession of someone who was holding the same for the corporation, and allege that it was taken without the consent of such person, with the intention to deprive the owner of the value of the property.—Thurmond v. State, 30 Tex. App. 539, 17 S. W. 1098.

Person having actual control for an absent owner, of animals running at large, is properly alleged to be the possessor thereof.—Moore v. State, 8 Tex. App. 496.

Cattle having been removed from the possession of A, a person in charge, and his agency revoked except as to taking care of such estrays as he might find belonging to the herd, an indictment for the theft of an estray, which had never been found by such person and taken charge of by him, can not lay the possession in A.—Massey v. State, 31 Tex. Cr. Rep. 91, 19 S. W. 908.

4 Price v. State, 55 Tex. Cr. Rep. 157, 115 S. W. 586.

5 State v. Gallimore, 29 N. C. (7 Ired. L.) 150; Thompson v. Com., 4 Va. (2 Va. Cas.) 135; Angel v. Com., 4 Va. (2 Va. Cas.) 228; State v. Cass, 12 Wash. 675, 42 Pac. 127.

6 People v. Henselman, 76 Cal. 460, 9 Am. St. Rep. 238, 18 Pac. 425; Hughes v. State, 74 Miss. 368; State v. Ellis, 119 Mo. 437, 24 S. W. 1017.

7 Hugo v. State, 110 Ga. 768, 36 S. E. 60.

8 People v. Smith, 86 Hun (N. Y.) 485, 9 N. Y. Cr. Rep. 525, 33 N. Y. Supp. 989.

ing that the property alleged to have been stolen was taken by the accused by stealth, and without the consent of the owner, sufficiently alleges possession in the owner, and the taking of the property from the owner's possession.[9] Possession may be laid in the owner,[10] a bailee,[11] or in one having the lawful custody and control of the property, although he is not the owner thereof;[12] but the possession of a servant of his master's property is the possession of the master, and must be so alleged.[13]

§ 879. —— INSTANCES OF ALLEGATION OF POSSESSION. In an indictment or information charging the larceny of property of a ward, which at the time of the taking was in the possession of his natural guardian, it is sufficient to allege the possession in the latter.[1] An indictment or information charging accused with having in his custody and control, as state highway commissioner, specific funds of the state, which he unlawfully stole, charges an offense under the Washington statute,[2] although accused was not legally authorized to receive and have in his possession the funds taken.[3] A horse having escaped from its owner onto the field of another, which latter took up the horse and put it in his stable from which it was stolen by a third person, such horse was in the constructive possession of the owner, and the actual possession of the person taking him up, and an indictment or information charging the larceny may lay the possession in either the owner of the horse, or in the person taking him up.[4] Animals feræ naturæ, not being the sub-

9 Bayless v. State, 9 Okla. Cr. 27, 130 Pac. 520.

10 State v. Mullen, 30 Iowa 203.

11 McKinney v. State, 12 Ala. App. 155, 68 So. 518.

12 Cain v. State, 49 Tex. Cr. Rep. 360, 92 S. W. 808.

13 Crook v. State, 39 Tex. Cr. Rep. 252, 45 S. W. 720.

See, supra, § 871.

1 Trafton v. State, 5 Tex. App. 482.

See, also, supra, § 868.

2 Rem. & Bal. Code, § 2601.

3 State v. Snow, 65 Wash. 353, 37 L. R. A. (N. S.) 305, 118 Pac. 209.

4 Owen v. State, 25 Tenn. (6 Humph.) 330.

ject of larceny, as has already been shown,[5] an indictment or information charging the larceny of such animals—e. g., pigeons, and the like—must allege that they were in the care and custody and possession of the person claiming to be the owner, and were tamed and domesticated;[6] but there is an exception as to oysters, which belong to this class of animals, alleged to have been stolen, and the indictment or information need not allege that the oysters had been gathered and were in the actual possession of the person claiming to be the owner.[7] Money alleged to have been stolen,[8] possession thereof is properly laid in the owner, although he did not have the control and custody of it at the time of the larceny charged, because he was in the constructive possession thereof.[9] A railroad ticket alleged to have been stolen,[10] an indictment or information charging that the ticket was in the possession of an agent of the railroad for the purpose of sale, and the like, need not further allege that it was in the physical custody of a servant of such agent.[11]

§ 880. SECRETING, WITHHOLDING, OR APPROPRIATING. Under a statute providing that any person or public officer[1] having the care, custody or possession of money or property belonging to another, or public moneys or property, who, with intent to deprive or defraud the owner thereof, shall secrete, withhold or appropriate the same to his own use, shall be guilty of larceny, an in-

5 See, supra, § 838.

6 Carter v. Com., 2 Ky. L. Rep. 311.

7 State v. Taylor, 27 N. J. L. (3 Dutch.) 117, 72 Am. Dec. 347.

See, supra, § 838, footnotes 5 and 12.

8 As to larceny of money, see, supra, §§ 844-848.

9 Martin v. State, 44 Tex. Cr. Rep. 538.

10 As to larceny of railroad ticket, see, supra, § 851.

11 Kersh v. State, 45 Tex. Cr. Rep. 451, 77 S. W. 790.

See, supra, § 878, footnote 12.

1 As in New York Pen. Code, § 528; Mont. Rev. Codes, § 8642; Rem. & Bal. Wash. Code, § 2601.

As to larceny by public officer, see, supra, § 873.

dictment or information charging a public officer "with intent to appropriate to himself, did unlawfully appropriate, steal, and carry away," moneys in his possession, charges an appropriation of the moneys in his possession, and is a sufficient allegation of larceny thereof;[2] the fact that the accused was not legally authorized to collect, have and receive the funds embezzled will not militate against the validity of the indictment,[3] because it does not lie in the mouth of one who holds the money of another to deny that he had the authority which he claimed in order to collect it, and which the confidence reposed in him by his employer enabled him to claim with success.[4] Charging accused did feloniously steal, withhold and appropriate to his own use designated goods and chattels, the property of another, charges larceny by withholding, under the Montana statute.[5]

§ 881. LARCENY BY TRICK OR DEVICE. On a charge of larceny by means of trick or device, the pleader need not write into the indictment or information the probative facts of the larceny, such as the conspiracy of the accused to cheat and defraud the prosecuting witness while pretending to play at a game of cards;[1] by pretending to purchase property for prosecuting witness at a price in excess of that actually paid;[2] by procuring bill on pre-

2 People v. Lammerts, 164 N. Y. 137, 15 N. Y. Cr. Rep. 158, 58 N. E. 22, affirming 51 App. Div. 618, 64 N. Y. Supp. 1145.

3 State v. Snow, 65 Wash. 353, 37 L. R. A. (N. S.) 305, 118 Pac. 209.

4 Id. See: CAL.—Ex parte Hedley, 31 Cal. 109; People v. Gallagher, 100 Cal. 466, 35 Pac. 80; People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524. IND.—State v. Tumey, 81 Ind. 559. KAN.—State v. Spaulding, 24 Kan. 1. MICH.—People v. Hawkins, 106 Mich. 479, 64 N. W. 736. OHIO—State v. Pohlmeyer, 59 Ohio St. 491, 52 N. E. 1027. NEV.—Ex parte Ricord, 11 Nev. 287. TENN.—State v. O'Brien, 94 Tenn. 79, 26 L. R. A. 252, 28 S. W. 311.

5 State v. Van, 44 Mont. 374, 120 Pac. 479.

1 State v. Reis, 9 Wash. 329, 37 Pac. 452.

2 Com. v. Lannan, 153 Mass. 287, 25 Am. St. Rep. 629, 11 L. R. A. 450, 26 N. E. 458. See Com. v. Dehle, 42 Pa. Super. Ct. 306.

tense of getting it changed;[3] by obtaining money by "bunco game,"[4] and the like. No common-law offense need be charged in that manner, and under statute the offense need not be charged in any other way than as required by the statute.[5]

§ 882. LARCENY BY AGENT, BAILEE, SERVANT, OR TRUSTEE. What is known as statutory larceny, otherwise known as embezzlement, by a person occupying a position of trust and confidence or a fiduciary relation, has already been fully treated.[1] All that remains to add here is the fact that an indictment or information charging larceny on or after a breach of trust by an agent, a bailee, a servant, a trustee, and the like, will be sufficient where so framed as to cover the acts which are forbidden by the particular statute;[2] and where drawn in the language of the statute, or substantially in the language of the statute, will be sufficient in most instances.[3] An indictment or information which, by its terms, charges simple larceny, is never sufficient;[4] the trust relation must be properly set

3 Com. v. Flynn, 167 Mass. 453, 57 Am. St. Rep. 472, 47 N. E. 924.

4 People v. Shaughnessy, 110 Cal. 598, 43 Pac. 2. See People v. Rose, 85 Cal. 378, sub nom. People v. Hood, 24 Pac. 817.

5 State v. Reis, 9 Wash. 329, 37 Pac. 452.

1 See, supra, §§ 583-600.

2 In re Dempsey, 32 Misc. (N. Y.) 178, 15 N. Y. Cr. Rep. 90, 65 N. Y. Supp. 722; Elton v. State, 40 Tex. Cr. Rep. 339, 50 S. W. 379, 51 S. W. 245; Young v. State, 45 Tex. Cr. Rep. 247, 75 S. W. 798.

Indictment charging accused was bailee of a sewing machine belonging to the prosecuting witness, and in violation of the bailment sold the machine and converted the proceeds to his own use, sufficient allegation of the theft.—Collins v. State, 56 Tex. Cr. Rep. 385, 118 S. W. 1038.

A mere custodian of property in the owner's possession, who wrongfully removes and sells them, the custodian is not guilty of larceny.—Komito v. State, 90 Ohio St. 352, 107 N. E. 762.

3 CAL.—People v. Garcia, 25 Cal. 531. GA.—Aiken v. State, 73 Ga. 812; Williams v. State, 82 Ga. 286, 10 S. E. 208; Cody v. State, 100 Ga. 105, 28 S. E. 106. ORE.—State v. Chew Muc You, 20 Ore. 216, 25 Pac. 355. ENG.—R. v. Somerton, 7 Barn. & C. 463, 14 Eng. C. L. 84, 108 Eng. Repr. 796.

See, supra, § 810.

4 Holcombe v. State, 69 Ala. 218; People v. Jersey, 18 Cal. 337.

A tenant in common who fraudulently converts to his own use

out, and the breach alleged.[5] Thus, on a charge of larceny against a bailee, the indictment or information must set out all essential facts necessary to be proved in order to secure a conviction,[6] such as (1) the name of the bailor,[7] (2) the purpose for which the property was entrusted to the accused,[8] (3) the consideration of the bail-

the undivided interest of his cotenant, can not be convicted under an indictment which charges simple larceny.—Holcombe v. State, 69 Ala. 218.

An agent of an insurance company charged with having reinsured the cargo of a vessel in the company after having been notified of its loss, and by false representations obtained from the company a large sum of money in payment of the loss, the indictment or information need not allege the precise peril against which the accused represented the company had insured, it being sufficient to charge that the representation was of a valid insurance, and that the loss which imposed the liability on the company had already occurred.—People v. Dimick, 107 N. Y. 13, 14 N. E. 178, reversing 41 Hun 616, 5 N. Y. Cr. Rep. 185.

Where A, acting as the attorney and agent of B, secures from B a sum of money represented as the purchase price for property A has been commissioned to purchase for B, which sum of money is in excess of the actual price paid, and he retains the difference between the actual price paid and the sum of money received, he is guilty of larceny, and an indictment or information charging these facts is sufficient.—Com. v. Lannan, 153 Mass. 287, 25 Am. St. Rep. 629, 11 L. R. A. 450, 26 N. E. 458.

5 Holcombe v. State, 69 Ala. 218.

6 CAL.—People v. Poggi, 19 Cal. 600. MINN.—State v. Berry, 77 Minn. 128, 79 N. W. 656. TEX.—McCarty v. State, 45 Tex Cr. Rep. 510, 78 S. W. 506. WYO.—Wilbur v. Territory, 3 Wyo. 268, 21 Pac. 698.

7 State v. Holton, 88 Minn. 171, 92 N. W. 541; State v. Schoemperien, 101 Minn. 8, 111 N. W. 577; R. v. Bailey, 7 Cox C. C. 179, 1 Dears. & B. 121.

8 State v. Holton, 88 Minn. 171, 92 N. W. 541; State v. Schoemperien, 101 Minn. 8, 111 N. W. 577.

Charging accused received money from prosecuting witness as bailee for two specific purposes, one of which was to purchase a wedding ring for such prosecuting witness, and instead of applying the money thus received to the purposes for which given, appropriated a part of it, and a wedding ring purchased with the balance thereof, to his own use, is sufficient.—In re Dempsey, 32 Misc. (N. Y.) 178, 15 N. Y. Cr. Rep. 90, 65 N. Y. Supp. 722.

Charging accused was entrusted with a ring of certain value, for the purpose of pawning it, and fraudulently converted the same to his own use, is a sufficient indictment for larceny after a trust under the Georgia statute, requiring three elements to the crime (1) the bailment, (2) the purpose of the bailment, and (3) the fraudulent conversion, to be stated.—

ment, under some of the state statutes,[9] but not under other statutes,[10] (4) the original felonious intent of the accused upon the taking, in some instances,[11] but not in

Birt v. State, 1 Ga. App. 150, 57 S. E. 965.

9 State v. Humphreys, 43 Ore. 44, 70 Pac. 824; Terry v. State, 1 Wash. 277, 24 Pac. 447.

Alleging accused was bailee for hire of witness and "did fail, neglect, and refuse to keep or account for said witness according to the nature of his trust" by stealing, embezzling, and converting the same to his own use, is sufficient. —State v. Humphreys, 43 Ore. 44, 70 Pac. 824.

"Keep or account" instead of keep and account held to be immaterial, as the passage in which it occurred might be treated as surplusage, the indictment being sufficient without that passage.—State v. Humphreys, 43 Ore. 44, 70 Pac. 824.

10 State v. Humphreys, 43 Ore. 44, 70 Pac. 824; Caskey v. State, (Tex.) 50 S. W. 703.

Payment to bailee for his care of the property, or a tender of such payment, need not be alleged in the indictment.—State v. Humphreys, 43 Ore. 44, 70 Pac. 824.

11 People v. Jersey, 18 Cal. 337.

Hiring or borrowing contract: Alleging theft by bailee, charging accused had possession of property taken by virtue of a contract of hiring and borrowing made with a third person, sufficiently alleges a contract made by accused with such third person.—Elton v. State, 40 Tex. Cr. Rep. 339, 50 S. W. 379, 51 S. W. 245.

Charging accused with having possession of two head of cattle, the property of a named person, by virtue of a contract of hiring and borrowing with the owner of such property, and that accused did then and there unlawfully and without the consent of such owner, fraudulently convert the said cattle to his own use and benefit, with the intention to deprive the owner of the value of the same, is sufficient.—Young v. State, 45 Tex. Cr. Rep. 247, 75 S. W. 798.

Accused being charged with larceny by the conversion of the property of another, which he held on a contract of hiring with the owner, made through a person acting as his agent, which charges the conversion was without the consent of such agent, is defective in not directly and positively alleging that the agent was duly authorized in the premises and in not alleging absence of consent of the agent.—McCarty v. State, 45 Tex. Cr. Rep. 510, 78 S. W. 506.

Secretary of a named society charged with having received a specified sum, which he took possession of and held for the use of the said society as said secretary, and that he did fraudulently and feloniously steal, take and carry away and convert to his own use, the said sum of money, whereby he committed a breach of trust, with fraudulent intent, and by force of the statute in such cases made and provided, was guilty of the crime of larceny, contrary to the form of the statute, etc., is a sufficient charge of the crime of

other cases;[12] but it is not necessary to allege the details of the bailment agreement,[13] or of the conversion.[14] An indictment or information charging larceny by a trustee must allege, (1) that the accused was acting as trustee under appointment by will, deed, etc., (2) that the money or property alleged to have been stolen came into his possession and was held by him by virtue of such office or appointment, and (3) that he secreted or withheld such money or property, or appropriated it to his own use, or to the use of one other than the true owner entitled to it; and if the allegation as to either of these three particulars is insufficient, the indictment or information will be bad.[15]

§ 883. LARCENY FROM THE PERSON.[1] An indictment or information charging the statutory crime of larceny from

larceny under a statute which declares a breach of trust, with fraudulent intent, to be larceny.—State v. Butler, 21 S. C. 353, 5 Am. Cr. Rep. 206.

—"Breach of trust" in such a statute does not create a new offense in its nature and essence, but simply removes the technical difficulty in the way of conviction. The larceny which the act denounces is the same in all its features as common-law larceny. It is not simply the nonpayment of a debt, but it is the appropriation of the property of another to the use of the accused, with the intent to make it his own, and to destroy the title of the true owner, under circumstances which would make it larceny at common law, except for the fact that he had obtained possession in the first instance in some legal way. In morals there is no difference between a theft committed upon property over which one has a charge or custody, and property in possession of another. — State v. Butler, 21 S. C. 353, 5 Am. Cr. Rep. 206.

—Estoppel of one who acts as the secretary of a society to deny the existence of such society when prosecuted for a fraudulent breach of his trust.—State v. Butler, 21 S. C. 353, 5 Am. Cr. Rep. 206. But see State v. Hutchinson, 60 Iowa 478, 4 Am. Cr. Rep. 162, 15 N. W. 298.

12 Purcelly v. State, 29 Tex. App. 1, 13 S. W. 993.

13 State v. Berry, 77 Minn. 128, 79 N. W. 656; Com. v. Baturin, 22 Pa. Co. Ct. 161; Elton v. State, 40 Tex. Cr. Rep. 339, 50 S. W. 379, 51 S. W. 245.

14 People v. Poggi, 19 Cal. 600; Caskey v. State, (Tex.) 50 S. W. 703.

15 State v. Farrington, 59 Minn. 147, 28 L. R. A. 395, 60 N. W. 188; State v. Nelson, 79 Minn. 376, 82 N. W. 674.

1 As to robbery, see, infra, chapter on "Robbery."

the person, need not set out all the elements of the common-law offense of larceny, such as that the taking was against the owner's will,[2] or with the intent to steal;[3] but an ordinary indictment or information charging simple larceny will not be bad.[4] The indictment or information must set forth all the elements of the offense as defined by the particular statute,[5] and allege that the taking was from the person of an individual named, or declare him to be unknown;[6] it must identify the particular transaction and give accused reasonable notice of what will be produced against him,[7] and the allegation must be framed in language such that a person of ordinary understanding would be able to know the particular offense charged, under some statutes.[8] The exact language of the statute need not be used in making the charge,[9] and where the statute defining the offense provides no distinctive features, no further particularity is required than in other charges of larceny;[10] but where the statute defines the offense as taking "privately" or "stealthily" and "without the knowledge" of the victim, the private or stealthy taking, and without knowledge of the victim, become necessary elements in the crime, and

2 Chezem v. State, 56 Neb. 496, 76 N. W. 1056.

3 Eaton v. State, (Tex.) 41 S. W. 604.

4 Nichols v. State, 28 Tex. App. 105, 12 S. W. 500. See Gage v. State, 22 Tex. App. 122, 2 S. W. 638.

Discussion in Kerry v. State, 17 Tex. App. 178, 50 Am. Rep. 122, may be consulted with profit in this connection.

5 Woodard v. State, 9 Tex. App. 412; Kerry v. State, 17 Tex. App. 178, 50 Am. Rep. 122; McCollum v. State, 29 Tex. App. 162.

6 State v. Graham, 65 Iowa 617, 22 N. W. 897; Bush v. State, 53 Tex. Cr. Rep. 513, 109 S. W. 184.

7 Williams v. State, 12 Tex. App. 395; Huntsman v. State, 12 Tex. App. 619.

8 State v. Lawrence, 20 Ore. 236, 25 Pac. 638; State v. Faulk, (Tex.) 116 S. W. 72.

9 Mukes v. Com., (Ky.) 21 S. W. 529; Brown v. State, (Tex.) 22 S. W. 24; Chitwood v. State, 44 Tex. Cr. Rep. 439, 71 S. W. 973; Bush v. State, 53 Tex. Cr. Rep. 513, 109 S. W. 184; Schanz v. State, 17 Wis. 251.

10 People v. Long, 44 Mich. 296.

must be alleged;[11] and the same is true of a provision regarding taking from the person "in the night-time."[12]

[11] Hugo v. State, 110 Ga. 768, 36 S. E. 60; Chitwood v. State, 44 Tex. Cr. Rep. 439, 71 S. W. 973.

Charging theft in general, and averring that the theft was committed in the presence of the victim, and without his knowledge, is a sufficient allegation of larceny from the person under Texas statute. — Woodard v. State, 9 Tex. App. 412; Brown v. State, (Tex.) 22 S. W. 24.

Kentucky rule is that alleging taking "from the possession of" a named person as owner is notice that the indictment is found under the statute prescribing punishment for taking from the person. — Mukes v. Com., (Ky.) 21 S. W. 529.

Property taken without knowledge of victim, passes to the accused, though without subsequent resistance, the offense of "privately stealing from the person" is complete.—Green v. State, 28 Tex. App. 493, 13 S. W. 784.

Charging accused unlawfully and fraudulently took from the possession of a person named, without his consent and so suddenly as to not allow time for resistance, was held to sufficiently describe the crime of stealing from the person under such a statute. — Bush v. State, 53 Tex. Cr. Rep. 513, 109 S. W. 184. See Woodard v. State, 9 Tex. App. 412.

Under Texas statute insufficient to allege accused "with force and arms, did unlawfully and fraudulently take, steal and carry away privately from the person of one Luke Brewer two silver dollars, current silver coin of the United States of America, of the value of one dollar each, which said silver coin the grand jury can not more fully describe, then and there the corporeal personal property of said Luke Brewer, from and out of the possession of said owner, without his consent, with intent to deprive said owner of the value of said property and to appropriate it to the use and benefit of him, the said Lou Kerry, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state." —Kerry v. State, 17 Tex. App. 178, 50 Am. Rep. 122.

Wisconsin rule that an indictment or information charging accused "with force and arms, feloniously stole, took, and carried away from the person of" a named individual, certain personal property described, held to be good as clearly showing that the indictment was found under the statute prohibiting and punishing stealing from the person.—Schanz v. State, 17 Wis. 251.

[12] **Robbery instead of larceny** being shown by the evidence, the indictment will still be good, for the reason that robbery is larceny committed with violence from the person of one put in fear, and the prosecution has the right to waive the element of force and fear and prosecute for the lesser offense of larceny.—State v. Keeland, 90 Mo. 337, 2 S. W. 442.

Compare: State v. Lawrence, 20 Ore. 236, 25 Pac. 638.

Under New York statute (2 Rev. Stats., p. 649, § 63, and Laws 1862, ch. 374, § 2) it is not necessary to aver that the property was stolen

Attempted larceny from the person may be charged, as where accused thrusts his hand into the pocket of another, but fails to get anything therefrom, for the reason that there is nothing in the pocket to steal;[13] and where the person from whom accused attempted to steal is unknown to the jurors, the indictment need not show the amount which might have been stolen, and for that reason it is not necessary that the indictment or information should describe the property or allege its value, or even that the person unknown had anything on his person which could have been the subject of larceny.[14] An indictment which charges that a person named had on his person specified personal property, and that the persons accused feloniously attempted to steal it from his person by placing their hands in his pockets and attempting to steal said property, with intent on the part of each of them to deprive him of said property and to appropriate the same to their own use, and that such acts tended to, but failed to, effect the commission of the intended crime, states facts sufficient to constitute an attempt to commit the crime of larceny from the person.[15]

§ 884. LARCENY FROM A DWELLING-HOUSE, STORE, OR OTHER BUILDING. The statutory offense of larceny from a dwelling-house or other building enumerated in the statute prohibiting and punishing as a distinct crime such a larceny, is distinguished from the offense of burglary,[1] and an indictment or information which, in effect, describes the offense of burglary, will not be sufficient to sustain a conviction of stealing from a dwelling-house or other

from the person in the night time.—People v. Fallon, 6 Park. Cr. Rep. (N. Y.) 256; affirmed in Fallon v. People, * 41 N. Y. (2 Keyes) 145, 2 Abb. Ct. App. Dec. 83, 1 Cow. Cr. Rep. 414.

13 See, supra, § 203.

14 Com. v. Cline, 213 Mass. 225, 100 N. E. 358.

15 State v. Miller, 103 Minn. 24, 114 N. W. 188.

1 As to burglary, see, supra, §§ 457-492.

building.[2] The indictment or information must allege all the facts necessary to bring the offense charged clearly within the provisions and prohibitions of the statute,[3] and must allege the ownership of the building accurately,[4] except in those cases in which the building has acquired a specific name by which it is usually known, in which case it may be described by such name;[5] a tenant in possession can not be described as the owner;[6] but

2 Fournier v. State, 69 Miss. 417, 50 So. 502.

An indictment or information charging accused with burglary in entering a building with intent to take, steal, and carry away, certain designated property found therein, charges burglary and not larceny from a building.—Fournier v. State, 69 Miss. 417, 50 So. 502.

3 State v. Savage, 32 Me. 583; Haggett v. Com., 44 Mass. (3 Metc.) 457; Hopkins v. Com., 44 Mass. (3 Metc.) 460; Hutchinson v. Com., 45 Mass. (4 Metc.) 359.

Alleging accused unlawfully and feloniously did enter a certain storehouse, the property of a named person, with the intent to commit a felony, to wit, the larceny of goods and chattels of a designated value, held not to be bad for failure to allege an intent to feloniously take the goods from the house, nor because it did not charge a crime, or because it did not advise accused of the nature of the accusation.—Hunter v. State, 64 Fla. 315, 60 So. 786.

Charging accused, certain goods, in a designated building and in the possession of a named person being found, "did then and there steal" sufficiently charges stealing from a building.—Com. v. Smith, 111 Mass. 429.

Charging accused on a day named, "with force and arms," the storehouse of a named individual "did enter, and having entered, did fraudulently and privately take therefrom and carry away, with intent to steal" designated property, sufficiently charges the offense of larceny from a house.—Glaze v. State, 2 Ga. App. 704, 58 S. E. 1126.

Charging accused with breaking and entering a described building of a named person, and stealing therefrom designated property of a given value, the personal property of a named individual, charging that he "did privately steal" is a sufficient allegation under the Georgia statute defining larceny from a house and providing that the stealing must have been privately done.—Heard v. State, 120 Ga. 848, 48 S. E. 311.

4 Markham v. State, 25 Ga. 52.

Under a statute prohibiting larceny "from a dwelling-house," an indictment charging the offense must allege the ownership of the house, and an indictment or information failing so to do, or otherwise to identify it, is insufficient.—State v. Lawler, 220 Mo. 26, 119 S. W. 639.

5 State v. Minck, 94 Minn. 50, 102 N. W. 207.

6 Trice v. State, 116 Ga. 602, 42 S. E. 1008.

no other facts need be set out.[7] Thus, it is not necessary to allege that accused entered the dwelling-house, or other building, with intent to steal property therefrom, because the crime may be committed although the entry was not felonious;[8] and on a charge that A stole from the house of B property belonging to C, it is not necessary to allege that the property was under the control of or belonged to B.[9] Where accused is charged with larceny from a house where things of value are stored, whether the indictment or information should describe the property stored in such building, quære.[10] Charging accused with larceny in removing goods from a temporary deposit or from a platform for carrying them into a warehouse, with intent to steal, charges larceny from the warehouse.[11] An accusation that accused did privately enter the dwelling-house of a named person and privately and feloniously did steal, take, and carry away designated goods or articles, is a plain and full charge of entering and stealing from the dwelling-house of the person named.[12] "From" a dwelling-house and "in" a dwelling-house do not have the same import,[13] but they may be used interchangeably.[14] Under a statute prohibiting and punishing larceny by stealing "in any building on fire," an indictment or information charging accused with larceny "from a building then on fire," held to sufficiently charge the offense prohibited by statute.[15]

7 ALA.—Bolling v. State, 98 Ala. 80, 12 So. 782. GA.—Smith v. State, 60 Ga. 430; Moseley v. State, 74 Ga. 404; Kimbrough v. State, 101 Ga. 583, 29 S. E. 39; Heard v. State, 120 Ga. 848, 48 S. E. 311. N. C.—State v. Harris, 119 N. C. 811, 26 S. E. 148. TEX.—Irvin v. State, 37 Tex. 412.

8 Berry v. State, 10 Ga. 511.

9 Hill v. State, 41 Tex. 157.

10 Hillsman v. State, 68 Ga. 836.

11 Wilson v. State, 9 Ga. App. 297, 70 S. E. 1125.

12 State v. Givens, 87 S. C. 525, 70 S. E. 162.

13 Moore v. State, 40 Ala. 49.

14 Bailey v. State, 99 Ala. 143, 13 So. 566; People v. Klammer, 137 Mich. 399, 100 N. W. 600; United States v. Gassaway, 1 Hayw. & H. 174, Fed. Cas. 15190.

15 People v. Klammer, 137 Mich. 399, 100 N. W. 600.

Description of building from which accused is charged with having stolen property need not be in the language of the statute, where the ordinary and well-understood meaning of the words employed designates clearly the class of building, or the particular building, sought to be described. Thus, where the statute designates a "dwelling-house," the indictment or information may charge the building as a "dwelling,"[16] or as a "residence,"[17] of a named person; a "shop" may be designated as a "store," and vice versa,[18] except in those cases where the statute, by enumeration, draws a distinction between a shop and a store, and the like, in which case the statutory word must be used.[19]

§ 885. BRINGING STOLEN PROPERTY INTO STATE OR JURISDICTION. We have seen elsewhere that where a person steals property in another county or state and animo furandi brings it into the state or jurisdiction, he is, in the eyes of the law, guilty of larceny in every county into or through which the stolen property is thus carried.[1] This applies as well to property made subject of larceny by statute as to property which was a subject of larceny at common law.[2] In some jurisdictions it is held that on a charge of the larceny of property in another jurisdiction, a common law indictment will not be sufficient,[3] for the reason that the offense is one created by statute,

16 State v. O'Neil, 21 Ore. 170, 27 Pac. 1038.

17 People v. Klammer, 137 Mich. 399, 100 N. W. 600.

18 Com. v. Riggs, 80 Mass. (14 Gray) 376, 77 Am. Dec. 333.

Compare: Sparrenberger v. State, 53 Ala. 481, in which the court say: "There are few, if any, who would understand that a man had a store, and was engaged in buying and selling goods or merchandise, if we said he had a shop. We never speak of the place in which the mechanic exercises his trade as a store, nor do we speak of the place in which goods are bought and sold as a shop."

19 State v. Canney, 19 N. H. 135; State v. Hanlon, 32 Ore. 95, 48 Pac. 353.

1 See 2 Kerr's Whart. Crim. Law, § 1166.

2 Com. v. Rand, 48 Mass. (7 Metc.) 475, 41 Am. Dec. 455.

3 Ham v. State. 17 Ala. 188; La Vaul v. State, 40 Ala. 44.

and that the indictment or information charging the offense must be framed under the statute and not according to the common law.[4] In many jurisdictions, it is held that the offense may be laid as having been committed within the jurisdiction of the court in which the indictment is found or the information presented,[5] without stating facts showing the commission of the larceny in any other state or county;[6] other cases hold that the indictment or information must show that the accused was connected with the original theft, and himself brought the property within the jurisdiction, that his mere receipt of the stolen goods within the jurisdiction will not amount to the crime sought to be charged;[7] and that on charging accused with having the possession of stolen property in another state or county, it must be alleged that such possession was felonious.[8] The general doctrine, and the better practice, is thought to be that the indictment or information must charge the offense in the same form as though the original larceny had been com-

4 La Vaul v. State, 40 Ala. 44.

5 CAL.—People v. Mellon, 40 Cal. 648. IOWA—State v. Lillard, 59 Iowa 479, 13 N. W. 637. KAN.—State v. Wade, 55 Kan. 693, 41 Pac. 951. MO.—State v. Ware, 62 Mo. 597; State v. Smith, 66 Mo. 62; State v. Jackson, 86 Mo. 18. NEB.—Hurlburt v. State, 52 Neb. 428, 72 N. W. 471. NEV.—State v. Brown, 8 Nev. 208. N. Y.—Haskins v. People, 16 N. Y. 344. TEX. — Connell v. State, 2 Tex. App. 422; Cameron v. State, 9 Tex. App. 332; Hoffman v. State, 42 S. W. 309.

6 People v. Mellon, 40 Cal. 648; State v. Mintz, 189 Mo. 268, 88 S. W. 12; Beard v. State, 45 Tex. Cr. Rep. 522, 78 S. W. 348.

Charging that accused stole property in the county of Allen and brought it to the county of Wells, though informal, is sufficient.—Hurt v. State, 26 Ind. 106; Jones v. State, 53 Ind. 235.

Charging accused with larceny of property in Clark county, May 15, 1878, and with having brought the stolen goods into Floyd county, May 16, 1876, is insufficient on motion in arrest.—Hutchinson v. State, 62 Ind. 556.

Sufficiency of indictment or information, in ordinary form, charging a larceny committed in the state, quære.—Morrissey v. State, 11 Mich. 327.

7 Sullivan v. State, 109 Ark. 407, 160 S. W. 239.

8 State v. Seay, 3 Stew. (Ala.) 123, 20 Am. Dec. 66.

mitted within the jurisdiction of the court,[9] must charge the offense to have been committed within such jurisdiction,[10] and that a failure to so charge will be fatal.[11] The indictment or information should also further charge that the taking and carrying away of the property in the other state or jurisdiction was criminal, and that it was theft in that jurisdiction,[12] because this is an issuable fact,[13] although a different doctrine prevails in some jurisdictions, it being held in Massachusetts, and perhaps elsewhere, that the law will so far take notice of what constitutes larceny in another state of the Union, that if goods are stolen in another state and are brought by the thief into that state, it is a continuing larceny there, and the thief may be convicted and punished in that state.[14] In some of the states, where property is taken in one county and carried by the thief into another county, the taking may be charged to have occurred in either county.[15] Where a person in one state changes the brand on cattle, with the intention to steal them, or to convert them to his own use, and then brings them into another state, such

9 State v. Ham, 17 Ala. 188.

10 Johnson v. State, 47 Miss. 671.

11 State v. Brown, 8 Nev. 208; Knight v. State, 54 Ohio St. 365, 43 N. E. 995.

12 State v. Adams, 14 Ala. 486; Alsey v. State, 39 Ala. 664; Norris v. State, 33 Miss. 373; State v. Morales, 21 Tex. 298; Carmisales v. State, 11 Tex. App. 474; Cummins v. State, 12 Tex. App. 121.

Charging accused with larceny in a particular county and making no mention of an offense in another state or county, and the bringing of the stolen property into the state, is bad.—Norris v. State, 33 Miss. 373.

"Did feloniously take, steal and lead away two mares, the property of" a named person, "in the state of Mississippi, and brought the same into the county of" naming the jurisdiction, was held to be fatally defective in that it failed to show with sufficient certainty that the larceny was committed in the foreign state alleged. — Alsey v. State, 39 Ala. 664.

13 Carmisales v. State, 11 Tex. App. 474; Cummins v. State, 12 Tex. App. 121.

14 Com. v. Cullins, 1 Mass. 116; Com. v. Andrews, 2 Mass. 14, 3 Am. Dec. 17; Com. v. Rand, 48 Mass. (7 Metc.) 475, 41 Am. Dec. 455.

15 See Johnson v. State, 47 Miss. 671; Cox v. State, 43 Tex. 101.

latter act may be described in an indictment or information as simple larceny within the latter state.[16]

§ 886. JOINDER—OF PARTIES DEFENDANT. An indictment or information charging larceny may join as defendants all the persons engaged in the taking[1] and asportation[2] of the property alleged to have been stolen. There may also be joined as defendants, in different counts, in the same indictment the principal in the larceny and any accessories before the fact,[3] and also the thief and the receiver of the stolen property,[4] although the latter joinder is denied by some cases.[5]

§ 887. —— OF OFFENSES. The general rule permitting the joinder in one indictment or information of different counts charging the same transaction in such a manner as to meet the different characteristics of the proof as it may develop on the trial, applies in the case of a charge of larceny in any of its various phases; for in a great many cases it is impossible to determine, in advance of the

16 State v. White, 76 Kan. 654, 92 Pac. 829.

1 **As to the taking,** see, supra, § 813.

2 **As to the asportation,** see, supra, § 814.

3 **As to joinder** generally, see, supra, §§ 351-359.

Accessories before the fact must be indicted as principals in some states.—Fixmer v. State, 153 Ill. 123, 38 N. E. 667.

Principals and accessories before the fact were joined as defendants in the same indictment; the principals plead guilty; the accessories were not arrested. On motion in arrest of judgment, in overruling the motion the court, among other things, said: "We see no objection to the indictment itself which can avail the defendants, especially after a plea of guilty. The count against them as principals is sufficient in all respects; and, without intending to intimate that Wilson and Clapp may not be held upon the same indictment, we are clearly of the opinion that the judgment may now be entered upon the pleas of the defendants." —State v. Garver, 49 Me. 588, 77 Am. Dec. 275.

4 Gandolpho v. State, 33 Ind. 439; Goodman v. State, 141 Ind. 35, 39 N. E. 939; Com. v. Adams, 73 Mass. (7 Gray) 43; R. v. Wheeler, 7 Car. & P. 170, 32 Eng. C. L. 483; R. v. Hartall, 7 Car. & P. 475, 32 Eng. C. L. 589.

5 People v. Hawkins, 34 Cal. 181; Ex parte Goldman, 7 Cal. Unrep. 254, 88 Pac. 819.

actual trial, whether the evidence will make out a case of larceny, or one of embezzlement, or one or other of the allied crimes; and where the distinction between these various allied or cognate crimes is strictly maintained, by thus pleading the different phases of the offense, in separate counts, all questions arising out of the evidence as it transpires on the trial, where it develops an offense different from any specific offense charged in a single count, are avoided.[1] Under this rule it has been held that a count for simple larceny may be joined with a count for larceny by fraudulent conversion of chattels which came into the possession of the accused as an agent of the owner;[2] larceny and breaking with intent to commit larceny;[3] larceny and burglary,[4] although there is authority to the contrary,[5] and breaking and entering,[6] or burglary and receiving stolen goods,[7] although a count for larceny and a count for burglary can not be joined in North Dakota[8] and perhaps elsewhere; larceny and embezzlement, where the punishment for each is the same in quality, though differing in degree of severity, they being

1 CAL. — People v. Bogart, 36 Cal. 245. GA. — State v. Hogan, R. M. Charlt. 474. ILL.—Langford v. People, 134 Ill. 444, 25 N. E. 1009. IND.—Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494; Cooper v. State, 79 Ind. 206. IOWA—State v. Elsham, 70 Iowa 531, 31 N. W. 66. OKLA.—Martin v. Territory, 4 Okla. 105, 43 Pac. 1067. TEX.—Shuman v. State, 34 Tex. Cr. Rep. 69, 20 S. W. 160; Vaden v. State, 25 S. W. 777; Greenwood v. State, 44 S. W. 177.

2 State v. Leichman, 41 Wis. 565, 2 Am. Cr. Rep. 117.

3 State v. Hayden, 45 Iowa 11.

4 Dodd v. State, 33 Ark. 517.

5 State v. Robertson, 48 La. Ann. 1024, 20 So. 166; Territory v. Fox, 3 Mont. 440; Territory v. Willard, 8 Mont. 328, 21 Pac. 301.

6 ARK.—Dodd v. State, 33 Ark. 517. IND.—McCullough v. State, 132 Ind. 427, 31 N. E. 1116. ME.—State v. Hood, 51 Me. 363. N. Y.—People v. Rose, 15 N. Y. Supp. 815.

7 ARK.—Dodd v. State, 33 Ark. 517. GA.—Gilbert v. State, 65 Ga. 449. IND.—Short v. State, 63 Ind. 376. LA.—State v. Malloy, 30 La. Ann. (pt. I) 60; State v. Depass, 31 La. Ann. 487. MASS.—Josslyn v. Com., 47 Mass. (6 Metc.) 236; Com. v. Darling, 129 Mass. 112. S. C.—State v. Strickland, 10 S. C. 191. VA.—Speers v. Com., 58 Va. (17 Gratt.) 570. FED.—Ex parte Peters, 2 McCr. 403, 17 Fed. 461.

8 State v. Smith, 2 N. D. 515, 52 N. W. 320.

cognate offenses belonging to the same family of crimes,[9] although in California[10] and in Wyoming[11] the two crimes can not be joined because they are distinct offenses; larceny and obtaining goods under false pretenses,[12] both these counts being good as a charge of simple larceny under the Virginia[13] and the West Virginia[14] statutes; larceny and receiving stolen goods in different counts,[15]

9 ALA.—Mayo v. State, 30 Ala. 32. IND.—Griffith v. State, 36 Ind. 406. MO.—State v. Porter, 26 Mo. 201. N. Y. — Coats v. People, 4 Park. Cr. Rep. 662; reversed on another point, 22 N. Y. 245. N. C.—State v. Lanier, 89 N. C. 517. ENG.—R. v. Murray, 5 Car. & P. 145, 24 Eng. C. L. 496; R. v. Johnson, 3 Maule & S. 539, 105 Eng. Repr. 712.

Conviction for either offense could not be had at common law, because it is essential that the fiduciary relation provided by statute in embezzlement must be alleged. — Fulton v. State, 13 Ark. 168; Com. v. Simpson, 50 Mass. (9 Metc.) 138; People v. Allen, 5 Den. (N. Y.) 76; R. v. Moah, 1 Dears. C. C. 626, 36 Eng. L. & Eq. 592; R. v. Gorbutt, 1 Dears. & B. 166.

Under statute in England, and in some of the states of the Union, the rule is otherwise: LA.—State v. Roennals, 14 La. Ann. 278; State v. Poland, 33 La. Ann. 1161. MINN.—State v. New, 22 Minn. 76; State v. Butler, 26 Minn. 90, 1 N. W. 821. ORE.—State v. Sweet, 2 Ore. 127. TEX.—Reily v. State, 32 Tex. 763; Griffin v. State, 4 Tex. App. 390; Simco v. State, 8 Tex. App. 406; Whitworth v. State, 11 Tex. App. 414. ENG.—R. v. Cooper, L. R. 2 C. C. 123.

10 People v. De Coursey, 61 Cal. 134; People v. Clement, 4 Cal. Unrep. 493, 35 Pac. 1022.

11 McCann v. United States, 2 Wyo. 267.

12 GA.—State v. Hogan, R. M. Charlt. 474. IND.—Keefer v. State, 4 Ind. 246. MO.—State v. Daubert, 42 Mo. 242. N. C.—State v. Morrison, 85 N. C. 561. R. I.—State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96. TENN. — Hampton v. State, 27 Tenn. (8 Humph.) 69, 47 Am. Dec. 599. VA.—Dowdy v. Com., 50 Va. (9 Gratt.) 727, 60 Am. Dec. 314. W. VA.—State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

13 Dull v. Com., 66 Va. (25 Gratt.) 965; Fay v. Com., 69 Va. (28 Gratt.) 912.

14 State v. Reece, 27 W. Va. 375; State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

15 ALA. — Broughton v. State, 105 Ala. 103, 16 So. 912; Orr v. State, 107 Ala. 35, 18 So. 142. GA.—Johnson v. State, 61 Ga. 612. IND.—Keefer v. State, 4 Ind. 246; Gandolpho v. State, 33 Ind. 349; Goodman v. State, 141 Ind. 35, 39 N. E. 939. KAN.—State v. Blakesley, 43 Kan. 250, 23 Pac. 570. KY.—Sanderson v. Com., 11 Ky. L. Rep. 341, 12 S. W. 136. LA.—State v. Banton, 4 La. Ann. 31; State v. Crosby, 4 La. Ann. 434; State v. McLane, 4 La. Ann. 435; State v. Moultrie, 33 La. Ann. 1146. ME.—State v. Stimpson, 45 Me. 608.

notwithstanding they are different offenses under statute and punished by different degrees of severity,[16] although it is otherwise in California, where it is said such an indictment is bad because it charges two distinct offenses, the offense of receiving stolen goods being a different offense from either larceny of the goods or being accessory after the fact;[17] larceny and robbery;[18] larceny as bailee and larceny from the person;[19] larceny from a dwelling-house in the day-time with larceny from the same in the night-time;[20] larceny from the person and obtaining money under false pretenses,[21] and the like. Distinct larcenies of goods, belonging to different owners, all taken at the same time, or at different times, may be joined in different counts;[22] that is to say, ownership in different per-

MASS.—Com. v. Adams, 73 Mass. (7 Gray) 43; Com. v. O'Connell, 94 Mass. (12 Allen) 451. MICH.—Brown v. People, 39 Mich. 37. MO.—State v. Daubert, 42 Mo. 242. N. Y.—People v. Bruno, 6 Park. Cr. Rep. 657; People v. Infield, 1 N. Y. Cr. Rep. 146. N. C.—State v. Speight, 69 N. C. 72; State v. Lawrence, 81 N. C. 522; State v. Jones, 82 N. C. 685; State v. Carter, 113 N. C. 640, 18 S. E. 517. OHIO—Whiting v. State, 48 Ohio St. 220, 27 N. E. 96. S. C.—State v. Posey, 7 Rich. L. 484. TENN.—Cassels v. State, 12 Tenn. (4 Yerg.) 149; Hampton v. State, 27 Tenn. (8 Humph.) 69, 47 Am. Dec. 599; Ayrs v. State, 45 Tenn. (5 Coldw.) 26; Cook v. State, 84 Tenn. (16 Lea) 461. VA.—Dowdy v. Com., 50 Va. (9 Gratt.) 727, 60 Am. Dec. 314. FED.—United States v. Prior, 5 Cr. C. C. 37, Fed. Cas. No. 16092. ENG.—R. v. Wheeler, 7 Car. & P. 170, 32 Eng. C. L. 483; R. v. Austin, 7 Car. & P. 796, 32 Eng. C. L. 740; R. v. Galloway, 1 Moo. C. C. 234.

Charged in the same count the indictment or information will be bad. — State v. Moultrie, 33 La. Ann. 1146; Trimble v. State, 18 Tex. App. 632; Gaither v. State, 21 Tex. App. 527, 1 S. W. 456.

Compare: State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

16 State v. Rountree, 80 S. C. 387, 22 L. R. A. (N. S.) 833, 61 S. E. 1072; Hampton v. State, 27 Tenn. (8 Humph.) 69, 47 Am. Dec. 599.

17 People v. Hawkins, 34 Cal. 181; Ex parte Goldman, 7 Cal. Unrep. 254, 88 Pac. 819.

18 Damewood v. State, 2 Miss. (1 How.) 262; Com. v. Shutte, 130 Pa. St. 272, 17 Am. St. Rep. 773; sub nom. Appeal of Shutte, 18 Atl. 635.

19 Greenwood v. State, (Tex.) 44 S. W. 177.

20 State v. Elsham, 70 Iowa 531, 31 N. W. 66.

21 Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383.

22 IND.—Bell v. State, 42 Ind. 335. ME.—State v. Nelson, 29 Me. 329. OHIO—Barton v. State, 18

sons may be laid in separate counts,[23] or ownership may be laid in a designated person in one count and in an unknown owner in another count.[24] And where two or more offenses have been committed by the accused at the same time and as a part of the same transaction, they may be included in the same indictment, in separate counts, where they are of the same general nature and belong to the same family of crimes, requiring the same mode of trial and punished in the same general manner, although some of the offenses charged may be punished more severely than the others.[25]

§ 888. —— DUPLICITY. In those cases in which various articles of property, belonging to different owners are stolen at the same time and place, and as a part of the same transaction, the indictment or information may charge the crime in a single count,[1] alleging the diversity

Ohio 221. TENN.—Cash v. State, 29 Tenn. (10 Humph.) 111. ENG.—R. v. Heywood, 9 Cox C. C. 479, 1 Leigh & C. 451.

23 ALA. — State v. Wisdom, 8 Port. 512; Maynard v. State, 46 Ala. 85. ARK.—State v. Jourdan, 32 Ark. 203. CAL.—People v. Connor, 17 Cal. 354. FLA.—Kennedy v. State, 31 Fla. 428, 12 So. 858. ILL.—Langford v. People, 134 Ill. 444, 25 N. E. 1009. IND.—Cooper v. State, 79 Ind. 206. MD.—State v. McNally, 55 Md. 559. MASS.—Bushman v. Com., 138 Mass. 507. TEX.—Irving v. State, 8 Tex. App. 46; Pisano v. State, 34 Tex. Cr. Rep. 63, 29 S. W. 42; Shuman v. State, 34 Tex. Cr. Rep. 69, 29 S. W. 160; McLaughlin v. State, 34 S. W. 280.

24 Irving v. State, 8 Tex. App. 46; McLaughlin v. State, (Tex.) 34 S. W. 280; R. v. Robinson, 1 Holt 595, 3 Eng. C. L. 233.

25 Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; State v. Parker, 262 Mo. 169, L. R. A. 1915C, 121, 170 S. W. 1121; Hampton v. State, 27 Tenn. (8 Humph.) 69, 47 Am. Dec. 599.

1 ALA.—Clemm v. State, 154 Ala. 12, 129 Am. St. Rep. 17, 45 So. 212. D. C.—Hoiles v. United States, 3 Mac A. (D. C.) 370, 36 Am. Rep. 106. GA.—Lowe v. State, 57 Ga. 171, 2 Am. Cr. Rep. 344. IOWA—State v. Sampson, 157 Iowa 257, 42 L. R. A. (N. S.) 967, 138 N. W. 473. MISS.—Dalton v. State, 91 Miss. 162, 124 Am. St. Rep. 637, 44 So. 802. MO.—State v. Maggard, 160 Mo. 469, 83 Am. St. Rep. 484, 61 S. W. 184. NEV.—State v. Douglas, 26 Nev. 196, 99 Am. St. Rep. 688, 65 Pac. 802. OHIO—State v. Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253. TEX.—Peck v. State, 54 Tex. Cr. Rep. 81, 16 Ann. Cas. 583, 111 S. W. 1019.

of ownership,[2] although this last is not required by some decisions;[3] the reason for this rule is the fact that the single act of taking constitutes but one offense,[4] although there are cases to the contrary.[5] But where the indictment or information charges, in one count, the larceny of articles described as belonging to different owners, it must allege that they were all taken at the same time and place, and as a part of the same transaction, to avoid being duplic-

2 State v. Douglas, 26 Nev. 196, 99 **Am. St. Rep.** 688, 65 Pac. 802.

Stealing two hogs at the same time and place, alleging that one is the property of one person and the other the property of another person, covers but one transaction and charges but one offense.—Lowe v. State, 57 Ga. 171, 2 **Am. Cr. Rep.** 344.

Taking of two bales of cotton at the same time and place and as a part of the same transaction, belonging to two different owners.—Peck v. State, 54 Tex. Cr. Rep. 81, 16 **Ann. Cas.** 583, 111 S. W. 1019.

3 State v. Douglas, 26 Nev. 196, 99 **Am. St. Rep.** 688, 65 Pac. 802.

4 CAL.—People v. De La Guerra, 31 Cal. 416. D. C.—Hoiles v. United States, 3 MacA. 370, 36 **Am. Rep.** 106. GA.—Lowe v. State, 57 Ga. 171, 2 **Am. Cr. Rep.** 344. IDA.—State v. Steers, 12 Ida. 180, 85 Pac. 187. ILL.—Schintz v. People, 178 Ill. 320, 52 N. E. 903. IND.—Bell v. State, 42 Ind. 335; Joslyn v. State, 128 Ind. 160, 25 **Am. St. Rep.** 425, 27 N. E. 492; Furnace v. State, 153 Ind. 93, 54 N. E. 441. IOWA—State v. Larson, 85 Iowa 659, 52 N. W. 539; State v. Sampson, 157 Iowa 257, 42 **L. R. A.** (N. S.) 967, 138 N. W. 473. KY.—Nichols v. Com., 78 Ky. 180. ME.—State v. Nelson, 29 Me. 329. MD.—State v. Warren, 77 Md. 121, 39 **Am. St. Rep.** 401, 26 Atl. 500. MICH.—People v. Johnson, 81 Mich. 573, 45 N. W. 1119. MISS.—Dalton v. State, 91 Miss. 162, 124 **Am. St. Rep.** 637, 44 So. 802. MO.—Lorton v. State, 7 Mo. 55, 37 **Am. Dec.** 179; State v. Morphin, 37 Mo. 373. MONT.—State v. Mjelde, 29 Mont. 490, 75 Pac. 87. N. H.—State v. Merrill, 44 N. H. 624. OHIO—State v. Hennessey, 23 Ohio St. 339, 13 **Am. Rep.** 253; State v. Smith, 10 Ohio Dec. Repr. 682, 23 Cinc. L. Bul. 85. ORE.—State v. Clark, 46 Ore. 140, 80 Pac. 101. PA.—Fulmer v. Com., 97 Pa. St. 503; Com. v. Ault, 10 Pa. Super. Ct. 651. S. C.—State v. Thurston, 2 McM. L. 382. TEX.—Long v. State, 43 Tex. 467; Wilson v. State, 45 Tex. 76, 23 **Am. Rep.** 602; Addison v. State, 3 Tex. App. 41; Hudson v. State, 9 Tex. App. 151, 35 **Am. Rep.** 732; Clark v. State, 28 Tex. App. 189, 19 **Am. St. Rep.** 817, 12 S. W. 729. VT.—State v. Newton, 42 Vt. 537. VA.—Alexander v. Com., 90 Va. 809, 20 S. E. 782. WASH.—Territory v. Heywood, 2 Wash. Ter. 180, 2 Pac. 189; State v. Bliss, 27 Wash. 463, 68 Pac. 87; State v. Butts, 42 Wash. 455, 85 Pac. 33.

5 State v. Nelson, 8 N. H. 163; Kilrow v. Com., 89 Pa. St. 480.

itous,[6] although there is authority to the contrary;[7] the reason for this rule being because it can not be assumed that where articles are stolen from different persons they were all stolen at the same time, and for that reason an allegation to that effect is required in the indictment or information, where it is the fact.[8] Thus, it has been said that a count charging that accused, at the same time and place, "nineteen head of calves, of the goods, chattels and property of owners to the grand jury unknown, then and there being found, did then and there unlawfully, knowingly and feloniously steal, take, lead, and drive away," is not bad for duplicity, because the face of the instrument discloses the fact that the larceny occurred at the same time and place, and constitutes but a single transaction;[9] and an indictment or information under a statute which punishes whoever, "with intent to commit larceny, . . . confines, maims, injures, . . . puts in fear any person for the purpose of stealing from a building," is not bad for duplicity because the allegations therein as to the acts done constitute all the elements of an assault and battery.[10] But in those cases where there are several larcenous takings in the same transaction,—e. g., as the taking of the goods of one person at one place,

6 ALA.—Clemm v. State, 154 Ala. 12, 129 Am. St. Rep. 17, 45 So. 212. D. C.—Holles v. United States, 3 Mac A. 370, 36 Am. Rep. 106. IND.—Joslyn v. State, 128 Ind. 160, 25 Am. St. Rep. 425, 27 N. E. 492; Furnace v. State, 153 Ind. 93, 54 N. E. 441. MD.—State v. Warren, 77 Md. 121, 39 Am. St. Rep. 401, 26 Atl. 500. MONT.—State v. Mjelde, 29 Mont. 490, 75 Pac. 87. ORE.—State v. Clark, 46 Ore. 140, 80 Pac. 101. S. C.—State v. Ryan, 2 McC. L. 16, 17 Am. Dec. 402. TEX.—Addison v. State, 3 Tex. App. 41; Peck v. State, 54 Tex. Cr. Rep. 81, 16 Ann. Cas. 583, 111 S. W. 1019. VT.—State v. Newton, 42 Vt. 537. WASH.—State v. Bliss, 27 Wash. 463, 68 Pac. 87; State v. Butts, 42 Wash. 455, 85 Pac. 33.

7 State v. Douglas, 26 Nev. 196, 99 Am. St. Rep. 688, 65 Pac. 802.

8 Joslyn v. State, 128 Ind. 160, 25 Am. St. Rep. 425, 27 N. E. 492.

9 State v. Klasner, 19 N. M. 474, Ann. Cas. 1917D, 824, 145 Pac. 679. See: Furnace v. State, 153 Ind. 93, 54 N. E. 441; State v. Laws, 61 Wash. 533, 112 Pac. 488.

10 Com. v. Holmes, 165 Mass. 457, 43 N. E. 189.

and later taking the goods of another person at another place,—such separate crimes can not be charged in the same count.[11]

§ 889. —— Election. Where two or more offenses are charged, in separate counts, in the same indictment, in certain cases, the court, in its discretion,[1] and for the protection of the accused from hardship or embarrassment in making his defense, may require the prosecutor to elect upon which count he will proceed to trial,[2] and will listen to a request to compel the prosecutor to so elect when they can see that the charges are actually distinct, and may confound the prisoner or distract the attention of the jury;[3] but the court will not usually require an election where the counts are properly joined, as pointed out as being permissible in the two preceding sections.[4] Thus, where the indictment joins a charge of larceny with a charge of embezzlement, in separate counts, the court will not require the prosecutor to elect upon which

11 State v. Sampson, 157 Iowa 257, 42 L. R. A. (N. S.) 967, 138 N. W. 473; State v. Emery, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432.

Separate larcenies committed in pursuance of a formulated design to steal, can not be joined in one count, although occurring in rapid succession in the same adventure, but not as a part of the same transaction.—State v. Maggard, 160 Mo. 469, 83 Am. St. Rep. 484, 61 S. W. 184.

1 It is a matter within the discretion of the trial court whether the prosecution shall be required to elect upon which of several counts in the information it will proceed, and the determination of that court will not be reversed, except for an abuse of discretion.—State v. Leichman, 41 Wis. 565, 2 Am. Cr. Rep. 117.

2 COLO.—Roberts v. People, 11 Colo. 213, 17 Pac. 637. IND.—Lamphier v. State, 70 Ind. 320; McCullough v. State, 132 Ind. 427, 31 N. E. 1116. ME.—State v. Nelson, 29 Me. 329; State v. Hood, 51 Me. 363. MASS.—Com. v. Sullivan, 104 Mass. 552. MO.—State v. Daubert, 42 Mo. 242. R. I.—State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96.

3 State v. Gummer, 22 Wis. 441; Miller v. State, 25 Wis. 384.

4 ALA.—Orr v. State, 107 Ala. 35, 18 So. 142. MO.—State v. Daubert, 42 Mo. 242. NEB.—Hurlburt v. State, 52 Neb. 428, 72 N. W. 471. OHIO—Whiting v. State, 48 Ohio St. 220, 27 N. E. 96. TEX.—Womack v. State, 25 S. W. 772.

count he will stand;[5] and where burglary, larceny, and receiving stolen goods are charged separately, in separate counts, they will be considered to refer to the same transaction, and an election will not be required, simply because the indictment or information fails to allege that the goods referred to in each count are the same.[6] An indictment consisting of two counts, each of which is sufficient as an indictment for simple larceny, the accused can not require the prosecution to elect to try him upon one count only, except in those cases where it appears that the two counts charged separate and distinct offenses.[7] But it has been said that under a statute declaring acts of embezzlement to constitute larceny, the prosecution can not charge larceny in one count, and embezzlement in another, without electing upon which count it will proceed to trial, for the reason that the two offenses are separate and distinct offenses, and that the legislature can not, by giving a particular offense the same name as another offense, make the two but one offense by changing the nature of the other.[8]

[5] State v. Finnegean, 127 Iowa 286, 4 Ann. Cas. 628, 103 N. W. 155.

[6] People v. Rose, 15 N. Y. Supp. 815.

[7] State v. Halida, 28 W. Va. 499, 6 Am. Cr. Rep. 407.

[8] State v. Finnegean, 127 Iowa 286, 4 Ann. Cas. 628, 103 N. W. 155.

CHAPTER LV.

INDICTMENT—SPECIFIC CRIMES.

Lewdness.

§ 890. In general—At common law.
§ 891. —— Under statute in this country.
§ 892. Form and sufficiency of indictment—In general.
§ 893. —— Allegation of intent.
§ 894. —— Allegation as to time and place.
§ 895. —— Allegation as to public character of act.
§ 896. Particular averments—Sex and race.
§ 897. —— As to cohabitation.
§ 898. —— As to marriage.
§ 899. —— Prostitution.
§ 900. —— Frequenting or living in house of ill-fame.
§ 901. —— Lewd or lascivious conduct with child.
§ 902. Joinder of parties.
§ 903. Duplicity.

§ 890. IN GENERAL—AT COMMON LAW. At common law the crime of lewdness included various offenses which, under our statutes, now fall under different heads and are treated elsewhere in this work,—e. g., adultery;[1] fornication;[2] indecent exposure of person;[3] the use of obscene and indecent language;[4] the publishing, keeping for exhibition, or selling of obscene books, pictures, or prints;[5] exhibiting indecent or obscene shows;[6] night-walking or street-walking;[7] keeping house of ill-fame;[8] frequenting house of ill-fame;[9] being a common prosti-

1 As to adultery, see, supra, §§ 399-407.

2 As to fornication, see, supra, §§ 698-707.

3 As to obscenity and obscene literature, and the forms of indictment or information, see Forms Nos. 1718-1755.

4 See, supra, § 505.

5 See reference in footnote 3, this section.

6 See Id.

7 See, supra, § 588.

8 As to disorderly houses, see, supra, §§ 562-569.

9 Id.; post, tit. "Prostitution."

tute,[10] and the like. The term "lewdness," at common law, means open and public indecency, and in order to be indictable the various classes of acts above enumerated were required to be so openly and publicly and notoriously done as to have a tendency to corrupt public morals, and for that reason to constitute a common nuisance;[11] if the act was privately done, or in the presence of one person only, though in a public place, it was not indictable.[12]

Indictment or information at common law[13] must set out the facts and circumstances of the acts complained of, or describe those acts in adequate words having a well-understood meaning.[14] The offense being contra bonos mores and against the peace of the public, it must be charged that it was publicly committed, or committed in a public place,[15] and an allegation of public notoriety is essential.[16]

§ 891. —— UNDER STATUTE IN THIS COUNTRY. Under the various statutes, the term "lewdness" has a different significance and meaning from what it had at common law, and to constitute the offense of "open and gross lewdness," it is not necessary, and it is therefore unnecessary to allege in the indictment, that the act complained of should have been committed in a public place;[1] neither

10 As to prostitution, see that title.

11 State v. Dowd, 7 Conn. 385; Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357.

12 Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357.

13 As to form of indictment at common law, see Form No. 265.

14 State v. Baldwin, 18 N. C. (1 Dev. & B. L.) 195; State v. Wilson, 93 N. C. 608.

15 State v. Maddox, 74 Ind. 105; State v. Rose, 32 Mo. 560; State v. Brunson, 2 Bail. L. (S. C.) 149; State v. Cagle, 21 Tenn. (2 Humph.) 414; State v. Moore, 31 Tenn. (1 Swan.) 136; R. v. Holmes, 6 Cox C. C. 216, 20 Eng. L. & Eq., 597; R. v. Harris, 12 Cox C. C. 659, overruling R. v. Orchard, 3 Cox C. C. 248, 20 Eng. L. & Eq. 598.

16 Brooks v. State, 10 Tenn. (2 Yerg.) 482; Anderson v. Com., 26 Va. (5 Rand.) 627, 16 Am. Dec. 776; R. v. Peirson, 2 Ld. Raym. 1197, 92 Eng. Repr. 291.

1 Morris v. State, 109 Ga. 351, 34 S. E. 577; Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357; State v. Juneau, 88 Wis. 180, 43 Am. St.

does the offense depend upon the number who witnessed it, but rather upon the intention with which the offensive act was done in the presence of one or more persons,[2] e. g., the intentional act of exposing one's person indecently in the presence of one person;[3] but it has been said to be otherwise where the acts are done in private with the consent of those present, even though a third person should unexpectedly and unintentionally witness the lewd acts.[4] On the other hand, it is held that the statutes punish, not "public," but "open," lewdness; that the phrase "open and gross lewdness" is not equivalent to "gross lewdness in a public place," but that the phrase "open" lewdness is used in contradistinction to "secret" lewdness.[5] "Lewd female" under these statutes is said to be one who is guilty of illicit intercourse at or before the

Rep. 877, 24 L. R. A. 857, 59 N. W. 580.

Place must be where more than one person might have seen, on charge of exposure of person.—Morris v. State, 109 Ga. 351, 34 S. E. 577.

"The statute punishes, not public, but open, lewdness."—State v. Juneau, 88 Wis. 180, 43 Am. St. Rep. 877, 24 L. R. A. 857, 59 N. W. 580.

2 **Gross lewdness** is "open" when committed in the presence of another person, even though that "person" is a child of such tender years as to be incapable of being offended by it.—State v. Juneau, 88 Wis. 180, 43 Am. St. Rep. 877, 24 L. R. A. 857, 59 N. W. 580.

"The benignity of the law would neither presume nor permit the consent of such a child to such an act."—Id., citing Fowler v. State, 5 Day (Conn.) 81; Grisham v. State, 10 Tenn. (2 Yerg.) 589; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170.

Indecent exposure before one person, whether an indictable offense, raised but not decided in Morris v. State, 109 Ga. 351, 34 S. E. 577.

The phrase "open" lewdness has no reference to the number of persons present; it is used merely to define the quality of the act, as opposed to "secret" lewdness, and defines the same act whether committed in the presence of one or of many.—State v. Juneau, 88 Wis. 180, 43 Am. St. Rep. 877, 24 L. R. A. 857, 59 N. W. 580.

3 State v. Juneau, 88 Wis. 180, 43 Am. St. Rep. 877, 24 L. R. A. 857, 59 N. W. 580.

4 Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357.

5 Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; State v. Juneau, 88 Wis. 180, 43 Am. St. Rep. 877, 24 L. R. A. 857, 59 N. W. 580.

time of the commission of the offense charged;[6] though to be able to convict under a statute punishing any female found at or resorting to a hotel for the purpose of lewdness, or for leading a life of lewdness, the indictment or information must allege the commission of the act complained of on more than one night only, because mere private incontinence on different occasions does not constitute the offense sought to be charged; the allegation must be of, and the proof must show, an habitual resorting for purposes of lewdness.[7] Lewdness, under the statutes, refers mainly, though not altogether, to sexual offenses.

§ 892. FORM AND SUFFICIENCY OF INDICTMENT—IN GENERAL. Under the statutes of the various jurisdictions, the same as at common law,[1] an indictment or information charging the offense of lewdness, in any of its phases, must set out in detail the acts which fall within the prohibitions of the particular statute, or describe these acts in such technical or other well-understood words as will show the acts complained of to be of the acts prohibited by the statute.[2] Every element necessary to constitute the offense under the statute must be clearly charged.[3] The charge may be in the language of the statute creating the offense,[4] in all those cases in which the statute

6 Jamison v. State, 117 Tenn. 58, 94 S. W. 675.

7 State v. McDavitt, 140 Iowa 342, 132 Am. St. Rep. 275, 118 N. W. 370. See: ALA.—Smith v. State, 39 Ala. 554; Bodiford v. State, 86 Ala. 67, 11 Am. St. Rep. 20, 5 So. 559. ARK.—Turney v. State, 60 Ark. 259, 29 S. W. 893. GA.—Lawson v. State, 116 Ga. 571, 42 S. E. 752. IND.—Jackson v. State, 116 Ind. 464, 19 N. E. 330. IOWA—State v. Marvin, 12 Iowa 499. TEX.—Mitten v. State, 24 Tex. App. 346, 6 S. W. 196. VA.—Pruner v. Com. 82 Va. 115.

1 See, supra, § 890, footnotes 13-16, and text going therewith.

2 Dameron v. State, 8 Mo. 494; State v. Gardner, 28 Mo. 90; State v. Morrison, 64 Mo. App. 507; State v. Peirce, 43 N. H. 273; State v. Kennison, 55 N. H. 242.

3 State v. Clinch, 8 Iowa 401; Newman v. State, 69 Miss. 393, 10 So. 580.

4 CAL.—People v. Sylva, 8 Cal. App. 349, 97 Pac. 202. ILL.—Williams v. People, 67 Ill. App. 344; Crane v. People, 168 Ill. 395, 48 N. E. 54; affirming 65 Ill. App. 492. IND.—State v. Chandler, 96

under which the prosecution is had contains all the elements of the offense,[5] and a charge in language similar to and of like import and meaning with that of the statute will be sufficient;[6] but in addition thereto the particular act complained of must in each instance be specified in order to justify conviction.[7] That is to say, the indictment or information must so far individuate the offense sought to be charged that the accused will have proper notice of the particular act he is charged with and for which he is to be tried.[8] Thus, simply charging accused with "indecent and rude conduct" upon a public street of a designated town, contrary to the statute, without further specification or description of the acts complained of, is not sufficient, because it fails to apprise the accused of the particular act or acts with which he is charged, and is not sufficiently definite to enable him to plead a judgment of acquittal or conviction as a bar to a subsequent prosecution for the same offense; and also because it is not sufficient to enable the court to determine whether the accused, if he did the things charged, is guilty of any offense.[9] And it has been said that an indictment merely charging accused with "open and gross lewdness and

Ind. 591. IOWA—State v. Bauguess, 106 Iowa 107, 76 N. W. 508. MASS.—Com. v. Parker, 86 Mass. (4 Allen) 313. MO.—State v. Kesslering, 12 Mo. 565; State v. Byron, 20 Mo. 210; State v. Bess, 20 Mo. 419; State v. Osborne, 69 Mo. 143; State v. Davis, 70 Mo. 467; State v. James, 37 Mo. App. 214; State v. Morrison, 64 Mo. App. 507; State v. Hopson, 76 Mo. App. 482. NEV.—State v. King, 35 Nev. 153, 126 Pac. 880. N. C.—State v. Stubbs, 108 N. C. 774, 13 S. E. 90. VA.—Scott v. Com., 77 Va. 344.

5 ILL.—Williams v. People, 67 Ill. App. 344. MO.— Dameron v. State, 8 Mo. 494; State v. Morrison, 64 Mo. App. 507. S. C.—State v. Brunson, 2 Bail. L. 149.

6 CAL.—People v. Thompson, 4 Cal. 238. COLO.—King v. People, 7 Colo. 224, 3 Pac. 223. IND.—State v. Chandler, 96 Ind. 591. MASS.—Com. v Dill, 159 Mass. 61, 34 N. E. 84. N. C.—State v. Lyerly, 52 N. C. 158; State v. Stubbs, 108 N. C. 774, 13 S. E. 90. UTAH—People v. Colton, 2 Utah 457.

7 People v. Grinnell, 9 Cal. App. 238, 98 Pac. 681.

8 State v. Morrison, 64 Mo. App. 507.

9 State v. Peirce, 43 N. H. 273.

lascivious behavior," in the language of the statute, is insufficient for the same reason;[10] but charging that a man and a woman were guilty of open, gross lewdness and lascivious behavior, by publicly, lewdly, and lasciviously abiding and cohabiting with each other, in the words of one of the specifications of the statute, is sufficient,[11] because it sets out all the particular acts complained of.

Conclusion of indictment or information need not be "to the common nuisance of the community," under statutory provisions.[12]

§ 893. ——ALLEGATION OF INTENT. All acts of lewdness described in the statute being malum prohibitum—wrong because prohibited,—as a rule the question of intent does not enter into the elements of the offense, the act complained of being wrong and an offense because prohibited, and for that reason criminal intent is no part of the necessary description, and need not be alleged.[1] Thus, charging accused with an indecent exposure of the person, "devising and intending the morals of the people to debauch and corrupt," followed by the allegation that accused acted "unlawfully, scandalously, and wantonly," sufficiently shows the criminal intent in the act;[2] but a

10 Dameron v. State, 8 Mo. 494.

11 State v. Bess, 20 Mo. 419.

12 MASS.—Com. v. Haynes, 68 Mass. (2 Gray) 72, 61 Am. Dec. 437; Com. v. Parker, 86 Mass. (4 Allen) 313. N. C.—State v. Baldwin, 18 N. C. (1 Dev. & B. L.) 195; State v. Wilson, 93 N. C. 608. PA.—Com. v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632; Baker v. Com., 19 Pa. St. 412. ENG.—R. v. Holmes, 6 Cox C. C. 216, 20 Eng. L. & Eq. 597.

1 See: ARK.—State v. Eldridge, 12 Ark. 612. MASS.—Com. v. Haynes, 68 Mass. (2 Gray) 72, 61 Am. Dec. 437. N. J.—Van Houten v. State, 46 N. J. L. 16, 50 Am. Rep. 397. N. Y.—Miller v. People, 5 Barb. 203. R. I.—State v. Murphy, 17 R. I. 702, 16 L. R. A. 552, 52 Atl. 475. UTAH—People v. Colton, 2 Utah 457. FED.—United States v. Staats, 49 U. S. (8 How.) 41, 12 L. Ed. 979; Bannon v. United States, 156 U. S. 466, 39 L. Ed. 496, 15 Sup. Ct. Rep. 468; United States v. Bayaud, 21 Blatchf. 295, 16 Fed. 383; United States v. Ulrici, 3 Dill. 543, Fed. Cas. No. 16594; United States v. Debs, 65 Fed. 211. ENG.—R. v. Crunden, 2 Campb. 89, 11 Rev. Rep. 671.

2 Com. v. Haynes, 68 Mass. (2 Gray) 72, 61 Am. Dec. 437.

charge that accused "was found in bed feloniously together with" a named female, "under circumstances affording a presumption of an illicit and felonious intent," in the language of the Vermont statute, has been held to be insufficient for failure to allege what the "illicit intention" was.[3]

§ 894. —— ALLEGATION AS TO TIME AND PLACE. An indictment or information charging lewdness should set out the date upon which the alleged offense was committed,[1] though not ordinarily a material element,[2] it merely being necessary to lay the time of the commission of the offense within the statute of limitations, and prior to the finding of the indictment or the presentation of the information.[3] Where the indictment or information charges a continuing offense, the commission may be alleged as between certain dates.[4] Thus, charging that accused lived in a state of adultery on the twenty-fifth day of May of a stated year, and thence continuously until about the fifteenth day of July of the same year, is sufficiently definite as to time;[5] but a charge that accused "lewdly" and "lasciviously" abided and cohabited,[6] or lived openly in adultery[7] on a day certain, is sufficient, without a continuando.[8] The indictment should also state the place at which the acts complained of were done in order to show that the offense was openly and notoriously committed, where that is an element of the offense under the statute.[9] It has

3 State v. Miller, 60 Vt. 90, 12 Atl. 526.

1 Dameron v. State, 8 Mo. 494.

2 State v. Kirkpatrick, 63 Iowa 554, 19 N. W. 660.

3 People v. Anthony, 20 Cal. App. 586, 129 Pac. 968.

4 State v. Nelson, 39 Wash. 221, 81 Pac. 721.

5 State v. Way, 5 Neb. 283; Bailey v. State, 36 Neb. 808, 55 N. W. 241; State v. Nelson, 39 Wash. 221, 81 Pac. 721.

6 State v. Kirkpatrick, 63 Iowa 554, 19 N. W. 660; Hinson v. State, 7 Mo. 244.

7 Lyman v. People, 198 Ill. 544, 64 N. E. 974; affirming 98 Ill. App. 386.

8 Hinson v. State, 7 Mo. 244.

9 State v. Johnson, 69 Ind. 85; Delany v. People, 10 Mich. 241; State v. Cagle, 21 Tenn. (Humph.) 414; State v. Moore, 31 Tenn. (1 Swan.) 136.

been said that an indictment or information charging an indecent exposure of the person in a public place, must charge the act to have been "wilfully and lewdly" done, it not being sufficient to charge the act to have been done "unlawfully and wilfully."[10]

§ 895. —— ALLEGATION AS TO PUBLIC CHARACTER OF ACT. In those jurisdictions in which the statute prohibits and punishes "open and gross lewdness," without defining the crime or enumerating the acts included therein, an indictment or information charging adulterous relations[1] may be good, although it does not charge that the acts were openly, notoriously, and scandalously committed;[2] and where indecent exposure of the person is charged, it need not be alleged to have been done in a public place, or in the presence of more than one person.[3] Charging accused with being a lewd, wanton, and lascivious person in speech and behavior, it need not be alleged that the offense was committed to the common nuisance of the people of the commonwealth.[4] The general rule, however, and the better practice is thought to be, in an indictment charging lewdness, to aver a "notorious" act of public indecency,[5] or to charge that it was openly and publicly committed, the public character of the act being an essential element under a majority of the statutes.[6] To comply with this

10 Stark v. State, 81 Mass. 397, 14 Am. Cr. Rep. 367, 33 So. 175.

1 See, infra, § 897.

2 Adams v. Com., 162 Ky. 76, 171 S. W. 1006.

3 Ardery v. State, 56 Ind. 328; Lorimer v. State, 76 Ind. 495; Com. v. Parker, 86 Mass. (4 Allen) 313; Com. v. Lambert, 94 Mass. (12 Allen) 177.

See, also, supra, § 891, footnotes 2-4.

4 Com. v. Parker, 86 Mass. (4 Allen) 313.

See, supra, § 392, footnote 12.

5 Williams v. People, 67 Ill. App. 344.

6 IND.—State v. Johnson, 69 Ind. 85. MASS.—Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357. MICH.—Delany v. People, 10 Mich. 241. TENN.—State v. Cagle, 21 Tenn. (2 Humph.) 414; State v. Moore, 31 Tenn. (1 Swan.) 136. VT.—State v. Millard, 18 Vt. 574, 46 Am. Dec. 170. WIS.—State v. Juneau, 88 Wis. 180, 43 Am. St. Rep. 877, 24 L. R. A. 857, 59 N. W. 580.

requirement any allegation placing the act in a public place, and alleging it to be such, will be sufficient. Thus, charging that the offense was committed "in a public place, to wit, at the blacksmith shop of A, then and there a public place," is sufficient allegation as to the public character of the place and the act.[7]

§ 896. PARTICULAR AVERMENTS—SEX AND RACE. In charging the statutory crime of lewdness in cohabiting together, or any of the other sexual offenses, the better practice is to allege that one of the persons involved is a man and the other a woman,[1] although it has been said that the allegation as to sex will be sufficient in those cases where the court must infer therefrom that one of the persons is a man and the other a woman.[2] Thus, an indictment charging that A and B did then and there wilfully and unlawfully cohabit together, and have sexual intercourse with each other, A and B not then and there being married to each other, has been held to be sufficient without an allegation that A was a man and B was a woman,[3] although there is authority to the contrary.[4] In the absence of any statutory requirement, it is not necessary to allege the race of either of the persons involved in the charge. Thus, charging that accused, being a free person of African descent, and A, spinstress, did live together in fornication, is sufficient without stating the descent of the woman.[5]

7 Lorimer v. State, 76 Ind. 495.

1 State v. Dunn, 26 Ark. 34.

2 State v. Fore, 23 N. C. 378; State v. Lashley, 84 N. C. 754.

3 State v. Smith, 18 Ind. App. 179, 47 N. E. 685; Tynes v. State, 93 Miss. 119, 46 So. 535.

4 Indictment or information charging John Martin and Marie Whatson, being unmarried persons, with living together in an open state of fornication, contrary to the statute, is insufficient to charge the statutory offense, because it does not aver that the defendants are a man and a woman. —People v. Martin, 180 Ill. App. 578.

5 Ashworth v. State, 9 Tex. 490.

§ 897. ——As to cohabitation. The statutes of the various jurisdictions against lewdness and lascivious cohabitation and conduct are of wider scope than those directed at the crimes of adultery,[1] fornication,[2] and other like sexual offenses.[3] Every element necessary under the statute to make out the offense sought to be charged must be fully alleged. Thus, where the statute specifically provides that the cohabitation must be between a man and a woman "not married to each other,"[4] or that the offense

1 **As to adultery**, see, supra, §§ 399-407.

2 **As to fornication**, see, supra, §§ 698-707.

3 ARK.—Crouse v. State, 16 Ark. 566; State v. Dunn, 26 Ark. 34. IOWA—State v. Clinch, 8 Iowa 401. MASS.—Com. v. Dill, 159 Mass. 61, 34 N. E. 84. MICH.—Delany v. People, 10 Mich. 241. MISS.—Newman v. State, 69 Miss. 393, 10 So. 508. UTAH—People v. Colton, 2 Utah 457. VT.—State v. Chillis, 1 Brayt. (Vt.) 131. VA.—Scott v. Com., 77 Va. 344; Pruner v. Com., 82 Va. 115. W. VA.—State v. Foster, 21 W. Va. 767; State v. Foster, 26 W. Va. 272.

4 Crouse v. State, 16 Ark. 566; State v. Clinch, 8 Iowa 401; State v. Aldridge, 14 N. C. 331; People v. Colton, 2 Utah 457.

Charge must allege that man and woman had not intermarried. —State v. Aldridge, 14 N. C. 331.

Charging that A, a married man, and B, an unmarried woman, the said A and B "not being then and there married to each other, did unlawfully live and cohabit as man and wife," is sufficient.—State v. Chandler, 96 Ind. 591.

Charging A and B jointly with living together in adultery, not being then and there married to each other, and with unlawfully etc. living together in adultery, he, the said A, then and there being a married man, having a lawful wife other than the said B living, as he the said A, and she the said B well knew, sufficiently states the offense.—Lyman v. People, 98 Ill. App. 386; affirmed, 198 Ill. 544, 64 N. E. 974.

Charging accused, an unmarried man, with living in a state of cohabitation and adultery with a married woman, but which does not purport to charge the woman with the offense of adultery or allege that accused knew that she was a married woman, is not sufficient to state an offense against the statute as to the accused under the California Penal Code.—Ex parte Sullivan, 17 Cal. App. 278, 119 Pac. 526.

Under a statute penalizing every man and woman, one or both of whom are married and not to each other, who lewdly cohabit together, charging defendants were not married to each other, one of whom was then married to another person and the other a single man, with unlawfully, lewdly, and lasciviously abiding and cohabiting together, and with sexual intercourse with each other for

must be that of "habitual sexual intercourse,"[5] these are of the gist of the offense, and the indictment must so allege. When the statute under which prosecution is had sets forth all the facts constituting the offense, an indictment or information in the language of the statute, or in words equivalent to the language of the statute, will be sufficient.[6] Charging accused with wilfully and unlawfully living in a state of cohabitation and adultery with each other necessarily implies that the accused were married to others, and for that reason it is not necessary to allege in direct terms that they were married to others.[7]

some time within a year prior to the prosecution, was held to be sufficient.—State v. Dashman, 124 Mo. App. 238, 101 S. W. 597.

5 Newman v. State, 69 Miss. 393, 10 So. 580.

6 IND.—Williams v. State, 64 Ind. 553. MASS.—Com. v. Brown, 141 Mass. 78, 6 N. E. 377. N. C.—State v. Roper, 18 N. C. (1 Dev. & B. L.) 209. UTAH—People v. Colton, 2 Utah 457. VA.—Scott v. Com., 77 Va. 344. FED.—Cannon v. United States, 116 U. S. 55, 29 L. Ed. 561, 6 Sup. Ct. Rep. 278, affirming 4 Utah 122, 7 Pac. 369.

7 People v. Breeding, 19 Cal. App. 359, 126 Pac. 179; Crane v. People, 168 Ill. 395, 48 N. E. 54, affirming 65 Ill. App. 492; State v. Nelson, 39 Wash. 221, 81 Pac. 721.

"Did then and there unlawfully and illegally, each with the other, live together in an open state of adultery, the said A being then and there a married man, having been previously married to one B, and the said D being then and there a married woman, having been previously married to one E, sufficiently states the offense under a statute providing the indictment or information shall be sufficient where it states the offense so plainly that its nature may be easily understood by the jury.—Crane v. People, 168 Ill. 395, 48 N. E. 54, affirming 65 Ill. App. 492.

Living together in a state of adultery is sufficiently alleged by charging accused did wilfully and feloniously live and cohabit in an open state of adultery with a named person, and with having had carnal knowledge of such person, she being a female other than the wife of the accused and being the lawful wife of another, and accused having then and there a wife living.—State v. Nelson, 39 Wash. 221, 81 Pac. 721.

Living in a state of open and notorious cohabitation and adultery being a misdemeanor under the statute in which adultery is defined as the voluntary intercourse of a married person with a person other than the offender's husband or wife, an indictment or information charging accused with living "in a state of open and notorious cohabitation and adultery with each other, the said defendants not being then and there married to each other" is sufficient

Charging accused, at a certain time and place, were guilty of open, gross lewdness and lascivious behavior, and were then and there guilty of open and notorious acts of public indecency, grossly scandalous, by then and there publicly, lewdly, and lasciviously abiding and cohabiting with each other, sufficiently states the offense under the statute.[8] It has been said to be sufficient to charge the accused with "bedding and cohabiting together," on a charge of fornication and adultery;[9] "did then and there unlawfully live together in an open state of fornication;"[10] "did lewdly and lasciviously abide and cohabit"

without alleging that either of the accused was married to another.—People v. Silva, 8 Cal. App. 349, 97 Pac. 202.

8 State v. Osborne, 69 Mo. 143.

Under the Oklahoma statute making a person guilty of a misdemeanor who commits an act which openly outrages public decency and is injurious to public morals, an indictment or information which charges the accused, a married man, and well known to the general public as being a married man, with lasciviously associating in public and private with an unmarried female about eighteen years of age, and with openly and publicly going with and accompanying said female on and about the streets and other public places in such a manner and under such conditions as to be injurious to public decency and public morals, and did then and there openly and publicly go with and accompany said female to certain rooms, and did lock himself in said rooms with said female for the purpose of committing lascivious, lewd, immoral, and indecent acts, all of which said openly, public, and notorious conduct and acts of accused with and toward the said female did then and there grossly disturb the public peace, openly outrage public decency, and injure public morals, sufficiently charges an offense under the statute.—Fessler v. State (Okla. Cr.), 160 Pac. 1129.

9 State v. Jolly, 20 N. C. 108, 32 Am. Dec. 656.

Charging that A, a male, and B, a female, unlawfully did bed and cohabit together, without being lawfully married, and did then and there commit fornication and adultery, is sufficient.—State v. Lyerly, 52 N. C. 158.

"Unlawfully did associate, bed, and cohabit together, and then and there did commit fornication and adultery, contrary to the form of the statute," etc., they not being united together in marriage, implies that they did "lewdly and lasciviously associate" within the prohibition of the statute, and sufficiently charges the offense.—State v. Stubbs, 108 N. C. 774.

10 King v. People, 7 Colo. 224, 3 Pac. 223.

together, is sufficient after verdict, although "abide" was used for the statutory "associate";[11] but it has been said that to charge accused "did unlawfully cohabit together and carnally know each other" is not sufficient under a statute prohibiting either "living together and carnal intercourse with each other," or "habitual carnal intercourse with each other without living together."[12]

Sufficiency of charge: An indictment or information charging accused with lewdly and lasciviously cohabiting with a female, has been held to be sufficient as against the objection that it does not allege that she cohabited with him,[13] although the general rule seems to require that they be charged with joining in the act.[14] Failure to allege in direct terms that accused were married to others does not render an indictment or information insufficient where the charge is that of living together in a state of cohabitation and adultery.[15] Where a man is charged with living in a state of fornication with a woman, which woman is known indifferently by two names, the indictment may designate her by either name by which she is commonly known.[16] But it has been said that an indictment charging the accused, being uncle and niece, "did cohabit together and were guilty of adultery and fornication," is not sufficient as an indictment for unlawful cohabitation under the Mississippi statute,[17] because it fails to allege that there

11 Com. v. Dill, 159 Mass. 61, 34 N. E. 84.

Did unlawfully, openly, and publicly live, dwell, and cohabit together and lewdly and lasciviously, they being unmarried to and with each other, is sufficiently certain under a statute prohibiting that "any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together."—People v. Colton, 2 Utah 457.

12 Edwards v. State, 10 Tex. App. 25.

13 State v. Naylor, 68 Ore. 139, 136 Pac. 889.

General rule seems to be that they must be charged as joining in the act. See, infra, § 902.

14 See, infra, § 902.

15 People v. Silva, 8 Cal. App. 349, 97 Pac. 202; People v. Breeding, 19 Cal. App. 359, 126 Pac. 179.

16 Whittington v. State, 121 Ga. 193, 48 S. E. 948.

17 Miss. Code, § 270.

was "habitual sexual intercourse," which is the gist of the offense under the statute.[18]

§ 898. —— AS TO MARRIAGE. An indictment or information charging lewdness, involving any of the sexual offenses, should expressly negative the fact that the parties accused are married to each other;[1] and in those cases where the marriage of one or both of the parties involved to another is an element, in the statute under which the prosecution is had, entering into the particular offense sought to be charged, the fact of such marriage must be explicitly alleged;[2] but we have already seen that an indictment or information charging the accused with wilfully and unlawfully living in a state of cohabitation and adultery with each other necessarily implies that they were married to other persons, and the fact need not be alleged in direct terms.[3]

§ 899. —— PROSTITUTION. The offense of open and public prostitution is treated elsewhere.[1] The character of being a common prostitute enters into the offense of lewdness as we have already seen,[2] but is generally provided for and punished under the statutes punishing vagrancy.[3] In charging the offense the indictment or information must set out acts and conduct of the accused falling within the statutory description of that offense.[4]

18 Newman v. State, 69 Miss. 393, 10 So. 580.

1 Crouse v. State, 16 Ark. 566; State v. Clinch, 8 Iowa 401; State v. Aldridge, 14 N. C. 331; State v. Lashley, 84 N. C. 754; People v. Colton, 2 Utah 457.

2 State v. Gooch, 7 Blackf. (Ind.) 468; State v. Bess, 20 Mo. 419.

3 See, supra, § 897, footnote 7.

1 As to night-walking or street-walking, see, supra, § 558.

As to prostitution generally, see Chapter LXXI.

2 See, supra, § 891.

3 As to vagrancy, see chapter on that title.

4 People v. Cowie, 88 Hun 498, 9 N. Y. Cr. Rep. 541, 34 N. Y. Supp. 888.

§ 900. —— FREQUENTING OR LIVING IN HOUSE OF ILL-FAME. It being an offense under the statute, and falling within the scope of the statute prohibiting and punishing lewdness, to frequent or live in a house of ill-fame, an indictment or information charging the offense must allege the act to have been open and notorious.[1] It must also be charged that accused knew the character of the house,[2] although an indictment or information, in the language of the statute, which does not allege knowledge on the part of the accused as to the character of the house, will be sufficient after verdict.[3] Charging accused with living in a designated house of ill-fame is sufficient, notwithstanding the fact that the statute under which the prosecution is had is in the plural.[4] An allegation as to the location of the house of ill-fame which places it within the county in which the indictment is found or the information presented, will be sufficient.[5]

Enticing a female to house of ill-fame for purposes of prostitution,[6] or for purposes of illicit intercourse,[7] have all been already sufficiently discussed in the chapter on Abduction. Where under the statute it is not an offense to entice a female to a house of ill-fame unless such female was of previously chaste character, the indictment or information must allege, and the prosecution must show, as to the previous character of the female, as that character will not be presumed to have been chaste as against the presumption of accused's innocence, which the law raises.[8]

1 Brooks v. State, 10 Tenn. (2 Yerg.) 482; R. v. Peirson, 2 Ld. Raym. 1197, 92 Eng. Repr. 291; Claxton's Case, 12 Mod. 566, 88 Eng. Repr. 1524.

2 Brooks v. State, 10 Tenn. (2 Yerg.) 482.

3 State v. Richards, 76 Wis. 354, 44 N. W. 1104.

4 State v. Nichols, 83 Ind. 228, 43 Am. Rep. 66.

5 State v. Richards, 76 Wis. 354, 44 N. W. 1104.

6 See, supra, § 384.

7 See, supra, § 385.

8 People v. Rodrigas, 49 Cal. 9. See Com. v. Whitaker, 131 Mass. 225.

§ 901. —— LEWD OR LASCIVIOUS CONDUCT WITH CHILD. Under statutes, such as the California statute,[1] prohibiting and punishing any lewd or lascivious act, other than the acts constituting other crimes provided for and prohibited and punished in other statutes or other parts of the criminal code or laws, upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, an indictment or information must set forth all the facts and circumstances constituting the act complained of, but need not allege, and the proof need not show, that the accused touched the naked body, or some part of the body, in fondling or manipulating the person of the child;[2] but an indictment or information, in the language of the statute, must negative the exception stated in the statute.[3] And charging accused with unlawfully, feloniously, and lewdly committing a certain lewd and lascivious act with and upon the body, limbs, and private parts of a female child named, under the age of fourteen years, by then and there placing her hand upon his private parts, with felonious intent then and thereby of arousing, appealing to and gratifying his sexual lust and passions, was held to be sufficient.[4] Describing the act complained of by charging that the accused did then and there insert and place his hands up under the clothes and through and inside of the drawers of a designated female child, within the protection of the statute, with intent then and there, etc., held to sufficiently charge the crime alleged.[5]

1 See Kerr's Cyc. Cal. Pen. Code, § 288.

2 People v. Dabner, 25 Cal. App. 630, 144 Pac. 975.

3 People v. Grinnell, 9 Cal. App. 238, 98 Pac. 681.

4 People v. Anthony, 20 Cal. App. 586, 129 Pac. 968.

5 People v. Dabner, 25 Cal. App. 630, 144 Pac. 975.

§ 902. JOINDER OF PARTIES. The general rules governing criminal pleadings, as to the joinder of parties accused as defendants in the same indictment or information, applies to a charge of lewdness. In that portion of the offense of lewdness embracing the sexual offenses,—as where the statute denounces and punishes a man and a woman who "not being married to each other, lewdly and lasciviously cohabit together," and the like,—the indictment must charge both as concurring[1] in the commission of the alleged offense,[2] it being a joint act and offense;[3] and they may be indicted either jointly[4] or severally,[5] although there are cases holding that the indictment must be joint,[6] except where one of the parties is unknown or is dead.[7] Where they are jointly indicted, the parties are entitled to

1 **Oregon rule** seems to be to the contrary.—State v. Naylor, 68 Ore. 139, 136 Pac. 889.

2 State v. Hook, 4 Kan. App. 451, 46 Pac. 44; Delany v. People, 10 Mich. 241; State v. Chillis, 1 Brayt. (Vt.) 131; State v. Foster, 21 W. Va. 767; State v. Foster, 26 W. Va. 272.

3 Id.

4 CAL.—People v. Silva, 8 Cal. App. 349, 97 Pac. 202; Ex parte Sullivan, 17 Cal. App. 278, 119 Pac. 526; People v. Breeding, 19 Cal. App. 359, 126 Pac. 179. ILL.—Crane v. People, 168 Ill. 395, 48 N. E. 54, affirming 65 Ill. App. 492; Lyman v. People, 98 Ill. App. 386; affirmed, 198 Ill. 544, 64 N. E. 974; People v. Martin, 180 Ill. App. 578. MISS.—Newman v. State, 69 Miss. 393, 10 So. 580. MO.—State v. Dashman, 124 Mo. App. 238, 101 S. W. 597.

5 Wasden v. State, 18 Ga. 264; Scott v. Com., 77 Va. 344; State v. Foster, 21 W. Va. 767; State v. Foster, 26 W. Va. 272.

Compare: State v. Hook, 4 Kan. App. 451, 46 Pac. 44; Delany v. People, 10 Mich. 241.

6 **Participation of both parties** necessary to constitute the offense charged; both must be joined in the indictment. It is a well settled rule at common law that, where an offense can be committed only by the participation of a certain number of persons, the number required to constitute the offense must be jointly indicted, and an indictment against one of the number required to constitute the offense could not be sustained, and if a less number than are required to constitute the offense be indicted, the indictment is bad, and a conviction could not be sustained, as the specific offense would not have been properly charged.—State v. Hook, 4 Kan. App. 451, 46 Pac. 44; State v. Bailey, 3 Blackf. (Ind.) 208.

7 King v. People, 7 Colo. 224, 3 Pac. 223; State v. Hook, 4 Kan. App. 451, 46 Pac. 44; Delany v. People, 10 Mich. 241; State v. Bryon, 20 Mo. 210.

separate trials,[8] in the discretion of the court.[9] In all cases of lewdness other than the sexual offenses,—e. g., uttering obscene or indecent language, and the like,[10]—the offense being individual, two or more parties can not be joined in the same indictment.

§ 903. Duplicity. Where the statute defining and punishing lewdness, in any of its phases, enumerates, in the disjunctive, a series of acts any one or all of which may constitute the offense of lewdness, an indictment or information may charge this series of acts, in one count, in the conjunctive, without being open to the charge of duplicity;[1] and where the offense set forth consists of a method of conduct and acts, extending over a period of time, all the acts and conduct may be properly charged in the indictment or information, because the acts and course of conduct combined constitute the offense charged, which is a single offense, that of lewdness.[2]

8 State v. Hook, 4 Kan. App. 451, 46 Pac. 44; Delany v. People, 10 Mich. 241; Scott v. Com., 77 Va. 344; State v. Foster, 21 W. Va. 767.

9 Delany v. People, 10 Mich. 241; Stewart v. State, 64 Miss. 626, 2 So. 73.

10 State v. Roulstone, 35 Tenn. (3 Sneed) 107.

1 Fahnestock v. State, 102 Ind. 156; State v. Stout, 112 Ind. 245, 13 N. E. 715; Com. v. Parker, 86 Mass. (4 Allen) 313.

See, also, supra, § 278.

2 Com. v. Parker, 86 Mass. (4 Allen) 313.

CHAPTER LVI.

INDICTMENT—SPECIFIC CRIMES.

Criminal Libel and Slander.

§ 904. In general.
§ 905. Indictment—Requisites and sufficiency.
§ 906. —— Language of the statute and statutory requirements.
§ 907. Inducement and colloquium.
§ 908. Allegation as to person defamed—In general.
§ 909. —— Libel of a class.
§ 910. —— Blasphemous libels.
§ 911. —— Libel of the constitution and laws or government.
§ 912. —— Libel against president or governor.
§ 913. —— Libel against a public officer and the administration of justice.
§ 914. ——Libel against foreign officer and distinguished foreigners.
§ 915. Averment as to falsity, intent, and malice.
§ 916. Averment as to intent to provoke breach of the peace.
§ 917. Averment as to publication—In general.
§ 918. —— Mode of expression.
§ 919. —— Mode of publication.
§ 920. —— Time and place of publication.
§ 921. Setting forth defamatory matter—In general.
§ 922. —— Exceptions to the general rule.
§ 923. —— Libel in foreign language.
§ 924. Innuendo.
§ 925. Persons liable.
§ 926. Joinder and duplicity.

§ 904. In general. Indictment for criminal libel and criminal slander is a procedure which furnishes the prosecuting officers in every county in the Union with an effective weapon, which should be vigorously used, for the entire suppression of and elimination from our midst of

the many vicious elements which are threatening the government and civilization itself; e. g., anarchists, "reds," Bolsheviki, rabid and government-destroying socialists, the infamous I. W. W.,[1] and other classes of agitators and calumniators of that ilk. Criminal libel,—libellus famosus infamatoria scriptura,—is a scandal, or abuse, or vilification, or vituperation written or printed, or expressed by signs, symbols,[2] and the like;[3] and has been fully treated in another place.[4] Criminal libels may be directed:

1. Against God and the Christian religion;
2. Against morality;
3. Against the constitution and laws or government;
4. Against the president or governors;
5. Against the legislatures or congress;
6. Against public officers;
7. Against the magistrates or judges, and the administration of justice;
8. Against private individuals; or
9. Against the officers of foreign governments or foreigners of distinction.[5]

They are classified (1) as blasphemous, against God and the Christian religion, (2) plain libel, against an individual or a class, and (3) seditious libels, including all the other classes of libels above designated.

1 **As to I. W. W.**, see, supra, § 537.

2 Lamb. Sax. Law 64; Bract. lib. 3, ch. 36; 3 Co. Inst. 174; Case de Libellis Famosis (Scandalous Libels), 5 Co. 125, 77 Eng. Repr. 250; R. v. Bear, 1 Ld. Raym. 416, 91 Eng. Repr. 1175, and 2 Salk. 417, 91 Eng. Repr. 363 (libellus famosus).

Libel is a technical word deriving its meaning rather from its use than its etymology. There is no other word but that of libel applicable to the offense of libeling and we know the offense specifically by that name as we know the offense of horse-stealing, forgery, and the like, by the names which the law has annexed to them (Lord Camden).—R. v. Wilkes, 2 Wils. 121 (Eng. Repr.).

3 See, infra, §§ 917-920.

4 See 3 Kerr's Whart. Crim. Law, §§ 1915 et seq.

5 See 1 Russ. on Crimes (9th ed.) 332.

Criminal slander is to be distinguished from criminal libel in that (1) it is not so heinous an offense inasmuch as the words, being spoken merely, are not of so enduring a character and do not reach so large an audience as when written or printed, and (2), in the case of the slander of an individual, however scurrilous, it is not the subject of indictment, unless it tends directly to a breach of the peace.[6] Criminal slanders are divisible into the same classes as criminal libels are divided above, and where falling under the "seditious" class, are equally indictable with seditious libels; and thus prosecuted will reach and punish, and effectually silence the scurrilous and vituperative "soap-box orator" nuisance—individuals blatantly inveighing against laws, governments, officials, and the like, to the common nuisance of all civilized communities as well as to the jeopardy of individual rights, private property, and government itself.

Freedom of speech and liberty of the press, those grand privileges and ideals of the American government, secured alike by federal and state constitutions, are privileges and rights in nowise infringed or affected by the prompt indictment and vigorous prosecution for seditious criminal libel and seditious criminal slander herein recommended. Freedom of speech and liberty of the press do not mean an unbridled license to say and write or publish whatever evil-minded persons may feel inclined, any more than the equally constitutional right of free assembly authorizes and legalizes unlawful assemblies, riots, routs, and the like. Liberty does not mean unrestrained license. There is a legal obligation on the part of all those who speak and write and publish to do so in such a manner as not to offend against public decency, public morals, public laws, and not to scurrilously and vitupera-

6 1 Russ. on Crimes (9th ed.) 343. See: R. v. Langley, 6 Mod. 125, 87 Eng. Repr. 882; R. v. Bear, 2 Salk. 417, 91 Eng. Repr. 363, and 1175; Thornley v. Lord Kerry, 4 Taunt. 355, 13 Rev. Rep. 626, 128 Eng. Repr. 367; Villers v. Monsley, 2 Wils. 403, 95 Eng. Repr. 886.

tively attack public officers, the administration of justice, the laws of the land, or the government; and a failure in these particulars, and offending against any one or all of these things, renders a person subject to indictment and prosecution. And all such offenders, in the due and orderly administration of justice and the criminal laws of the land, should be promptly indicted, vigorously prosecuted, and adequately punished, notwithstanding, and in protection of, legitimate free speech and liberty of the press. The treatment of this question does not fall within the scope of the present work, and it is sufficient to say in this place that the foregoing principles and assertions are amply borne out by the adjudicated cases in this country and England.[7]

[7] See, among other cases, that of the "Haymarket" anarchists of Chicago.—Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 6 Am. Cr. Rep. 570, 12 N. E. 865, 17 N. E. 898; petition for writ of error dismissed, 123 U. S. 143, 31 L. Ed. 80, 8 Sup. Ct. Rep. 21.

Also the cases of Herr Most, the notorious German anarchist.—People v. Most, 128 N. Y. 108, 26 Am. St. Rep. 457, 8 N. Y. Cr. Rep. 273, 27 N. E. 970, affirming 7 N. Y. Cr. Rep. 376, 8 N. Y. Supp. 625; People v. Most, 171 N. Y. 423, 58 L. R. A. 509, 16 N. Y. Cr. Rep. 555, 64 N. E. 175, affirming 71 App. Div. 160, 16 N. Y. Cr. Rep. 392, 75 N. Y. Supp. 591, which affirmed 36 Misc. 139, 16 N. Y. Cr. Rep. 105, 73 N. Y. Supp. 220; R. v. Most, L. R. 7 Q. B. Div. 244.

See, also, in this connection, Coleman v. McLennan, 78 Kan. 711, 130 Am. St. Rep. 390, 20 L. R. A. (N. S.) 369, 98 Pac. 281; People v. Wallace, 85 App. Div. (N. Y.) 170, 17 N. Y. Cr. Rep. 432, 83 N. Y. Supp. 130; United States ex rel. Turner v. Williams, 154 U. S. 279, 48 L. Ed. 979, 24 Sup. Ct. Rep. 719.

Constitutional provision guaranteeing liberty of the press does not justify printing libels.—See: CONN.—State v. Sykes, 28 Conn. 225; State v. McKee, 73 Conn. 18, 49 L. R. A. 542, 46 Atl. 409. ILL.—Storhm v. People, 160 Ill. 582, 43 N. E. 622. IOWA—State v. Blair, 92 Iowa 28, 60 N. W. 486. KAN.—In re Banks, 56 Kan. 242, 42 Pac. 693; Coleman v. MacLennan, 78 Kan. 711, 130 Am. St. Rep. 390, 20 L. R. A. (N. S.) 369, 98 Pac. 281. LA.—Levert v. Daily States Pub. Co., 123 La. 594, 131 Am. St. Rep. 356, 23 L. R. A. (N. S.) 726, 49 So. 206. MASS.—Com. v. Holmes, 17 Mass. 336. MINN.—State v. Pioneer Press Co., 100 Minn. 177, 117 Am. St. Rep. 684, 10 Ann. Cas. 351, 9 L. R. A. (N. S.) 482, 110 N. W. 867 (restricting publication of news as to executions). MO.—State v. Van Wye, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938. N. Y.—Hart v. People, 26 Hun

§ 905. INDICTMENT[1]—REQUISITES AND SUFFICIENCY. The requisites and sufficiency of an indictment or information charging criminal libel, or criminal slander, are to be determined by the general principles applicable to indictments and informations generally, which have been al-

396. FED.—Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; In re Rapier, 143 U. S. 110, 36 L. Ed. 93, 12 Sup. Ct. Rep. 374; Arnold v. Clifford, 2 Sumn. 238, Fed. Cas. No. 555; United States v. Harmon, 45 Fed. 414; Harmon v. United States, 50 Fed. 921; Hallam v. Post Pub. Co., 55 Fed. 456.

English rule is the same.—See R. v. Brodlaugh, L. R. 2 Q. B. Div. 569, 21 Moak (Eng. Repr.) 269; reversed on another point, L. R. 3 Q. B. Div. 607; R. v. Hicklin, L. R. 3 Q. B. Div. 360; In re Besant, L. R. 11 Ch. Div. 508.

"**Constitutional liberty of speech and of the press**, as we understand it, simply guarantees the right to freely utter and publish whatever the citizen may desire, and to be protected in so doing, provided always that such publications are not blasphemous, obscene, and scandalous in their character, so that they become an offense against the public, and by their malice and falsehood injuriously affect the character, reputation, or pecuniary interests of individuals. The constitutional protection shields no one from responsibility for abuse of this right. To hold that it did would be a cruel libel upon the bill of rights itself. The laws punishing criminal libel have never been deemed an infringement of this constitutional guarantee."—State v. Van Wye, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938.

"It may as well be said here as elsewhere that it is a radical misconception of the scope of the constitutional protection to indulge the belief that a person may print and publish ad libitum, any matter, whatever the substance or language, without accountability to law. Liberty in all its forms and assertions in this country is regulated by law. It is not an unbridled license. Where vituperation or licentiousness begins liberty of the press ends."—United States v. Harmon, 45 Fed. 414.

Prohibiting addresses in public parks and other public places is not an infringement of the freedom of speech.—GA.—Fitts v. Atlanta (City of), 121 Ga. 567, 104 Am. St. Rep. 167, 67 L. R. A. 803, 49 S. E. 793. MASS.—Com. v. Abrahams, 156 Mass. 57, 49 Am. Rep. 5, 30 N. E. 79; Com. v. Davis, 162 Mass. 510, 44 Am. St. Rep. 389, 26 L. R. A. 712, 39 N. E. 113. MICH.—Love v. Phelan, Judge of Recorder's Court, 128 Mich. 550, 55 L. R. A. 621, 87 N. W. 785; In re Cox, 129 Mich. 636, 89 N. W. 440. NEB.—In re Anderson, 69 Neb. 690, 5 Ann. Cas. 421, 96 N. W. 149. TEX.—Ex parte Warfield, 40 Tex. Cr. Rep. 413, 76 Am. St. Rep. 724, 50 S. W. 933.

[1] **As to indictment generally for** criminal libel, see Forms Nos. 1570-1583.

ready sufficiently treated.[2] In general, in criminal libel, or criminal slander, as in every other criminal offense, sufficient must be alleged against the accused to make out a prima facie case, and the allegations must be sufficiently detailed and specific for this purpose, or they will be insufficient.[3] The indictment or information must comply with the general rule in criminal pleading, requiring it to be certain and specific, and sufficient to set forth, in a plain and brief manner, every fact necessary to constitute the offense sought to be charged against the accused.[4] It is not necessary to allege in an indictment or information facts which the law will necessarily infer upon the proof of other facts which are alleged.[5] Inasmuch as the statutory definition of criminal libel, or of criminal slander, governs, it is immaterial whether the words alleged to be libelous, or slanderous, are so per se or not,[6] it being sufficient to charge that the libel is "as follows," and then set it forth verbatim, with sufficient innuendoes,

2 **Requisites of indictments and informations are fully treated in** supra, §§ 126-380.

3 IOWA—State v. Lomack, 130 Iowa 79, 106 N. W. 386. N. J.—State v. O'Hagan, 73 N. J. L. 209, 63 Atl. 95. TENN.—Melton v. State, 22 Tenn. (3 Humph.) 389. ENG.—R. v. Gregory, 8 Ad. & E. N. S. (8 Q. B.) 508, 55 Eng. C. L. 507; R. v. Dean of St. Asaph, 21 How. St. Tr. 847, 1044; R. v. Rossewell, 2 Show. 411, 89 Eng. Repr. 1012.

Charging imputing want of chastity to a woman, an indictment or information which alleges accused declared that a man named was "monkeying" with the woman and "doing what he pleased with her, meaning thereby that he was having carnal knowledge of her," is good.—Dickson v. State, 34 Tex. Cr. Rep. 1, 53 Am. St. Rep. 694, 28 S. W. 815, 30 S. W. 807.

4 ALA.—Reid v. State, 53 Ala. 402, 25 Am. Rep. 627; Brooke v. State, 154 Ala. 53, 45 So. 622. KY.—Tracy v. Com., 87 Ky. 578, 9 S. W. 822. MD.—Richardson v. State, 66 Md. 205, 7 Atl. 43. MICH.—People v. Jones, 67 Mich. 544, 35 N. W. 419. MO.—State v. Buck, 43 Mo. App. 443. N. Y.—People v. McLaughlin, 33 Misc. 691, 15 N. Y. Cr. Rep. 302, 68 N. Y. Supp. 1108. OKLA.—Lawton v. Territory, 9 Okla. 456, 60 Pac. 93. PA.—Com. v. Chambers, 15 Phila. 415. S. C.—State v. Henderson, 1 Rich. L. 179.

5 R. v. Munslow, 18 Cox C. C. 112, 10 Am. Cr. Rep. 480.

6 People v. Seeley, 139 Cal. 118, 72 Pac. 834; State v. Elder, 19 N. M. 393, 143 Pac. 482.

and this alleges the libel or slander with sufficient certainty.[7]

§ 906. —— LANGUAGE OF THE STATUTE AND STATUTORY REQUIREMENTS. An indictment or information charging criminal libel, or criminal slander, in the language of the statute,[1] or substantially in the language of the statute,[2] creating and defining the offense will be sufficient; but the indictment or information must set forth all the essential elements of the offense under such statute.[3] Where the statute under which the prosecution is had requires that the libel, or the slander, shall be of a nature to provoke a breach of the peace, or have any other specific tendency, it has been said that the indictment or information must allege that it had such tendency;[4] and this would seem to be a reasonable rule where the words charged are not libelous per se,[5] but that in those cases in which the words are actionable per se, the meaning being plain and certain, the reason for the rule ceases.[6]

7 People v. Seely, 139 Cal. 118, 72 Pac. 834; Clay v. People, 86 Ill. 147, 2 Am. Cr. Rep. 381.

1 People v. Keithley, 158 Ill. App. 11.

2 State v. Van Wye, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938.

3 Lawton v. Territory, 9 Okla. 456, 60 Pac. 93.

4 Moody v. State, 94 Ala. 42, 10 So. 670.

5 State v. Grinstead, 62 Kan. 593, 14 Am. Cr. Rep. 209, 64 Pac. 49, affirming 10 Kan. App. 78, 61 Pac. 976; State v. Elliott, 62 Kan. 860, 64 Pac. 1116, affirming 10 Kan. App. 69, 61 Pac. 981; State v. Clark, 67 Kan. 870, 74 Pac. 232.

6 CAL.—People v. Seeley, 139 Cal. 118, 72 Pac. 834. ILL.—People v. Fuller, 238 Ill. 124, 87 N. E. 338, affirming 141 Ill. App. 374. KAN.—State v. Grinstead, 62 Kan. 808, 64 Pac. 55, reversing 10 Kan. App. 90, 61 Pac. 980. N. Y.—More v. Bennett, 48 N. Y. 472, reversing 48 Barb. 229, 33 How. Pr. 177; People v. McLaughlin, 33 Misc. 691, 15 N. Y. Cr. Rep. 302, 68 N. Y. Supp. 1108. TEX.—Jones v. State, 38 Tex. Cr. Rep. 364, 70 Am. St. Rep. 751, 43 S. W. 78; Mankins v. State, 41 Tex. Cr. Rep. 662, 57 S. W. 950. WASH.—State v. Nichols, 15 Wash. 1, 45 Pac. 647.

Where the article clearly tended to impeach the honesty and integrity of the person, and to expose him to public hatred and contempt it was not necessary in the indictment to allege that it had such a tendency.—People v. Fuller, 238 Ill. 116, 87 N. E. 336, affirming 141 Ill. App. 374.

Consent of the person libeled or slandered being required by the statute to the finding of an indictment or the presentation of an information, that consent must be specifically alleged,[7] because without it there is no authority to bring the indictment,[8] but consent need not be proved.[9]

Verification of an indictment or information charging criminal libel, or criminal slander, being required by statute, that verification is sufficiently made where the facts therein set forth are declared to be true to the best of affiant's knowledge, information, and belief,[10] but an indictment or information unverified will be insufficient.[11]

§ 907. INDUCEMENT AND COLLOQUIUM. Inducement and innuendo[1] perform the same offices in an indictment or information charging a criminal libel, or a criminal slander, that they perform in a petition or complaint in a civil action for the same libel or slander.[2] The inducement is that part of an indictment or information for a libel not per se defamatory, which alleges those extrinsic facts which are necessary to explain the meaning of the words used, and to show them to be injurious in effect;[3]

7 Want of truth of such allegation must be timely objected to and presented to the court on a motion to set aside the indictment.—State v. Matheis, 44 Mo. App. 294.

8 Conrand v. State, 65 Ark. 559, 47 S. W. 628.

9 Id.

10 State v. Bennett, 102 Mo. 356, 10 L. R. A. 717, 14 S. W. 865; State v. Armstrong, 106 Mo. 395, 27 Am. St. Rep. 361, 13 L. R. A. 419, 16 S. W. 604; State v. Murlin, 137 Mo. 307, 38 S. W. 923; Arnold v. Sayings, 76 Mo. App. 182; State v. Simpson, 136 Mo. App. 666, 118 S. W. 1187; see State v. McCaffery, 16 Mont. 38, 40 Pac. 63.

11 State v. Pruett, 61 Mo. App. 159.

1 As to innuendo, see, infra, § 924.

2 Dickson v. State, 34 Tex. Cr. Rep. 1, 53 Am. St. Rep. 694, 78 S. W. 815, 30 S. W. 807; Squires v. State, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147.

3 CAL.—People v. Collins, 102 Cal. 345, 36 Pac. 669. KAN.—State v. Osborn, 54 Kan. 473, 38 Pac. 572. MD.—Richardson v. State, 66 Md. 205, 7 Atl. 43. MASS.—Com. v. Child, 30 Mass. (13 Pick.) 198. MICH.—People v. Jackman, 96 Mich. 269, 55 N. W. 809. MO.—State v. Pulitzer, 12 Mo. App. 6; State v. Buck, 43 Mo.

where inducement is essential and is not inserted, the indictment or information will be defective.[4] In the case of libels that upon their face show themselves to be injurious, much explanatory matter otherwise required by the rules of criminal pleading may be dispensed with;[5] but in the case of publications the injurious character of which is not thus shown upon their face, all of the averments of inducement, innuendo, and consequence must be made;[6] and in such case the indictment or information is fatally defective unless it avers that the publication tended to produce some of the consequences mentioned in the statute under which the prosecution is had,—such as provocation to wrath, exposure to public hatred, deprivation of public confidence, and the like.[7] In cases where matters of inducement and innuendo are required, they need not be separated in statement from one another, but may be alleged together in the same part of the information, and together may be allowed to help one another's averments.[8]

App. 443. N. Y.—People v. Isaacs, 1 N. Y. Cr. Rep. 148. N. C.—State v. White, 28 N. C. (6 Ired. L.) 418. R. I.—State v. Spear, 13 R. I. 324. S. C.—State v. Henderson, 1 Rich. L. 179. TEX.—Neely v. State, 32 Tex. Cr. Rep. 370, 23 S. W. 798; Clark v. State, 32 Tex. Cr. Rep. 412, 24 S. W. 29. VT.—State v. Atkins, 42 Vt. 252. ENG.—R. v. Yates, 12 Cox C. C. 233.

4 State v. Grinstead, 62 Kan. 593, 14 Am. Cr. Rep. 209, 64 Pac. 49, affirming 10 Kan. App. 78, 61 Pac. 976. See: Carter v. Andrews, 23 Mass. (6 Pick.) 8; State v. Pulitzer, 12 Mo. App. 6; State v. Atkins, 42 Vt. 253.

5 IND.—State v. DeLong, 88 Ind. 312. KAN.—State v. Osborn, 54 Kan. 473, 38 Pac. 572. TEX.—Dickson v. State, 34 Tex. Cr. Rep. 1, 53 Am. St. Rep. 694, 28 S. W. 815, 30 S. W. 807. W. VA.—State v. Aler, 39 W. Va. 549, 20 S. E. 585.

6 State v. Grinstead, 62 Kan. 593, 14 Am. Cr. Rep. 209, 64 Pac. 49, affirming 10 Kan. App. 78, 61 Pac. 976. See: Moody v. State, 94 Ala. 42, 10 So. 670; Lawton v. Territory, 9 Okla. 456, 60 Pac. 93; State v. Nichols, 15 Wash. 1, 45 Pac. 647.

7 State v. Grinstead, 62 Kan. 593, 14 Am. Cr. Rep. 209, 64 Pac. 49, affirming 10 Kan. App. 78, 61 Pac. 976.

8 State v. Grinstead, 62 Kan. 593, 14 Am. Cr. Rep. 209, 64 Pac. 49, affirming 10 Kan. App. 78, 61 Pac. 976.

Colloquium is that part of the indictment or information wherein it is alleged that the accused spoke the words in a certain discourse or conversation—in quodam colloquio—which he had with others or with the person defamed in the presence of others, and in the case of a libel that the written words or published article, was of and concerning the person defamed, followed by an averment that such words were "of and concerning" the person defamed.[9] And this colloquium is essential to the validity of every such indictment or information[10] and must be averred, either in terms or in words equivalent thereto, and can not be in the form of an innuendo.[11]

9 IND.—Kelly v. State, 24 Ind. App. 639, 57 N. E. 257. IOWA—State v. Lomack, 130 Iowa 79, 106 N. W. 386. KAN.—State v. Osborn, 54 Kan. 473, 38 Pac. 572; State v. Grinstead, 62 Kan. 593, 14 Am. Cr. Rep. 209, 64 Pac. 49, reversing on other grounds 10 Kan. App. 78, 61 Pac. 976; State v. Elliott, 10 Kan. App. 69, 61 Pac. 981. KY.—Com. v. Duncan, 31 Ky. L. Rep. 1277, 104 S. W. 997. MD.—Barnes v. State, 88 Md. 347, 41 Atl. 781. MASS.—Ellis v. Kimball, 33 Mass. (16 Pick.) 132. MICH.—People v. Jackman, 96 Mich. 269, 55 N. W. 809. MO.—State v. Pulitzer, 12 Mo. App. 6. N. Y.—Croswell v. Weed, 25 Wend. 621. N. C.—State v. Neese, 4 N. C. (Term. Rep. 270) 691. PA.—Com. v. Meeser, 1 Brewst. (Pa.) 492; Com. v. Swallow, 8 Pa. Super Ct. 539. R. I.—State v. Corbett, 12 R. I. 288; State v. Spear, 13 R. I. 324. S. C.—State v. Henderson, 1 Rich. L. 179; Wilson v. Hamilton, 9 Rich. L. 382. TENN.—State v. Brownlow, 26 Tenn. (7 Humph.) 63. TEX.—Neely v. State, 32 Tex. Cr. Rep. 370, 23 S. W. 798; Clark v. State, 32 Tex. Cr. Rep. 412, 24 S. W. 29; State v. Squires, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147. VT.—State v. Atkins, 42 Vt. 252. ENG.—R. v. Marsden, 4 Maul. & S. 164, 105 Eng. Repr. 796.

See, also, infra, § 908, footnotes 7 and 8.

10 CAL.—Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; People v. Collins, 102 Cal. 345, 36 Pac. 669. MD.—Barnes v. State, 88 Md. 347, 41 Atl. 781. MASS.—Bloss v. Tobey, 19 Mass. (2 Pick.) 320. N. Y.—People v. Isaacs, 1 N. Y. Cr. Rep. 148.

11 KAN.—State v. Grinstead, 10 Kan. App. 78, 61 Pac. 976; reversed on other grounds, 62 Kan. 593, 14 Am. Cr. Rep. 209, 64 Pac. 49; State v. Elliott, 10 Kan. App. 69, 61 Pac. 981. MD.—Barnes v. State, 88 Md. 347, 41 Atl. 781. MASS.—Goodrich v. Davis, 52 Mass. (11 Metc.) 473; Chenery v. Goodrich, 98 Mass. 224. MICH.—People v. Jackman, 96 Mich. 269, 55 N. W. 809. MO.—State v. Pulitzer, 12 Mo. App. 6; State v. Boos, 66 Mo. App. 537.

§ 908. ALLEGATION AS TO PERSON DEFAMED—IN GENERAL. To constitute a criminal libel or a criminal slander, there must be some person ascertained, or ascertainable, who was defamed thereby; there being no aspersion or defamation of any particular individual, or of any class of individuals, no averment, inducement or innuendo can render the matter defamatory.[1] Hence, every indictment or information charging criminal libel, or criminal slander, must set out the name of the person "of and concerning" whom the libelous or slanderous words were written or spoken, thereby indicating clearly the person it was intended to defame,[2] but his profession or occupation,[3] and his place of residence[4] need not be given. Where the libel or slander is against two or more persons, it is not necessary to set out the names of all the persons defamed.[5] We have already seen[6] that it should be alleged that the defamatory words were written or spoken "of and concerning" the subject of the libel, or of the slander, yet it is to be observed that it has been said this is necessary in those cases, only, in which it is necessary to allege

N. Y.—Caldwell v. Raymond, 2 Abb. Pr. 193; Miller v. Maxwell, 16 Wend. 9. N. C.—State v. Neese, 4 N. C. (Term. Rep. 270) 691. R. I.—State v. Spear, 13 R. I. 324. S. C.—Davis v. Davis, 1 Nott. & McC. 290; State v. Henderson, 1 Rich. L. 179; Wilson v. Hamilton, 9 Rich. L. 382. VT.—State v. Atkins, 42 Vt. 252. ENG.—R. v. Horne, 2 Cowp. 672, 98 Eng. Repr. 1300, 20 How. St. Tr. 651; R. v. Rosswell, 2 Show. 411, 89 Eng. Repr. 1012.

1 IND.—Harvey v. Coffin, 5 Blackf. 566. KY.—Brashear v. Shepherd, 2 Ky. (Sneed, Ky. Dec.) 249. MASS.—Baldwin v. Hildreth, 80 Mass. (14 Gray) 221. MINN.—Petsch v. Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034. N. Y.—Miller v. Maxwell, 16 Wend. 9.

2 GA.—Taylor v. State, 4 Ga. 14. IND.—Kelly v. State, 24 Ind. App. 639, 57 N. E. 257. PA.—Com. v. Meeser, 1 Brewst. 492. S. C.—State v. Henderson, 1 Rich. L. 179. TENN.—State v. Brownlow, 26 Tenn. (7 Humph.) 63. TEX.—Neely v. State, 32 Tex. Cr. Rep. 370, 23 S. W. 798.

3 Com. v. Varney, 64 Mass. (10 Cush.) 402.

4 State v. Barnes, 32 Me. 530; Com. v. Varney, 64 Mass. (10 Cush.) 402.

5 State v. Heacock, 106 Iowa 191, 76 N. W. 651; R. v. Griffin, 7 Mod. 197, 87 Eng. Repr. 1186.

6 See, supra, § 907, footnote 9.

extrinsic matter or facts in order to make the libel complete;[7] but where it is required to be alleged for this purpose, the allegation must be in direct terms and not by way of innuendo.[8] In the absence of statutory provisions making it sufficient to allege generally that the publication was made or the words spoken of the person alleged to have been defamed, as in New York,[9] Utah,[10] and perhaps elsewhere, in all those cases in which the person or subject intended is referred to in an uncertain manner, or in ambiguous terms, the indictment or information must contain full and explicit averments showing the application of such ambiguous or other indefinite terms or references, and point out the particular individual or individuals meant or intended.[11] We shall see in a later section[12] that the indictment or informa-

7 IOWA—State v. Lomack, 130 Iowa 79, 106 N. W. 386. KAN.—State v. Osborn, 54 Kan. 473, 38 Pac. 752. KY.—Com. v. Duncan, 31 Ky. L. Rep. 1277, 104 S. W. 997. N. Y.—Croswell v. Weed, 25 Wend. 621.

8 MASS.—Goodrich v. Davis, 52 Mass. (11 Metc.) 473; Chenery v. Goodrich, 98 Mass. 224. MICH.—People v. Jackman, 96 Mich. 269, 55 N. W. 809. MO.—State v. Pulitzer, 12 Mo. App. 6. N. Y.—Caldwell v. Raymond, 2 Abb. Pr. 193; Miller v. Maxwell, 16 Wend. 9. N. C.—State v. Neese, 4 N. C. (Term. Rep. 270) 691. R. I.—State v. Spear, 13 R. I. 324. S. C.—Davis v. Davis, 1 Nott. & McC. 290; State v. Henderson, 1 Rich. L. 179; Wilson v. Hamilton, 9 Rich. L. 382. VT.—State v. Atkins, 42 Vt. 252. ENG.—R. v. Horne, 2 Cowp. 672, 98 Eng. Repr. 1300, 20 How. St. Ter. 651; R. v. Rosswell, 2 Show. 411, 89 Eng. Repr. 1012.

9 People v. Stokes, 30 Abb. N. C. 200, 24 N. Y. Supp. 727.

10 People v. Ritchie, 12 Utah 180, 42 Pac. 209.

Without inducement in the indictment showing the application of the libelous matter to the subject, held proper, in the case the party libeled is designated in an ambiguous manner, to admit testimony to show that the publication was understood to mean the person charged to have been defamed.—People v. Ritchie, 12 Utah 180, 42 Pac. 209. See: Russell v. Kelly, 44 Cal. 641, 13 Am. Rep. 169; Nelson v. Borchenius, 52 Ill. 236; Miller v. Butler, 60 Mass. (6 Cush.) 71, 52 Am. Dec. 768; Leonard v. Allen, 65 Mass. (11 Cush.) 241; Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628; Smart v. Blanchard, 42 N. H. 146; Smith v. Miles, 15 Vt. 245.

11 State v. Pulitzer, 12 Mo. App. 6; State v. Schmitt, 49 N. J. L. 579, 9 Atl. 774; State v. Henderson, 1 Rich. L. (S. C.) 179.

12 See, infra, § 926.

tion may charge a libel, or a slander, against a convent as a corporation, where the matter complained of relates to that convent and its inmates,[13] in one part, and against the mother superior, when it relates to that individual, in another part.[14]

§ 909. —— LIBEL OF A CLASS. A criminal action for the libel, or for the slander, of a class differs in a very material regard from a civil action for the same libel or slander. The rule in civil cases is that one of a class can not maintain a civil action against a charge of either libel or slander where the libel or slander charged against the class is so general as to designate all persons who may belong to the designated class collectively, by a single name, irrespective of geographical limitations, political divisions, place of abode, or any other similar restrictions,[1] and there is nothing in the language employed which, by proper innuendo or colloquium, can be made to apply to any particular individual of the class.[2] Thus, it has been said that if a man were to write or publish that "all lawyers are thieves," without something in addition pointing out some particular lawyer, no lawyer could maintain a civil action thereon.[3] The rule is differ-

13 As to libel or slander of a class, see, infra, § 909.

14 See State v. Hosmer, 72 Ore. 57, 142 Pac. 581.

1 See note, 23 L. R. A. (N. S.) 726.

2 ARK.—Comes v. Cruce, 85 Ark. 79, 14 Ann. Cas. 327, 107 S. W. 185. GA.—Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479, 12 S. E. 874. MASS.—Merrill v. Post Pub. Co., 197 Mass. 185, 83 N. E. 419. MICH.—Lewis v. Soule, 3 Mich. 514; McGraw v. Detroit Free Press Co., 85 Mich. 203, 48 N. W. 500; Watson v. Detroit Journal Co., 143 Mich. 430, 8 Ann. Cas. 131, 5 L. R. A. (N. S.) 480, 107 N. W. 81. MINN.—Stewart v. Wilson, 23 Minn. 449. MO.—Kenworthy v. Journal Co., 117 Mo. App. 237, 93 S. W. 882. N. H.—Palmer v. Concord (City of), 48 N. H. 211, 97 Am. Dec. 605. N. Y.—Sumner v. Buel, 12 Johns. 475; Miller v. Maxwell, 16 Wend. 9; Ryckman v. Delavan, 25 Wend. 186, reversing White v. Delavan, 17 Wend. 49; People v. Eastman 188 N. Y. 478, 11 Ann. Cas. 302, 81 N. E. 459; Hauptner v. White, 81 App. Div. 153, 80 N. Y. Supp. 895. ENG.—R. v. Alme, 3 Salk. 224, 91 Eng. Repr. 790.

3 Eastwood v. Holmes, 1 Fost. & F. 347.

ent where the language restricts the designation of a class so as to point out a particular locality.[4]

In criminal libel, or criminal slander, the rule is that a criminal proceeding may be instituted at the instance of any individual of the class defamed,[5] for, as Mr. Chief Justice Cullen remarks, in People v. Eastman,[6] the foundation of the theory upon which libel is made a crime is that by provoking passions of persons libeled, it excites them to violence and a breach of the peace, and for that reason a criminal prosecution can be maintained where no civil action would lie.[7] While this language is purely obiter,[8] it but restates the well-established principle of criminal libel. The same observation is to be

[4] See: ALA.—Chandler v. Holloway, 4 Port. 17; Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66, 55 L. R. A. 214, 30 So. 625. CAL.—Schomberg v. Walker, 132 Cal. 224, 64 Pac. 290. COLO.—Byers v. Martin, 2 Colo. 605, 25 Am. Rep. 755. KY.—Forbes v. Johnson, 50 Ky. (11 B. Mon.) 48. MASS.—Ellis v. Kimball, 33 Mass. (16 Pick.) 132. N. Y.—Gidney v. Blake, 11 Johns. 54; Weston v. Commercial Advertiser Assoc., 184 N. Y. 479, 77 N. E. 660; Woods v. Gleason, 18 App. Div. 401, 46 N. Y. Supp. 200; Maybee v. Fisk, 42 Barb. 326; Dwyer v. Fireman's Journal Co., 11 Daly 248; Ryer v. Fireman's Journal Co., 11 Daly 251; Cook v. Reif, 52 Sup. Ct. (20 Jones & S.) 302, 8 N. Y. Civ. Proc. Rep. 133; McClean v. New York Press Co., 19 N. Y. Supp. 262. UTAH—Fenstermaker v. Tribune Pub. Co., 12 Utah 439, 35 L. R. A. 611, 43 Pac. 12, 13 Utah 532, 35 L. R. A. 611, 45 Pac. 1197. WIS.—Smith v. Utley, 92 Wis. 133, 35 L. R. A. 620, 65 N. W. 744. ENG.—Foxcroft v. Lacy, 1 Hobart 89, 80 Eng. Repr. 239; Shearlock v. Beardsworth, 1 Murr. (Sch.) 196.

[5] People v. Eastman, 188 N. Y. 478, 11 Ann. Cas. 302, 81 N. E. 459, affirming 116 App. Div. 922, 101 N. Y. Supp. 1137.

[6] Id.

[7] Citing State v. Brady, 44 Kan. 435, 21 Am. St. Rep. 296, 24 Pac. 948; Palmer v. Concord (City of), 48 N. H. 211, 97 Am. Dec. 605; Sumner v. Buel, 12 Johns. (N. Y.) 475.

[8] The point involved did not embrace the general principle, which was in nowise before the court. In the case at bar the prosecuting attorney had plainly blundered by indicting the accused under a section of the New York Penal Code, which had no application to the offense charged. The accused had been indicted for an article attacking the confessional of the Roman Catholic Church, in a malicious and scurrilous manner, which was a libel against a large and respected body of Christian clergymen; but the indictment was drawn under § 317 of the New

made regarding the identical remarks of Mr. Justice Smith, in Palmer v. City of Concord,[9] in which case the libel before the court was a charge of cowardice and ill treatment of noncombatants on the part of the whole Union Army, and the judge, after saying the libel might be prosecuted criminally adds: "It is obvious that a libelous attack on a body of men, though no individuals are pointed out, may tend as much, or more, to create public disturbances as an attack on one individual; and a doubt has been suggested whether the fact of numbers defamed does not add to the enormity of the act." And the same is true of the case of Sumner v. Buel,[10] in which a majority of the court held that a civil action could not be maintained by an officer of a regiment for a publication reflecting on the officers of the regiment generally, but add: "The offender in such case, does not go without punishment. The law has provided a fit and proper remedy, by indictment; and the generality and extent of such libels make them more peculiarly public offenses."[11]

General libel upon a body of men, indictment lies, though no individuals are pointed out, because such writings and publications have a tendency to inflame and disorder society, and for that reason are within the cognizance of the criminal law.[12] Thus, it has been said to publicly charge the street-car conductors of a certain city with being pimps, and averring that they would sell the virtue of their sisters for a drink, is an indictable

York Penal Code, which prohibits and punishes "obscene and indecent prints" and has nothing whatever to do with criminal libel. The only question before the court was as to whether the indictment stated an offense under § 317, and it was held that it did not, the court saying "that it is 'indecent' from every consideration of propriety is entirely clear, but that is not the indecency condemned by this section of the code."

9 Palmer v. Concord (City of), 48 N. H. 211, 97 Am. Dec. 605.

10 Sumner v. Buel, 12 Johns. (N. Y.) 475.

11 R. v. Hector Campbell, K. B., Hil. Term. 1808, cited in Holt on Libel 249, 250.

12 Holt on Libel 237; Le Fanu v. Malcomson, 1 H. L. C. 637, 9 Eng. Repr. 910.

libel.[13] And a scandal published of three or four persons is punishable at the complaint of one or more, or all of them.[14] Where the alleged publication is against a class of persons, it need not designate the names of the persons of that class.[15] A libel on one of the class, without designating him, is a libel on the whole, and may be so described in the indictment or information;[16] because where a paper is published equally reflecting upon a number of people, it reflects upon all, and readers, according to their different opinions, may so apply it.[17]

§ 910. —— BLASPHEMOUS LIBELS. Blasphemy of the Almighty, or turning the doctrines of the Christian religion into contempt and ridicule, is indictable as a blasphemous libel at common law; such as denying God's existence or providence, and all contumelious reproaches of Jesus Christ;[1] all profane scoffing at the Holy Scriptures, or

13 Jones v. State, 38 Tex. Cr. Rep. 364, 70 Am. St. Rep. 751, 43 S. W. 78.

14 Holt on Libel 237; R. v. Benfield, 2 Burr. 980, 97 Eng. Repr. 664; Le Fanu v. Malcomson, 1 H. L. C. 637, 9 Eng. Repr. 910.

15 Jones v. State, 38 Tex. Cr. 364, 70 Am. St. Rep. 751, 43 S. W. 78.

16 R. v. Jenour, 7 Mod. 400, 87 Eng. Repr. 1318.

17 Id.

1 1 East P. C. 3; L. Hawk. P. C. ch. 5; Trem. P. C. 226; DEL.—State v. Chandler, 2 Harr. 553. MASS.—Com. v. Kneeland, 37 Mass. (20 Pick.) 206, 218. MO.—State v. Wakefield, 8 Mo. App. 11. N. Y.—People v. Ruggles, 8 Johns. 289, 5 Am. Dec. 335. PA.—Updegraph v. Com., 11 Serg. & R. 394. ENG.—R. v. Carlile, 3 Barn. & Ald. 161, 5 Eng. C. L. 101; R. v. Rollo, 1 Sayer, 158, 96 Eng. Repr. 837; Le Roy v. Sir Charles Sidley, 1 Sid. 168, 82 Eng. Repr. 1036; R. v. Hall, 1 Str. 416, 93 Eng. Repr. 606; R. v. Woolston, 2 Str. 834, 93 Eng. Repr. 881; R. v. Doyley, Tremain 225; Taylor's Case, 1 Vent. 293, 86 Eng. Repr. 189.

Denying God, Christ, and the Holy Ghost, accused was convicted of blasphemous libel, in 1835, in Com. v. Kneeland, 37 Mass. (20 Pick.) 206.

"Jesus Christ was a bastard, and his mother must be a whore," uttered in a wanton manner, with wicked and malicious disposition, held by Mr. Chief Justice Kent, in 1911, to be a public offense punishable at common law.—People v. Ruggles, 8 Johns. (N. Y.) 289, 5 Am. Rep. 335.

"Jesus Christ was a bastard, a whoremaster, and religion a cheat," held to be a blasphemous libel.—Taylor's Case, 1 Vent. 293,

exposing any part thereof to contempt and ridicule;[2] and also all seditious words in derogation of the established religion,[3]—all these being considered as offenses tending to subvert all religion and morality.[4] In this country statutes have been passed regulating the subject;[5] but where there are statutes upon the subject, the offense is still indictable at common law, in those jurisdictions where the common law is the basis of the jurisprudence, because the statutory provisions are regarded as merely cumulative.[6] The reason for the rule making such libels indictable is that the Christian religion is a part of the law of the land,[7] and therefore whatever derides Christianity derides the law, and consequently must be an offense against the law.[8]

86 Eng. Repr. 189, sub nom. R. v. Tayler, 3 Keb. 607, 621, 84 Eng. Repr. 906, 914.

Jesus Christ was spoken as an imposter, a murderer in principle, and a fanatic, it was held libelous. —R. v. Waddington, 1 Barn. & C. 26, 8 Eng. C. L. 12.

"The virgin Mary was a whore, and Jesus Christ was a bastard," held to be punishable as a blasphemous libel.—State v. Chandler, 2 Harr. (Del.) 553.

2 **"To say that religion is a cheat** is to dissolve all those obligations whereby civil society is preserved; that Christianity is part of the law of England and therefore to reproach the Christian religion is to speak in subversion of the law" (Hale C. J.).—Taylor's Case, 1 Vent. 293, 86 Eng. Repr. 189, sub nom. R. v. Tayler, 3 Keb. 607, 621, 84 Eng. Repr. 906, 914.

3 1 Hawk. P. C., ch. 5; 1 Vin. Abr. 295; Fitzg. 65; 2 Roll. Abr. 187; R. v. Read, 11 Mod. 142, 88 Eng. Repr. 593; R. v. Hall, 1 Str. 416, 93 Eng. Repr. 606; R. v. Curl, 2 Str. 788, 93 Eng. Repr. 849; R. v. Woolston, 2 Str. 834, 93 Eng. Repr. 881; Taylor's Case, 1 Vent. 293, 86 Eng. Repr. 189, sub nom. R. v. Tayler, 3 Keb. 607, 621, 84 Eng. Repr. 906, 914.

4 1 Hawk. P. C. ch. 5; Gathercole's Case, 2 Lewin 255, 287.

5 Massachusetts Colony law on the subject is found in Ancient Charters, etc., p. 58. See, also, Mass. Rev. Stats., ch. 130, § 15 (Stat. of 1782).

6 R. v. Carlisle, 3 Barn. & Ald. 161, 5 Eng. C. L. 101.

7 See among many other cases in this country Goodrich v. Goodrich, 44 Ala. 670; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. Ed. 226, 12 Sup. Ct. Rep. 511.

8 R. v. Woolston, Barnard 162, 2 Str. 834, Fitzgib. 64, 93 Eng. C. L. 881.

Freedom of religion, guaranteed by the constitution, is not violated by prosecution criminally for blasphemous libels,[9] because it does not limit free discussions on any religious topic.[10]

All the libel, or all of the conversation, need not be set out in the indictment or information charging this offense.[11]

§ 911. —— LIBEL OF THE CONSTITUTION AND LAWS OR GOVERNMENT. In the absence of any personal allusions, libels against the constitution and laws, or the government, are not found to ever have been subject of inquiry in the criminal courts. The publications upon the constitution and laws avoiding all discussions of personal rights and privileges are speculative in their nature and not calculated to generate popular heat and thus accomplish public harm; but where they are of a different description and tend to degrade and vilify the constitution, laws, government, to promote insurrection, and to circulate discontent throughout the land, it is thought that they would be considered seditious and criminal and indictable libels.[1] That is to say, any speech or writing which tends to, and is intended to, effect a total change of a system of government by subversion or demolition of existing government, is libelous; yet in all such cases the question of intention is for the jury, giving to the words complained of their application and meaning as they impress their minds.[2] Lord Holt said that a libel

9 Constitution does not permit publication of blasphemous articles.—People v. Most, 171 N. Y. 423, 16 N. Y. Cr. Rep. 555, 58 L. R. A. 509, 64 N. E. 175, affirming 71 App. Div. 160, 16 N. Y. Cr. Rep. 105, 75 N. Y. Supp. 591.

10 See Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82.

11 State v. Steele, 50 Tenn. (3 Heisk.) 135.

1 See Holt on Libel 86.

Thus, in an early case, it is held to be a libel upon the laws to say that they are contrary to the laws of God.—R. v. Lambert, 2 Campb. 398.

2 2 Roll. Abr. 78.

For other instances of conviction of libel against the Constitution and the laws, see R. v. Harrison, 3 Keb. 841, 84 Eng. Repr.

against a man is a moral offense, but that a libel against the government tends to destroy it, and that this notion of libeling is as old as the law.[3] Lord Mansfield declared that to be free is to live under a government of law; that the liberty of the press consists in printing without any license, subject to the consequences of the law; that the licentiousness of the press is Pandora's box, the source of every evil—and he doubtless would have included the "soap-box orator," had that evil flourished in his day; that miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of the law, to protect individuals and to guard the state.[4] Finally Lord Camden says that all governments must set their face against libels; that whenever they come before court and jury, they will set their faces against them; and that if juries do not prevent them, they may prove fatal to liberty, destroy government, and introduce anarchy.[5] Our own Mr. Justice Yeates has said that all libels which tend to vilify and degrade the constitution, to promote insurrection, and circulate discontent throughout the country—to asperse its justice, and in any way impair the exercise of its functions, are seditious libels, and are visited with the peculiar rigor of the law.[6]

1044, sub nom. Harrington's Case, 1 Vent. 324, 86 Eng. Repr. 210.

3 R. v. Beare, 1 Ld. Raym. 414, 418, 91 Eng. Repr. 175, 177.

4 R. v. Dean of St. Asaph, 3 T. R. 428n, 100 Eng. Repr. 657n.

5 Entick v. Carrington, 2 Wils. 275, 95 Eng. Repr. 807.

6 Respublica v. Dennie, 4 Yeates (Pa.) 267, 2 Am. Dec. 402.

"For the antiquity of this notion, see Vinnius, p. 741, by the law of the Twelve Tables. And afterwards when the Civil Law was digested into a method by the Emperor Justinian, about the year 741, in his Institutes, lib. 4, tit. De Injuriis 4, where writing of a libel is distinguished, and held to be an offense. And he said that he cited this authority because Bracton, lib. 3, tit. Coron. 135, seems to have transferred the same sentence out of Justinian. And therefore (by him) judgment ought to be given for the king."—R. v. Beare, 1 Ld. Raym. 414, 418, 91 Eng. Repr. 175, 177.

An indictment or information setting forth the time and place of the publication of the libel, together with a full but concise statement of the facts, giving that portion of the written or spoken libel upon which reliance will be had for a conviction, will be a sufficient charge of this offense.

§ 912. —— LIBEL AGAINST PRESIDENT OR GOVERNOR. It is now well settled that bare words, not relative to any act or design, however wicked, indecent and reprehensible they may be, are not in and of themselves overt acts of high treason, and can not be indicted as such, but are merely misprisions, punishable at common law by fine and imprisonment. Generally speaking, any words, acts, or writing tending to vilify or disgrace the king,[1] or to lessen him in the esteem of the people, or a denial of the rights of the rulers, even in common and unadvised discourse, are punishable at common law.[2] The common-law doctrine in this respect is greatly modified in this country by our doctrine of free speech and liberty of the press; and so long as the criticism of the ruler, or of the government, is confined to the legitimate scope of discussion and criticism, there can be no libel;[3] but where the article or the language descends to vituperation, abuse, denunciation of the ruler as a man, impugning his motives and his principles; or a denunciation of the constitution, the laws and the form of government, and calling for its destruction and the erection of another and a different form—it is plainly seditious libel and can be indicted as such in any state in the Union.[4]

1 Thus, it has been said that to publish of the king,—and the same might be true to publish of the president or a governor,—that he is laboring under a mental derangement is a libel, because it tends to unsettle and agitate the public mind and to lower the respect due to the ruler.—R. v. Harvey, 2 Barn. & C. 257, 9 Eng. C. L. 119.

2 2 Bl. Com. *123.

3 The rule in this country since the case of Respublica v. Dennie, 4 Yeates (Pa.) 267, 2 Am. Dec. 402, decided in 1805.

4 Respublica v. Dennie, supra.

An indictment or information charging this offense, drawn in the same manner as indicated in the preceding section, will be sufficient.

§ 913. —— LIBEL AGAINST A PUBLIC OFFICER AND THE ADMINISTRATION OF JUSTICE. A libel against a public officer, charging misconduct in office is punishable the same as a criminal libel against a private individual, the indictment or information being varied to meet the different facts and modifications of the allegation as to criminal intent,[1] setting out the official character of the officer.[2] As nothing tends more to the disturbance of the public weal than aspersions upon the administration of justice, contemptuous and scandalous articles and speeches reflecting upon the judges and judicial procedure and impugning generally, and denying, the probity of jurors, and scandalous reflections upon judicial proceedings, have always been considered highly criminal offenses, one of the earliest cases of libel having been for an offense of this kind;[3] but in this country such offenses are frequently dealt with as contempts of court.[4]

Indictment or information charging the publication in the newspaper of accused of an article charging a public officer with such acts of misconduct in office that, if true, would render him unfit to occupy his office, and would bring him into public scandal and disgrace, charges a criminal libel.[5]

§ 914. —— LIBEL AGAINST FOREIGN OFFICER AND DISTINGUISHED FOREIGNERS. Malicious and scurrilous reflections upon those who are possessed of office, rank and influence

1 R. v. White, 1 Camp. 359; R. v. Watson, 2 T. R. 199, 100 Eng. Repr. 108; see, also, Ex parte Barry, 85 Cal. 603, 20 Am. St. Rep. 248, 25 Pac. 256; Richardson v. State, 66 Md. 205, 7 Atl. 43; People v. Cornell, 126 App. Div. (N. Y.) 151, 22 N. Y. Cr. Rep. 520, 110 N. Y. Supp. 648; State v. Lyon, 89 N. C. 568.

2 R. v. Hatfield, 4 Car. & P. 244, 19 Eng. C. L. 497.

3 Bac. Abr., tit. Libel (A) 2.

4 See Ex parte Barry, 85 Cal. 603, 20 Am. St. Rep. 248, 25 Pac. 256.

5 Nicholson v. State, 24 Wyo. 347, 157 Pac. 1013.

in foreign states may tend to involve the country in disputes and warfare, and for this reason it has always been held that publications tending to degrade officers of foreign countries, or persons in considerable situations of power and dignity in foreign countries, may be indicted as libels.[1] An indictment charging a libel of an officer of a foreign government should be drawn in a manner similar to that for the libel of a private individual, varied to meet the different facts and different modifications of criminal intent, to which may be added such matters as are deemed best regarding the friendly governmental relations existing between this country and the foreign country involved, and the tendency of the libel to breed discord.[2]

§ 915. AVERMENT AS TO FALSITY, INTENT, AND MALICE. An indictment or information charging criminal libel, or criminal slander, usually alleges the falsity thereof, the intent to injure, and malice on the part of the accused. However, knowledge of falsity need not be alleged,[1] or falsity itself,[2] even, according to some cases,

1 R. v. D'Eon, 1 Bl. Rep. 510, 96 Eng. Repr. 295; R. v. Lord George Gordon (Lord Byron) 1787 (a libelous publication concerning the French Ambassador and the French Chargé d'Affaires); R. v. Vincent, 1801 (an information for an alleged libel upon the Emperor of Russia); R. v. Peltier, 1803, Holt on Libel 78, Stark. on Libel 218 (an information for libel on Napoleon Bonaparte).

2 Com. v. Buckingham, 2 Wheel. Cr. Cas. 181; R. v. Peltier, 28 How. St. Tr. 529.

1 State v. Roberts, 2 Marv. (Del.) 450, 43 Atl. 252.

The accused then and there well knowing the said scandalous and malicious libel to be false, seems to be an averment that is not necessary.—State v. Barnes, 32 Me. 530; Hunt v. Bennett, 19 N. Y. 173.

2 State v. Fosburg, 32 S. D. 370, Ann. Cas. 1916A, 424, 143 N. W. 279 (under Penal Code, § 318).

Where the statute provides that in all prosecutions for libel the truth may be given in evidence, the indictment or information need not allege, and the prosecution need not prove, the falsity of the libel.—State v. Fosburgh, 32 S. D. 370, Ann. Cas. 1916A, 424, 143 N. W. 279.

Failure to allege specifically in the terms of the statute, that the words were "falsely spoken," will not vitiate an indictment or in-

it being sufficient to charge express malice.[3] Where the indictment or information charges the alleged defamatory matter to be false it is sufficient, as against a demurrer, and need not aver that if true the matter was not published with good motive or justifiable end.[4] There must be an averment as to the intent of the accused to injure, according to some cases,[5] while this is said in other cases to be unnecessary,[6]—depending on the provisions of the particular statute under which prosecution is had, and the language in which the offense is defined therein;[7] and under some statutes it is held that it must be alleged that the act complained of was "wil-

formation, where it is so stated in substance.—State v. Matheis, 44 Mo. App. 294.

That each statement in a libel is false, malicious and defamatory need not be alleged, where this fact is alleged of the whole libel. —Robinson v. State, 108 Md. 644, 71 Atl. 433.

3 **It is sufficient to charge express malice** without alleging that the publication was false.—State v. Sefrit, 82 Wash. 520, 144 Pac. 725.

Where the libelous publication is set out in full and it is alleged to be "false, scandalous, malicious, and defamatory," a specific assertion of the falsity of each statement is unnecessary.—Robinson v. State, 108 Md. 644, 71 Atl. 433.

Under Texas statute there need be no allegation that the acts were libelous nor that they were wickedly committed.—Baldwin v. State, 39 Tex. Cr. 245, 45 S. W. 714.

4 State v. Elder, 19 N. M. 393, 143 Pac. 482.

5 State v. Fosburg, 32 S. D. 370, Ann. Cas. 1916A, 424, 143 S. W. 279 (it need not be in the language of the statute but other words of the same meaning may be used).

Publication to defamed party, only, allegation must be of intent to provoke a breach of the peace. See, infra, § 916.

6 State v. Hosmer, 72 Ore. 57, 142 Pac. 581.

7 An indictment under a statute making it an offense to verbally accuse another of a crime punishable by law with the intent to extort money, must allege the acts which the party was accused of having done, and that it was done maliciously and with intent to injure, and it is not sufficient to allege that the act was a crime punishable by law.—Mann v. State, 47 Ohio St. 556, 11 L. R. A. 656, 26 N. E. 226. See, also, in this connection, Whiting v. State, 48 Ohio St. 234, 27 N. E. 96; Du Brul v. State, 80 Ohio St. 61, 87 N. E. 837; Smith v. State, 1 Ohio C. C. N. S., 25 Ohio C. C. 27; State v. Ice Delivery Co., 5 Ohio N. P. N. S. 109, 17 Ohio S. & C. P. Dec. 531.

fully" done.[8] The general rule is that the indictment or information should allege that the act complained of was false and malicious, or state facts showing falsity and malice,[9] although there are cases holding that malice need not be charged.[10] Thus, it has been said that an indictment for defamatory libel, which omitted to allege that the libel was published maliciously was nevertheless good, inasmuch as upon proof of the publication of the libel, the legal inference, until rebutted by the accused, was that it was published maliciously, and the allegation that the publication was malicious was not, for that reason, a necessary averment.[11]

§ 916. AVERMENT AS TO INTENT TO PROVOKE BREACH OF THE PEACE. In those cases in which the publication of the libel, or the utterance of the words complained of, is to the party defamed, only, the indictment or information must allege that the matter was written or printed, or that the words were spoken, with an intent to provoke a breach of the peace.[1] But under a statute[2] providing

8 **Malicious publication** alleged sufficient under statute prohibiting "wilful publication." — State v. Robbins, 66 Me. 324.

Omission fatal, held in State v. Berry, 112 Me. 501, 92 Atl. 619.

9 State v. Roberts, 2 Marv. (Del.) 450, 43 Atl. 252; State v. Conable, 81 Iowa 60, 46 N. W. 759; State v. Robbins, 66 Me. 324; State v. Armstrong, 106 Mo. 395, 27 **Am. St. Rep.** 361, 13 **L. R. A.** 419, 16 S. W. 604; State v. Matheis, 44 Mo. App. 294.

10 Com. v. Blanding, 20 Mass. (3 Pick.) 304, 15 **Am. Dec.** 214; State v. Hosmer, 72 Ore. 57, 142 Pac. 581; R. v. Munslow, 18 Cox C. C. 112, 10 **Am. Cr. Rep.** 480 (that will be necessarily inferred from proof of other alleged facts).

An information for abusive publication, under Com. Gen. St. 1902, § 1284, need not show the occasion did not give the accused right to comment, but, if it does, must show malice.—State v. Pape, 90 Conn. 98, 96 Atl. 313.

11 R. v. Munslow, 18 Cox C. C. 112, 10 **Am. Cr. Rep.** 480.

1 MO.—State v. Armstrong, 106 Mo. 395, 27 **Am. St. Rep.** 361, 13 **L. R. A.** 419, 16 S. W. 604. PA.—Com. v. Wolfinger, 16 Pa. Co. Ct. Rep. 257. S. C.—State v. Syphrett, 27 S. C. 29, 13 **Am. St. Rep.** 616, 2 S. E. 624. TENN.—Hodges v. State, 24 Tenn. (5 Humph.) 112. VT.—Wilcox v. Moon, 64 Vt. 450, 33 **Am. St. Rep.** 936, 15 **L. R. A.** 760, 24 Atl. 244. ENG.—R. v. Wegener, 2 Stark. 245, 3 Eng. C. L. 395; R. v. Adams, 16 Cox C. C. 544.

2 **As Arizona Penal Code**, 1901, § 221.

that every person who wilfully, and with malicious intent to injure another, publishes, or procures to be published, any libel, shall be punished as designated, the criminal intent with which the libel is published must be the intent to injure another, and not to provoke a breach of the peace or crime, and for that reason, under such statute, the indictment or information need not allege an intent to provoke a breach of the peace.[3]

§ 917. AVERMENT AS TO PUBLICATION—IN GENERAL. An indictment or information charging criminal libel, or criminal slander, must allege the publication of the defamatory matter, whether written or printed, or oral,[1] or set out facts showing that it was exposed, where written or printed, by the accused, so that it might have been seen and read by others.[2] It is sufficient to allege that a libel was published by the accused,[3] without alleging that he wrote it;[4] and it has been said that it is not necessary to allege that it was circulated, or that it was read or seen by a third person.[5] Where an oral slander is charged, the indictment or information must allege that the words were spoken in the presence of some per-

[3] Gardner v. State, 15 Ariz. 403, 139 Pac. 474.

[1] GA.—Taylor v. State, 4 Ga. 14. ME.—State v. Barnes, 32 Me. 530. MO.—State v. Matheis, 44 Mo. App. 294. N. J.—Haase v. State, 53 N. J. L. 34, 20 Atl. 751. N. Y.—People v. Stark, 136 N. Y. 538, 10 N. Y. Cr. Rep. 289, 32 N. E. 1046, affirming 59 Hun 51, 12 N. Y. Supp. 688. WIS.—Barnum v. State, 92 Wis. 586, 66 N. W. 617. ENG.—R. v. Brereton, 8 Mod. 328, 88 Eng. Repr. 235.

[2] Giles v. State, 6 Ga. 276; Haase v. State, 53 N. J. L. 34, 20 Atl. 751; Mankins v. State, 41 Tex. Cr. Rep. 662, 57 S. W. 590.

Writing letter and giving to third person to mail as a "publication."—See footnote 5, this section.

[3] Taylor v. State, 4 Ga. 17; State v. Elder, 19 N. M. 393, 143 Pac. 482; R. v. Hunt, 2 Camph. 583.

[4] Taylor v. State, 4 Ga. 17; R. v. Hunt, 2 Camph. 583.

[5] State v. Elder, 19 N. M. 393, 143 Pac. 482.

An information alleging that defendant wrote a letter defaming a woman and gave it to her son to give to her husband sufficiently charges a publication to the husband without further alleging that the letter reached him or was seen by him.—State v. Lund, 80 Kan. 240, 101 Pac. 1000.

son[6] or persons, giving the name or names,[7] where known to the grand jury; and where the alleged slanderous words are charged to have been spoken in a foreign language, it must be specifically alleged that the hearers were acquainted with such foreign language and understood the words charged to have been spoken.[8]

§ 918. —— MODE OF EXPRESSION. Libels upon individuals being malicious defamations, they may be expressed in any manner tending either to blacken the memory of one who is dead or the reputation of one who is living, thereby exposing the person to public hatred, contempt and ridicule.[1] Such a libel may be expressed by asking questions as well as by direct allegation; for a man may insinuate a fact by asking a question, meaning thereby to assert it to be the truth, and this will be the same thing, in legal effect, as if he had asserted it in direct terms.[2] So also may a libel be as well by descriptions and circumstances as if expressed in terms, and scandal conveyed by way of allegory or irony amounts to libel;[3] that is to say, a writing in a taunting manner, reckoning up several acts of public charity done by the person alluded to, and adding, "you will not play the Jew nor the hypocrite," and then proceeding, in a strain of ridicule, to insinuate that what the person did was owing to his

[6] Charging the false imputation of want of chastity it is unnecessary to allege that it was made in the hearing or presence of more than one person, or that it was repeated to a third person.—Stutts v. State, 52 Fla. 110, 42 So. 51.

[7] Burham v. State, 37 Fla. 327, 20 So. 548; State v. Matheis, 44 Mo. App. 294; MacMahan v. State, 13 Tex. App. 220; Wiseman v. State, 14 Tex. App. 74.

[8] State v. Matheis, 44 Mo. App. 294; Haase v. State, 53 N. J. L. 34, 20 Atl. 751.

[1] 1 Hawk. P. C., ch. 73, §§ 1-7; Com. v. Clapp, 4 Mass. 163, 3 Am. Dec. 212; Com. v. Kneeland, 37 Mass. (20 Pick.) 206; People v. Crosswell, 3 Johns. Cas. (N. Y.) 337, 3 Wheel. Cr. Cas. 330; State v. Cooper, 2 Den. (N. Y.) 293; Sharff v. Com., 2 Binn. (Pa.) 214.

[2] Alderson B. in Gathercole's Case, 2 Lewin 255.

[3] 1 Hawk. P. C., ch. 73, § 4; Bac. Abr., tit. Libel (A) 3.

vainglory, is libelous,[4] because the slanderous words expressed in this, or any other manner, must be understood by the court and jurors in the same sense in which the rest of mankind would ordinarily understand them.[5] A publication in hieroglyphics or rebus or anagram, which are still more difficult to understand than an allegory, may be a libel, and the court, notwithstanding its obscurity and perplexity, will be allowed to judge its meaning as well as other persons.[6] A defamatory writing expressing only one or two letters of the person's name in such a manner that, from what goes before and what follows after, it must needs be understood to signify a particular person, in the plain, obvious and natural construction of the whole, and would be nonsense if strained to any other meaning, is as palpably a libel as if it had set out the full name; because it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions, and it is a ridiculous absurdity to say that a writing, which is understood by every one of the meanest capacity, can not possibly be understood by a judge or a jury.[7] Fictitious names and disguises in a libel will be regarded by the court in the sense that they are generally understood by the public.[8] Finally, a man may be as successfully exposed by caricature-painting as by any written misrepresentation, and the object of the person accused may be as clearly manifest in the latter case as in the former by reflecting upon the person defamed,—e. g., where he is painted in a disgraceful situation.[9]

4 1 Hawk. P. C., ch. 73, § 4; 1 Russ. on Crimes, (9th ed.) 322.

5 Harrison v. Findley, 23 Ind. 265, 85 Am. Dec. 456; State v. Chance, 1 Miss. (Walk.) 384; R. v. Lambert, 2 Campb. 398, 403, 11 Rev. Rep. 748, 751; Woolnoth v. Meadows, 5 East 463, 7 Rev. Rep. 742, 102 Eng. Repr. 1148.

6 Holt on Libel, 235.

7 1 Hawk. P. C., ch. 73, § 5; Bacon's Abr., tit. Libel (A) 3.

See Du Bost v. Beresford, 2 Campb. 512, 11 Rev. Rep. 782.

8 State v. Chance, 1 Miss. (Walk.) 384. See, also, footnote 5, this section.

9 Anonymous, 11 Mod. 99, 88 Eng. Repr. 921.

§ 919. —— MODE OF PUBLICATION. It has been said that an indictment or information charging a criminal libel should set out the mode of publication,[1] but a contrary doctrine seems to be the general rule,[2] the general holding being that charging accused did unlawfully and maliciously write and publish of and concerning a person named, and of and concerning the subject-matter fully set out, a false, scandalous and malicious libel, is sufficient, without adding the form of the libel; that is to say, it is not necessary to add that it was "in the form of a book," "in the form of a hand-bill," "in the form of a letter," and the like.[3] Where the statute makes it a felony to engage in editing, publishing or distributing a paper mainly devoted to the publication of scandal and immoral conduct, an indictment or information charging that the accused, on a day named, engaged in disseminating and selling a named newspaper, and alleging that it was devoted mainly to the publication of scandals, assignations and immoral conduct, is sufficient without setting forth the contents of the paper, its date, to whom sold, and the like.[4] Where it is alleged that the accused wrote a libel to a person and sent it to him, without making it known to a third person,[5] this is a sufficient allegation as to the mode of publication, in which case the indictment or information is required to allege an

1 See People v. Stark, 136 N. Y. 538, 10 N. Y. Cr. Rep. 289, 32 N. E. 1046, affirming 59 Hun 51, 12 N. Y. Supp. 688.

2 State v. Dowd, 39 Kan. 412, 18 Pac. 483; Rattray v. State, 61 Miss. 377; Haase v. State, 53 N. J. L. 34, 20 Atl. 751; Baldwin v. State, 39 Tex. Cr. Rep. 245, 45 S. W. 714.

3 CAL.—In re Kowalsky, 73 Cal. 120, 14 Pac. 399. ILL.—Crowe v. People, 92 Ill. 231. KAN.—State v. Dowd, 39 Kan. 412, 18 Pac. 483. MISS.—Rattray v. State, 61 Miss. 377. N. Y.—People v. Stark, 136 N. Y. 538, 10 N. Y. Cr. Rep. 289, 32 N. E. 1046, affirming 59 Hun 51, 12 N. Y. Supp. 688. N. C.—State v. McIntosh, 92 N. C. 794.

4 State v. Van Wye, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938.

5 State v. Lund, 80 Kan. 240, 101 Pac. 1000. See, also, supra, § 917, footnote 5.

intention to provoke a breach of the peace, under some statutes,[6] and not under others.[7]

§ 920. —— TIME AND PLACE OF PUBLICATION. An indictment or information charging criminal libel, or criminal slander, usually sets out the time and place of publication, though both the time of publication and the place of publication are immaterial,[1] although there are cases to the contrary,[2] the prosecution being required to prove, only, a publication (1) within the jurisdiction of the court, (2) within the period of the statute of limitations,[3] and (3) that the publication took place, or the words were spoken, before the finding of the indictment or the presentation of the information;[4] and it seems that a future or an impossible date alleged will not vitiate the indictment or information.[5] Time alleged with a continuando has been held proper in some cases,[6] and improper in others,[7] and it is thought to be improper for the reason that publications on different dates, or slanderous words spoken on different occasions, constitute

6 See, supra, § 916, footnote 1.

7 See, supra, § 916, footnote 3.

1 See: CAL.—Norris v. Elliott, 39 Cal. 72. ILL.—Hosley v. Brooks, 20 Ill. 115, 71 Am. Dec. 252. IND.—Shigley v. Snyder, 45 Ind. 543; Smith v. Smith, 76 Ind. 356; Hollowell v. Guntle, 82 Ind. 554. MO.—Martin v. Miller, 3 Mo. 135; Burbank v. Horn, 39 Me. 233. N. Y.—McKinly v. Rob, 20 Johns. 351; Potter v. Thompson, 22 Barb. 87; Gardinier v. Knox, 27 Hun 500. ORE.—Quigley v. McKee, 12 Ore. 22, 5 Pac. 347. WIS.—Brueshaber v. Hertling, 78 Wis. 498, 47 N. W. 725. ENG.—Jeffries v. Duncombe, 11 East 226.

2 Failure to allege time of publication of a libel was held to render the pleadings bad on demurrer in Gray v. Sidelinger, 72 Me. 114.

"On or about" held to render an allegation as to time indefinite and uncertain and to make the indictment bad on demurrer.—Cole v. Babcock, 78 Me. 41, 2 Atl. 545.

3 Com. v. Varney, 64 Mass. (10 Cush.) 324.

4 See Quigley v. McKee, 12 Ore. 22, 5 Pac. 347.

5 Conrand v. State, 65 Ark. 559, 47 S. W. 628 (a future and therefore impossible date, it being a mere clerical error).

6 Burbank v. Horn, 39 Me. 233.

7 Cummins v. Butler, 3 Blackf. (Ind.) 190; Swinney v. Nave, 22 Ind. 178; Gray v. Nellis, 6 How. Pr. (N. Y.) 290.

two different offenses;[8] but it has been said that the continuando clause will not be ground for special demurrer to the indictment or information, for the reason that the clause may be treated as surplusage.[9] Place also being immaterial, where laid in the indictment or information, the proof may show that the publication actually took place elsewhere.[10]

§ 921. SETTING FORTH DEFAMATORY MATTER—IN GENERAL. An indictment or information alleging libelous matter should set it out in hæc verba,[1] a mere statement as to the meaning and effect of the words being insufficient,[2]

8 Gray v. Nellis, 6 How. Pr. (N. Y.) 290.

9 Cummins v. Butler, 3 Blackf. (Ind.) 190.

10 Owen v. McKean, 14 Ill. 459; Cassem v. Galvin, 53 Ill. App. 419; Jeffries v. Duncombe, 11 East 226.

1 ARK.—Morris v. State, 109 Ark. 530, Ann. Cas. 1915C, 925, 160 S. W. 387. IDA.—Bonney v. State, 3 Ida. 288, 29 Pac. 185. LA.—State v. Bildstein, 44 La. Ann. 778. MASS.—Com. v. Wright, 55 Mass. (1 Cush.) 46; Com. v. Tarbox, 55 Mass. (1 Cush.) 66. N. C.—State v. Townsend, 86 N. C. 676. PA.—Com. v. Sweeney, 10 Serg. & R. 173. S. C.—State v. Goodman, 6 Rich. L. 387, 60 Am. Dec. 132. TENN.—State v. Brownlow, 26 Tenn. (7 Humph.) 63. TEX.—Coulson v. State, 16 Tex. App. 189; Rogers v. State, 30 Tex. App. 462, 17 S. W. 548.

Pasting or attaching original libelous publication to the indictment, and making it a part thereof, is sufficient.—State v. Bildstein, 44 La. Ann. 778, 11 So. 37; State v. Armstrong, 106 Mo. 395, 27 Am. St. Rep. 361, 13 L. R. A. 419, 16 S. W. 604.

The libelous matter clipped from the newspaper in which published may be pasted into the indictment.—State v. Bildstein, 44 La. Ann. 778.

But it seems that to simply set out the original printed paper without the necessary preliminary declaration that it is an exact copy, is not a sufficient indication that the paper is set out in the very words.—Com. v. Tarbox, 55 Mass. (1 Cush.) 66.

2 ARK.—Morris v. State, 109 Ark. 530, Ann. Cas. 1915C, 925, 160 S. W. 387. IDA.—Bonney v. State, 3 Ida. 288, 29 Pac. 185. MASS.—Com. v. Holmes, 17 Mass. 336; Com. v. Wright, 55 Mass. (1 Cush.) 46; Com. v. Buckingham, Thach. Cr. Cas. 29. MO.—State v. Armstrong, 106 Mo. 395, 27 Am. St. Rep. 361, 13 L. R. A. 419, 16 S. W. 604; State v. Marlier, 46 Mo. App. 233. N. C.—State v. Townsend, 86 N. C. 676. PA.—Com. v. Sweeney, 10 Serg. & R. 173. S. C.—State v. Walsh, 2 McC. L. 248 TENN.—State v. Brownlow, 26 Tenn. (7 Humph.) 63. TEX.—Hammers v. State, 13 Tex. App. 344; Wiseman v. State, 14 Tex.

and the indictment or information must profess, on its face, to set out the exact words of the defamation complained of.[3] It has been said that averring that the defamatory matter is to "the following purport and effect, that is to say,"[4] and then setting out in quotations what the evidence shows to be an exact copy of the libel, is insufficient, and that a conviction thereunder can not be sustained.[5] The tenor of a libel, in contradistinction to its substance, must be averred, and in the introductory part thereto, as above stated, it must be distinctly alleged to be so.[6] However, the indictment or information need not set out the entire article in which the libelous matter was contained,[7] but only such portions of it as the prosecution intends to rely upon at the trial.[8]

App. 74; Conlee v. State, 14 Tex. App. 222; Coulson v. State, 16 Tex. App. 189; Pederson v. State, 21 Tex. App. 485, 1 S. W. 521; Rogers v. State, 30 Tex. App. 462, 17 S. W. 548. ENG.—R. v. Bear, 1 Salk. 417, 91 Eng. Repr. 363.

Prosecutor's conclusion as to the meaning and effect of the words can not be set out. He must set out the language used, and enough must be set out to constitute the offense.—Morris v. State, 109 Ark. 530, Ann. Cas. 1915C, 925, 160 S. W. 387.

3 Com. v. Wright, 55 Mass. (1 Cush.) 46; State v. Goodman, 6 Rich. L. (S. C.) 387, 60 Am. Dec. 132; State v. Brownlow, 26 Tenn. (7 Humph.) 63.

4 An information setting forth the libelous matter in hæc verba prefaced with the words, "that is to say," is good, upon demurrer.—Bonney v. State, 3 Ida. 288, 29 Pac. 185.

5 State v. Goodman, 6 Rich. L. (S. C.) 387, 60 Am. Dec. 132.

6 ILL.—Clay v. People, 86 Ill. 147; McNair v. People, 89 Ill. 441. MD.—Winter v. Donovan, 8 Gill. 370. MASS.—Com. v. Wright, 55 Mass. (1 Cush.) 46; Com. v. Tarbox, 55 Mass. (1 Cush.) 66. N. C.—Whitaker v. Freeman, 12 N. C. (1 Dev. L.) 271; State v. Townsend, 86 N. C. 676. PA.—Com. v. Sweney, 10 Serg. & R. 173. S. C.—Bagley v. Johnston, 4 Rich. L. 22; State v. Goodman, 6 Rich. L. 387, 60 Am. Dec. 132. TENN.—State v. Brownlow, 26 Tenn. (7 Humph.) 63. TEX.—Coulson v. State, 16 Tex. App. 189. ENG.—Wright v. Clements, 3 Barn. & Ald. 503, 5 Eng. C. L. 292; R. v. Beare, 1 Ld. Raym. 414, 91 Eng. Repr. 1175; Wood v. Brown, 6 Taunt. 169, 1 Eng. C. L. 560, 16 Rev. Rep. 597, 128 Eng. Repr. 998.

7 Brooke v. State, 154 Ala. 53, 45 So. 622; State v. Barnes, 32 Me. 530; State v. Elder, 19 N. M. 393, 143 Pac. 482.

8 ALA.—Weir v. Hoss, 6 Ala. 881; Brooke v. State, 154 Ala. 53 45 So. 622. IND.—McCombs v. Tuttle, 5 Blackf. 431. ME.—State

Thus, such recital may omit the date and signature to the libel,[9] but any omission which varies the sense of the part of the libel relied upon will be fatal;[10] and in those cases in which a part, only, is given, that part must be correctly recited.[11] If the part set out does not constitute a libel, it will be insufficient and can not be cured by reference to the parts not set out.[12] "Of the tenor following," or if only a portion of the libelous publication is to be given, "one part whereof is of the tenor following," setting out the words with the needful innuendoes; and "another part whereof is of the tenor following," and so on, setting out the subject-matter complained of accurately, and explaining it by innuendoes when necessary, will be sufficient.[13] In those cases in which the matter set forth in the indictment or information contains two propositions, one of which is libelous and the other is not, the libelous proposition may be sub-

v. Barnes, 32 Me. 530. N. M.—State v. Elder, 19 N. M. 393, 143 Pac. 482. ENG.—Rutherford v. Evans, 4 Car. & P. 74, 19 Eng. C. L. 414; R. v. Bear, 2 Salk. 417, 91 Eng. Repr. 363.

9 Morehead v. Jones, 41 Ky. (2 B. Mon.) 210, 36 Am. Dec. 600; State v. Barnes, 32 Me. 530; Com. v. Harmon, 68 Mass. (2 Gray) 289; R. v. Lambert, 2 Campb. 398, 11 Rev. Rep. 748.

Thus, where the indictment or information charges the accused with selling and disseminating a certain named paper devoted mainly to the publication of scandal, assignations, and immoral conduct, it need not set out the contents of the paper, its date or to whom it was sold.—State v. Van Wye, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. E. 938.

10 Cartwright v. Wright, 5 Barn. & Ald. 615, 7 Eng. C. L. 336; Bell v. Byrne, 13 East 554, 12 Rev. Rep. 433.

11 Wright v. Clements, 3 Barn. & Ald. 503, 5 Eng. C. L. 292; Cartwright v. Wright, 5 Barn. & Ald. 615, 7 Eng. C. L. 336; Tabart v. Tipper, 1 Campb. 350, 10 Rev. Rep. 698.

Misuse or omission of a letter, which does not affect a word by changing it to a different one, will not be fatal to the sufficiency of the recital.—State v. Townsend, 86 N. C. 676.

12 See Miller v. State, 81 Ark. 359, 99 S. W. 533; Com. v. Snelling, Thach. Cr. Cas. (Mass.) 318.

13 ALA.—Lawson v. Hicks, 38 Ala. 279, 81 Am. Dec. 49; Reed v. State, 53 Ala. 402, 25 Am. Rep. 627. MD.—Robinson v. State, 108 Md. 644, 71 Atl. 433. MASS.—Com. v. Morgan, 107 Mass. 199. MICH.—People v. Jackman, 96 Mich. 269, 55 N. W. 809; People

mitted to the jury, with proper instructions to ignore or disregard the other proposition.[14]

§ 922. —— EXCEPTIONS TO THE GENERAL RULE. There are some well-established exceptions to the general rule set out in the preceding section, when the charge is in relation to (1) obscene matter, (2) obscene pictures, or (3) hanging in effigy.

Obscene matter is not required to be set out.[1] Hence, in this country, where the indictment or information charges an obscene libel, and the subject-matter is too indecent to be spread upon the record of the court, it may be described in a general way, together with an averment of the too great obscenity of its words to permit of its being set out, and this will be sufficient, but the averment as to the obscenity as an excuse for its omission is essential.[2] In England a different rule prevails, requiring the words to be set out regardless of their obscenity.[3]

v. Parsons, 163 Mich. 329, 128 N. W. 225. ENG.—Tabart v. Tipper, 1 Campb. 350, 353, 10 Rev. Rep. 698; R. v. Yates, 12 Cox C. C. 233, 4 Moak Eng. Rep. 523; R. v. Horne, 1 Cowp. 672, 98 Eng. Repr. 1300, 20 How. St. Tr. 651; Lake v. R., 1 Saund. (Williams' ed.) 120, 85 Eng. Repr. 128; R. v. Munslow [1895], 1 Q. B. 758.

14 Squires v. State, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147.

1 Reyes v. State, 34 Fla. 181.

Where the actual language used is so indecent and obscene as to be unfit to preserve in the records the facts may be so stated as an excuse for not setting it out.—McNair v. People, 88 Ill. 441; Com. v. Holmes, 17 Mass. 336; Com. v. Tarbox, 55 Mass. (1 Cush.) 66; People v. Girardin, 1 Mich. 90.

2 ILL. — McNair v. People, 89 Ill. 441; Fuller v. People, 92 Ill. 182. MASS.—Com. v. Holmes, 17 Mass. 336; Com. v. Tarbox, 55 Mass. (1 Cush.) 66. MICH.—People v. Jirardin, 1 Mich. 90. MO.—State v. Hayward, 83 Mo. 299. N. Y. — People v. Hollenbeck, 2 Abb. N. C. 66, 52 How. Pr. 502. R. I.—State v. Smith, 17 R. I. 371. TENN.—State v. Pennington, 73 Tenn. (5 Lea) 506; State v. Smith, 75 Tenn. (7 Lea) 249. TEX.—State v. Hanson, 23 Tex. 232. VT.—State v. Brown, 27 Vt. 619. FED.—Bates v. United States, 11 Biss. 70, 10 Fed. 92; United States v. Watson, 17 Fed. 145; United States v. Clarke, 40 Fed. 325.

3 Bradlaugh v. R., 3 Q. B. Div. 607, reversing 2 Q. B. Div. 569, 21 Moak's Eng. Repr. 269.

Obscene picture charged as libelous, the indictment or information is required to describe it merely in its tenor,[4] and any description which is reasonably definite and identifying, will be sufficient, without descending into indecent details;[5]—e. g., "a certain lewd, wicked, scandalous, infamous and obscene painting, representing a man in obscene, impudent and indecent posture with a woman," is sufficient.[6] But any description given of a picture will be binding upon the prosecution, and where the indictment or information alleges "naked girls," it will not be supported by evidence of a picture of girls naked to the waist, only.[7]

Hanging in effigy being charged as a criminal libel,[8] an indictment or information which simply describes the act complained of will be sufficient, there being no tenor.[9]

§ 923. —— LIBEL IN FOREIGN LANGUAGE. Where an indictment or information charging a libel or slander alleges the words to have been in a foreign language, it must set forth the tenor by giving an exact copy of the original together with an English translation thereof,[1]

4 See Bradlaugh v. R., 3 Q. B. Div. 607.

5 Baker v. Com., 19 Pa. St. 412.

6 Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; Dugdale v. R., 1 El. & Bl. 435, 16 Eng. L. & Eq. 380, 118 Eng. Repr. 499; R. v. Carlile, 1 Cox C. C. 229.

7 Collins v. People, 115 Ill. App. 280; Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652; State v. Powers, 24 N. C. (2 Ired. L.) 5.

8 Hanging in effigy with intent to make the person an object of ridicule, is a criminel libel.—2 Chit. Cr. Law 866; 1 Hawk P. C., ch. 73, § 2.

9 Archb. Crim. Pl. & Ev. (19th ed.) 923.

1 IND.—Hickley v. Grosjean, 6 Blackf. 351. IOWA—Kien v. Rough, 1 Iowa 482. MO.—State v. Marlier, 46 Mo. App. 233. TEX.—Stichtd v. State, 25 Tex. App. 420, 8 Am. St. Rep. 444, 8 S. W. 477. WASH.—State v. Takeuchi, 80 Wash. 556, 141 Pac. 1145. ENG.—R. v. Goldstein, 3 Brod. & B. 201, 7 Eng. C. L. 411; Zenobio v. Axtell, 6 T. R. 162, 101 Eng. Repr. 489; R. v. Peltier, 28 How. St. Tr. 529.

"But by a proper translation, or a correct translation, is not meant that every word in the original must be susceptible of but one meaning in English, and that meaning conveyed by a particular word."—State v. Takeuchi, 80 Wash. 556, 141 Pac. 1145.

although a different rule prevails in Louisiana as to libel;[2] setting out the original without a translation, is not sufficient,[3] and setting out a translation without the original, is not sufficient at common law,[4] although in California[5] and Louisiana[6] a translation without the original has been held to be sufficient. Where the original printed or written libel, or the words spoken, are set out in the indictment together with an English translation thereof, the sufficiency of the indictment is to be measured by the translation, and if it fails to show the words to be libelous or slanderous, the indictment will be insufficient, even though the original words were libelous or slanderous.[7] An oral slander charged to have been uttered in English can not be proved to have been uttered in German, or any other foreign language, notwithstanding the fact that the words, when interpreted, mean exactly the same as the slanderous ones set forth in the indictment or information.[8]

§ 924. Innuendo. An innuendo is distinct from inducement and colloquium, already referred to.[1] Its office in

2 State v. Willers, 27 La. Ann. 246.

3 People v. Ah Sum, 92 Cal. 648, 28 Pac. 680; State v. Marlier, 46 Mo. App. 233.

4 Zenobio v. Axtell, 6 T. R. 162, 101 Eng. Repr. 489; R. v. Goldstein, 3 Brod. & B. 201, 7 Eng. C. L. 685; R. v. Harris, 7 Car. & P. 416, 32 Eng. C. L. 684; R. v. Szudurskie, 1 Moo. 429; R. v. Warshauer, 1 Moo. 466.

5 People v. Ah Woo, 28 Cal. 205.

6 State v. Willers, 27 La. Ann. 246.

7 K—— v. H——, 20 Wis. 289, 91 Am. Dec. 397. This was a civil action in which a German word alleged to have been spoken had two meanings, one represented by the English word "bitch" and the other by the word "prostitute," and in the copy the word was translated "bitch." This was a civil case, but the principle governing the pleading is applicable to criminal cases also.

The word "bitch" applied to a woman does not, in its common acceptation, import whoredom, in any of its forms, is not slanderous, and can not by innuendo be made so.—Schurick v. Kollman, 50 Ind. 338.

8 State v. Marlier, 46 Mo. App. 233; Stichtd v. State, 25 Tex. App. 420, 8 Am. St. Rep. 444, 8 S. W. 477.

1 See, supra, § 907.

an indictment or information is the same as its office in a complaint or petition in a civil action for the same libel or slander,[2]—an explanatory averment of the meaning of the language used,[3] or of the person intended—and relates to matter already in the record[4] as having been written or spoken, and to explain the words and attach to them their proper meaning, or the meaning intended by the accused, where the words are uncertain or obscure,[5] and to designate the person to whom they were intended to apply, where the allusion or reference is covert or obscure.[6] After stating in the colloquium and elsewhere all the extrinsic things he desires, the pleader introduces into his recitation of the libelous words such explanations as to the meaning thereof as he may think will be helpful in the understanding of their real import and application, or as to the party to whom directed and intended to be defamed, and this constitutes the innuendo.

Words libelous or slanderous per se, their meaning being perfectly clear and requiring no further explana-

2 Dickson v. State, 34 Tex. Cr. Rep. 1, 53 Am. St. Rep. 694, 28 S. W. 815, 30 S. W. 807; Squires v. State, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147.

3 Van Vetchen v. Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339; Blaisdell v. Raymond, 4 Abb. Pr. (N. Y.) 446, 14 How. Pr. 265; Goldstein v. Foss, 6 Barn. & C. 154, 13 Eng. C. L. 81; R. v. Horne, 2 Cowp. 672, 98 Eng. Repr. 1300, 20 How. St. Tr. 651; R. v. Greepe, 2 Salk. 513, — Eng. Repr. —; sub nom. R. v. Griepe, 1 Ld. Raym. 256, —Eng. Repr. —, 12 Mod. 139.

4 MICH. — People v. Collier, 1 Mich. 137, 48 Am. Dec. 699. MO.—State v. Pulitzer, 12 Mo. App. 6. N. J.—State v. Mott, 45 N. J. L. (16 Vr.) 494. VT.—State v. Atkins, 42 Vt. 252. ENG.—Braham's Case, 4 Co. 20, 76 Eng. Repr. 908; R. v. Horne, 2 Cowp. 672, 98 Eng. Repr. 1300, 20 How. St. Tr. 651; R. v. Marsden, 4 Maule & S. 164, 105 Eng. Repr. 796.

5 Com. v. Child, 30 Mass. (13 Pick.) 198; Com. v. Snelling, 32 Mass. (15 Pick.) 321.

6 GA.—Giles v. State, 6 Ga. 276. MASS.—Com. v. Snelling, 32 Mass. (15 Pick.) 321. MO. — State v. Buck, 43 Mo. App. 443. S. C.—State v. Henderson, 1 Rich. L. 179. TEX.—Dickson v. State, 34 Tex. Cr. Rep. 1, 53 Am. St. Rep. 694, 28 S. W. 815, 30 S. W. 807; Squires v. State, 39 Tex. Cr. Rep 96, 73 Am. St. Rep. 904, 45 S. W. 147.

tion, no innuendo is required,[7] because an innuendo can not extend the words beyond their natural import or meaning as commonly understood;[8] it may connect the words averred with the extrinsic facts set out,[9] but it

7 ARIZ. — Gardner v. State, 15 Ariz. 403, 139 Pac. 474. GA.—Giles v. State, 6 Ga. 276. IND.—Kelly v. State, 24 Ind. App. 639, 57 N. E. 257. KAN.—State v. Grinstead, 62 Kan. 593, 14 Am. Crim. Rep. 209, 64 Pac. 49, affirming 10 Kan. App. 78, 61 Pac. 976. MASS.—Com. v. Snelling, 32 Mass. (15 Pick.) 321. MO.—State v. Kountz, 12 Mo. App. 511. N. J.—Benton v. State, 59 N. J. L. 551, 36 Atl. 1041. ORE.—State v. Conklin, 47 Ore. 509, 84 Pac. 482. S. C.—Gage v. Shelton, 3 Rich. L. 242. TEX.—McKie v. State, 37 Tex. Cr. Rep. 544, 40 S. W. 305; Squires v. State, 39 Tex. Cr. 96, 73 Am. St. Rep. 904, 45 S. W. 147. W. VA.—State v. Clifford, 58 W. Va. 681, 52 S. E. 864. ENG.—Horne v. R., 4 Bro. P. C. 368; R. v. Horne, 2 Cowp. 672, 98 Eng. Repr. 1300, 20 How. St. Tr. 651; Woolnoth v. Meadows, 5 East 463, 7 Rev. Rep. 742.

Allegation "she is a bad girl" or "a very bad girl," entirely insufficient without proper innuendo. — Snell v. Snow, 54 Mass. (13 Metc.) 278, 46 Am. Dec. 730.

Indictment charging slander alleged the defamatory matter to consist of the following narration: "I would go down to her home after the children had gone to school and before Willie would get up, and sit and visit with her, and hug her up to my breast, feel her person, while the little one would be playing about the floor. She would return my caresses and tell me that she loved me, and that no other man save her husband had ever taken such liberties with her as she allowed me to take; and one time she told me that 'she did not blame a man for getting all that was coming to him.' I asked her if she did not think something was coming to me after all that had passed between us. She replied: 'Not yet, but some time, perhaps, and she would let me know when,'" held to be sufficient without an innuendo. — Gardner v. State, 15 Ariz. 403, 139 Pac. 474.

"Nothing but a set of whores" alleged to have been spoken by the accused regarding two women, is sufficient with innuendo.—Roberts v. State, 51 Tex. Cr. Rep. 27, 100 S. W. 150.

8 MD.—Avirett v. State, 76 Md. 510. MO.—State v. Crossman, 15 Mo. App. 585. OHIO — State v. Cass, 5 Ohio N. P. 831, 8 Ohio S. C. Pl. Dec. 214. TEX.—Dickson v. State, 34 Tex. Cr. Rep. 1, 53 Am. St. Rep. 694, 28 S. W. 815, 30 S. W. 807; Squires v. State, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147. ENG.—R. v. Marsden, 5 Cox C. C. 252.

9 State v. Mott, 45 N. J. L. (16 Vr.) 494; State v. Schmitt, 49 N. J. L. 579, 9 Atl. 774; Dickson v. State, 34 Tex. Cr. Rep. 1, 53 Am. St. Rep. 694, 28 S. W. 815, 30 S. W. 807; Squires v. State, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147.

can not enlarge their natural meaning so as to make sufficient an indictment otherwise bad.[10]

Words not libelous or slanderous on their face, but being so by reason of extrinsic facts, those facts must be averred in a traversible form,[11] it not being sufficient to plead such facts by way of innuendo, only;[12] and where the words are charged to be libelous or slanderous by reason of a covert or latent meaning which makes them so, an innuendo is necessary to set out and to make the latent meaning plain,[13]—to show that they are in fact libelous or slanderous.[14] Extrinsic facts being necessary in explanation of the alleged libelous words, there must be an innuendo the effect of which is to connect those facts and the libelous words where other allegations fail to supply this connection.[15] And the innuendo

10 Avirett v. State, 76 Md. 510; Com. v. Snelling, 32 Mass. (15 Pick.) 321; State v. Mott, 45 N. J. L. (16 Vr.) 494.

11 State v. Elliott, 10 Kan. App. 69, 61 Pac. 981.

12 Id.

13 MICH. — Lewis v. Soule, 3 Mich. 514. N. Y.—Miller v. Maxwell, 16 Wend. 9. N. C.—State v. White, 28 N. C. (6 Ired. L.) 418. S. C.—State v. Henderson, 1 Rich. L. 179; Wilson v. Hamilton, 9 Rich. L. 382. ENG.—R. v. Burdett, 4 Barn. & Ald. 314, 6 Eng. C. L. 498.

14 People v. Collins, 102 Cal. 345, 36 Pac. 669; People v. Isaacs, 1 N. Y. Cr. Rep. 148.

"**Not a respectable woman**" being charged to have been declared by the accused against a married woman, an indictment or information without an innuendo does not state an offense under a statute making a person guilty of criminal slander who imputes want of chastity to a woman.—Woods v. State, 58 Tex. Cr. Rep. 103, 124 S. W. 918.

Publication not libelous on its face, but claimed to have a covert meaning, it is necessary that the prosecution should not only allege the slanderous or libelous sense in which the words were used by the accused, but must show that they were understood in the sense claimed by those to whom they were addressed.—Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Edwards v. Publishing Soc., 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128; People v. Collins, 102 Cal. 345, 36 Pac. 669; Bloss v. Tobey, 19 Mass. (2 Pick.) 320; People v. Isaacs, 1 N. Y. Cr. Rep. 148.

15 ALA. — Smith v. Gaffard, 33 Ala. 168. N. J.—State v. O'Hagan, 73 N. J. L. 209, 63 Atl. 95. N. Y.—Lindsey v. Smith, 7 Johns. 359. N. C.—Brittian v. Allen, 12 N. C. (3 Dev. L.) 167. ENG.—Goldstein v. Foss, 6 Barn. & C. 154, 13 Eng. C. L. 81; Clement v. Fisher, 7

is serviceable in those cases where the word used in the libelous or slanderous matter has two significations, to point out which one of the meanings was intended.[16]

An innuendo charges no fact and is incapable of being sustained by evidence.[17] Alleging nothing, it neither adds to nor qualifies any of the preceding allegations.[18] An innuendo introducing new and superfluous matter, or repugnant and insensible matter, may be rejected as surplusage;[19] and an innuendo being unnecessarily introduced into an indictment or information, it may be treated as surplusage.[20]

§ 925. Persons liable. The persons who may be proceeded against criminally for a libel, or a slander, are the same as those who may be proceeded against civilly for the same offense. Thus, the proprietor or manager of a newspaper may be indicted and prosecuted for a libel published in his paper, even though the article was written by another and was published without his consent or knowledge;[1] and in the absence of statutory

Barn. & C. 459, 14 Eng. C. L. 209; R. v. Marsden, 4 Maule & S. 164, 105 Eng. Repr. 796; Williams v. Gardner, 1 Mees. & W. 245.

16 Gosling v. Morgan, 32 Pa. St. 273; Woods v. State, 58 Tex. Cr. Rep. 103, 124 S. W. 918; Griffiths v. Lewis, 8 Ad. & E. N. S. (8 Q. B.) 841, 55 Eng. C. L. 840; Boydell v. Jones, 4 Mees. & W. 446.

17 Van Vetchen v. Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339; State v. Henderson, 1 Rich. L. (S. C.) 179; State v. Aler, 39 W. Va. 549, 20 S. E. 585.

18 Emery v. Prescott, 54 Me. 389; Gosling v. Morgan, 32 Pa. St. 273; R. v. Rosenwell, 3 Mod. 53, 87 Eng. Repr. 33; Harrison v. Thornborough, 10 Mod. 196, 88 Eng. Repr. 691; Anonymous, 11 Mod. 220, 88 Eng. Repr. 1001; R. v. Alderton, 1 Say. 280, 96 Eng. Repr. 880.

19 MD.—Barnes v. State, 88 Md. 347, 41 Atl. 781. N. Y.—Thomas v. Croswell, 7 Johns. 264, 5 Am. Dec. 269. S. C.—State v. Farley, 4 McC. L. 317. ENG.—Roberts v. Cambden, 9 East 93.

20 Com. v. Snelling, 32 Mass. (15 Pick.) 321; State v. Clifford, 58 W. Va. 681, 52 S. E. 864.

1 Com. v. Morgan, 107 Mass. 199; State v. Mason, 26 Ore. 273, 46 Am. St. Rep. 629, 38 Pac. 130; Ex parte Mason, 29 Ore. 24, 54 Am.

regulations to the contrary, the proprietor of a newspaper is liable criminally as well as civilly for the publication of a libel by his agents or servants.[2] The same criminal responsibility attaches to the editor in chief,[3] and the managing editor[4] of the paper in which the libel appeared.

A corporation is liable for libel, or for slander, in a civil suit, the same as a natural person;[5] the old doctrine that a corporation, having no mind, can not be liable for acts involving malice, has been completely exploded in modern jurisprudence.[6] Criminal liability, however, is

St. Rep. 772, 43 Pac. 651; Anonymous, Lofft. 544.

Proprietor of newspaper criminally liable unless the publication was made under such circumstances as to negative any presumption of privacy or connivance or want of ordinary precaution on his part to prevent it; it is not enough for him to show that he had never seen the alleged libel and was not aware of its publication till it was pointed out to him by a third person.—Com. v. Morgan, 107 Mass. 199.

Information for criminal libel will lie against the publisher of a newspaper, although he did not know of its being put into the paper, and stopped the sale as soon as he discovered it.—Anonymous, Lofft. 544.

2 Com. v. Buckingham, Thach. Cr. Cas. (Mass.) 29; R. v. Walter, 3 Esp. 21, 6 Rev. Rep. 808; R. v. Williams, Lofft. 759, 98 Eng. Repr. 905; R. v. Gutch, 1 Moo. & M. 433; R. v. Alexander, 1 Moo. & M. 437; R. v. Topham, 4 T. R. 126, 100 Eng. Repr. 931.

Malice in fact of servant or employee is not imputable to the owner of the paper from the act of employee. — Davis v. Hearst, 160 Cal. 165, 116 Pac. 530.

3 **Editor responsible for libel** published, although unknown to him, it appearing that he did not exercise proper supervision of his subordinates. — People v. Tuller, 238 Ill. 136, 87 N. E. 336. But see footnote 10, this section.

4 Smith v. Utley, 92 Wis. 133, 35 L. R. A. 620, 65 N. W. 744.

5 Hypes v. Southern R. Co., 82 S. C. 315, 17 Ann. Cas. 620, 21 L. R. A. (N. S.) 873, 64 S. E. 395. See Rucker v. Smoke, 37 S. C. 377, 34 Am. St. Rep. 758, 16 S. E. 40; Williams v. Tolbert, 76 S. C. 217, 56 S. E. 908; Schumpert v. Southern R. Co., 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813; Riser v. Southern R. Co., 67 S. C. 419, 46 S. E. 47; Dagnall v. Southern R. Co., 69 S. C. 115, 48 S. E. 97; Fields v. Lancaster Cotton Mills, 77 S. C. 549, 122 Am. St. Rep. 593, 11 L. R. A. (N. S.) 822, 58 S. E. 608.

6 CAL. — Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672. KY.—Pennsylvania Iron Works Co. v. Henry Voght Machine Co., 29 Ky. L. Rep. 861, 96 S. W. 551. MASS.—Fogg v. Bos-

put on somewhat different grounds. Although criminal action for libel, or for slander, can not be maintained against a corporation aggregate,[7] yet the officers of such a corporation may be held responsible for a libel, or a slander, by the agents or servants of the corporation, but only in those instances in which such officer participated in the act in some way as an aider, abetter, or as an accessory.[8] Thus, it has been said that an officer of a publishing corporation is liable criminally for a libel appearing in a paper owned and published by the corpora-

ton & L. R. Co., 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109; Finnish Temperance Soc. Sovittaja v. Riavaaja Pub. Co., 219 Mass. 28, Ann. Cas. 1916D, 1087, 106 N. E. 561. MICH.—Bacon v. Michigan Cent. R. Co., 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324. MISS.—Rivers v. Yazoo & Mississippi Valley R. Co., 90 Miss. 196, 9 L. R. A. (N. S.) 931, 43 So. 471. MO.—Johnson v. St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293. N. J. — Empire Cream Separator Co. v. DeLaval Dairy Supply Co., 75 N. J. L. 207, 67 Atl. 711. N. Y.—Rose v. Imperial Engine Co., 110 App. Div. 437, 18 N. Y. Ann. Cas. 37, 96 N. Y. Supp. 808, 127 App. Div. 885, 112 N. Y. Supp. 8; affirmed, 195 N. Y. 515, 88 N. E. 1130. N. C.—Hussey v. Norfolk So. R. Co., 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923. PA. — Hardoncourt v. Northern Penn. Iron Co., 225 Pa. St. 379, 74 Atl. 243. S. C.—Hypes v. Southern R. Co., 82 S. C. 315, 17 Ann. Cas. 620, 21 L. R. A. (N. S.) 873, 64 S. E. 395. TEX.—Missouri Pac. R. Co. v. Richmond, 73 Tex. 568, 15 Am. St. Rep. 794, 4 L. R. A. 280, 11 S. W. 555. WIS.—Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 N. W. 938. FED.—Philadelphia W. & B. R. Co. v. Quigley, 62 U. S. (21 How.) 202, 16 L. Ed. 73. CANADA—Rodger v. Maxon Co., 19 Ont. Pr. Rep. 327; Manitoba Free Press Co. v. Nagy, 39 Can. Sup. Ct. 340, 9 Ann. Cas. 816, affirming 16 Manitoba 619.

7 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

8 MASS. — Hewett v. Swift, 85 Mass. (3 Allen) 420. MO.—State v. Parsons, 12 Mo. App. 205. N. Y.—People v. England, 27 Hun 139; People v. Clark, 8 N. Y. Cr. Rep. 169, 179, 14 N. Y. Supp. 642. TEX.—Williams v. State, 23 Tex. 264. CANADA—R. v. Hendrie, 11 Ont. L. Rep. 202; R. v. Hays, 14 Ont. L. Rep. 201, 8 Ann. Cas. 380.

Compare: People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735; Crall v. Com., 103 Va. 855, 49 S. E. 638.

See discussion of cognate question, infra, § 985.

tion in those instances, only, in which he promoted the publication, or is chargeable with knowledge thereof;[9] and the editor in chief of a paper published by such a corporation, of which corporation he is president, can not be held personally responsible for a libelous publication in the paper without his knowledge or consent, and while he was absent from his office.[10]

§ 926. JOINDER AND DUPLICITY. An indictment or information charging a criminal libel, or a criminal slander, must contain but one offense of libel, or slander, in each count. Charging that accused "did compose and publish, and cause and procure to be composed and published" a specified libel set out, charges but one libel, and constitutes but one offense, and for that reason is not bad for duplicity;[1] and where in a single writing and a single publication two persons are libeled, the act constitutes but one libel, even though the persons libeled are not connected in business or otherwise associated.[2] It has been said that an indictment charging a libel against a convent as a corporation, and the mother superior thereof as an individual, where part of the article refers to the convent, and a distinct part of it to the mother superior, it is not duplicitous to charge the whole in one count, for the reason that, taken as a whole, it constitutes but one libel.[3] But where an indictment charges, in one count, two distinct publications, on different dates, of the same libel, it is bad for duplicity, because each separate publication is a distinct offense and

9 Pfister v. Sentinel Co., 108 Wis. 580, 84 N. W. 887.

10 Folwell v. Miller, 75 C. C. A. 489, 145 Fed. 496, 7 Ann. Cas. 455, 10 L. R. A. (N. S.) 334.

1 State v. Robbins, 66 Me. 324.

2 State v. Hoskins, 60 Minn. 168, 27 L. R. A. 412, 62 N. W. 270. See Tracy v. Com., 87 Ky. 578, 9 S. W. 822.

3 State v. Hosmer, 72 Ore. 57, 142 Pac. 581.

constitutes a distinct libel, and each separate and distinct libel must be set out in a separate count.[4]

[4] State v. Jackman, 96 Mich. 269, 55 N. W. 809; State v. Healy, 50 Mo. App. 243.

Thus, where the indictment charged, in one count, the publication of three articles, on three successive days, the first article alleging that the person defamed had an arm broken under disreputable and disgraceful circumstances; the second article alleging that he had upon his body marks of an adventure at institutions of a disreputable character; and the third article alleging that his arm was broken while he was being ejected from a house of prostitution, it was held that three separate libels were set out, and for that reason the indictment was bad for duplicity.—State v. Jackman, 96 Mich. 269, 55 N. W. 809.

CHAPTER LVII.

INDICTMENT—SPECIFIC CRIMES.

Lotteries.

§ 927. Requirements of indictment—Certainty.
§ 928. —— Language of the statute and statutory provisions.
§ 929. —— Alleging time and place.
§ 930. —— Negativing exceptions in statute.
§ 931. —— Aiders and abettors.
§ 932. Setting up and maintaining a lottery—In general.
§ 933. —— Sufficiency of allegation.
§ 934. —— —— As agent, etc.
§ 935. Advertising lotteries or lottery tickets.
§ 936. Selling lottery ticket—Sufficiency of allegation.
§ 937. —— Setting out ticket.
§ 938. —— False and fictitious lottery tickets.
§ 939. Unlawful use of the mails.
§ 940. Permitting premises to be used for lottery.
§ 941. Joinder of counts—Reference from one count to another.
§ 942. Duplicity—Election.

§ 927. REQUIREMENTS OF INDICTMENT[1]—CERTAINTY. An indictment or information charging the offense, in any of its phases, of setting up and maintaining and carrying on and conducting a lottery in violation of the statute, as in all other charges of criminal offenses, must charge such offense with definiteness and certainty,[2] so that the court may be able to determine whether the crime charged has been committed, the accused may be ap-

1 As to forms of indictment, in the various phases of the offense, see Forms Nos. 1586-1604.

2 IND.—Whitney v. State, 10 Ind. 404. N. H.—State v. Follet, 6 N. H. 53; State v. Moore, 63 N. H. 9, 56 Am. Rep. 478. N. Y.—People v. Taylor, 3 Den. 91; People v. Borges, 6 Abb. Pr. 132; Pickett v. People, 8 Hun 83; affirmed, 67 N. Y. 609; People v. Noelke, 29 Hun 461, 1 N. Y. Cr. Rep. 252; affirmed, 94 N. Y. 137, 46 Am. Rep. 128, 1 N. Y. Cr. Rep. 495. ORE.—State v. Dougherty, 1 Ore. 200. PA.—Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475; Com. v. Manderfield, 8 Phila. 457, 1 Pa. Leg. Gaz. 37. TENN.—France v. State, 65 Tenn. (6 Baxt.) 478.

prised of the particular accusation he must meet, and the jury may know what is the question presented for their determination.[3] Failing to meet these requirements the indictment or information will be insufficient. Thus, a general charge against the accused of having an interest in lotteries, or in a named lottery, is too general.[4]

§ 928. —— LANGUAGE OF THE STATUTE AND STATUTORY PROVISIONS. The various offenses connected with setting up and maintaining, or carrying on and conducting a lottery, in any of the phases, being purely statutory offenses, as a general rule, an indictment or information charging the offense in the language of the statute, or in terms substantially equivalent thereto, will be sufficient,[1] where the statute under which the prosecution is had sets out all the necessary elements of the offense,[2] but not otherwise.[3]

3 Id., and Miller v. Com., 76 Ky. (13 Bush) 731; Com. v. Sheedy, 159 Mass. 55, 34 N. E. 84.

4 **Accused interested in "policy writing,"** being charged generally, was held to be too indefinite, and could be stricken out on motion.—State v. Walls, 4 Penn. (Del.) 408, 56 Atl. 111.

1 ALA. — Salomon v. State, 27 Ala. 26. CONN.—State v. Carpenter, 60 Conn. 97, 22 Atl. 497. FLA.—Bueno v. State, 40 Fla. 160, 23 So. 862. ILL.—Dunn v. People, 40 Ill. 465. IND.—Howard v. State, 87 Ind. 68; State v. Miller, 98 Ind. 70; Trout v. State, 111 Ind. 499, 12 N. E. 1005; Watson v. State, 111 Ind. 599, 12 N. E. 1008. KY.—Com. v. Bull, 76 Ky. (13 Bush) 656. MASS. — Com. v. Dana, 43 Mass. (2 Metc.) 329; Com. v. Harris, 95 Mass. (13 Allen) 534. MO.—Freleigh v. State, 8 Mo. 606; State v. Kennon, 21 Mo. 262; State v. Woodward, 21 Mo. 265; State v. Wilkerson, 170 Mo. 184, 70 S. W. 478; State v. Cronin, 189 Mo. 663, 88 S. W. 604; State v. Miller, 190 Mo. 449, 89 S. W. 377; Kansas City v. Zahner, 73 Mo. App. 396. N. H.—State v. Martin, 68 N. H. 463, 44 Atl. 605. N. Y.—People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128, 1 N. Y. Cr. Rep. 495, affirming 29 Hun 461, 1 N. Y. Cr. Rep. 252; People v. Taylor, 3 Den. 91; People v. Borges, 6 Abb. Pr. 132; Dunn v. People, 27 Hun 272; reversed on another point, 90 N. Y. 104.

2 State v. Wilkerson, 170 Mo. 184, 70 S. W. 478; State v. Miller, 190 Mo. 449, 89 S. W. 377.

3 State v. McDowell, 1 Penn. (Del.) 2, 39 Atl. 454.

Nature of the statutes dealing with this offense, and the various additions and changes made therein, are set out in the case of

Verification being required to an information charging setting up and maintaining a lottery, or any of the offenses connected with the conducting thereof, this is sufficiently done "upon information and belief" of the affiant.[4]

§ 929. —— ALLEGING TIME AND PLACE. On a charge of the violation of a statute prohibiting and punishing lotteries, time is not of the essence of the offense, its allegation is mere matter of form, and the omission of the day of the month on which the alleged offense was committed will not vitiate the indictment or information when any day of the month alleged was prior to the filing of the indictment.[1] The place of the offense charged must be laid within the jurisdiction of the court. Time and place having been set out, it is not necessary in the charge of the alleged offense to repeat the allegation of time and place by insertion of the phrase "then and there" the accused did the thing complained of.[2]

Ford v. State, 85 Md. 465, 60 Am. St. Rep. 337, 41 L. R. A. 551.

The requirements of the early statutes may be found, by those curious to look into these requirements, among other cases, in the following: ALA. — Boullement v. State, 28 Ala. 83. CONN.—State v. Sykes, 28 Conn. 225. IND.—Markle v. State, 3 Ind. 535. MASS.—Com. v. Braynard, Thach. Cr. Cas. 146; Com. v. Pollard, Thach. Cr. Cas. 280; Com. v. Johnson, Thach. Cr. Cas. 284; Com. v. Eaton, 32 Mass. (15 Pick.) 273; Com. v. Horton, 68 Mass. (2 Gray.) 69. MO.—Freleigh v. State, 8 Mo. 606; State v. Kennon, 21 Mo. 262. N. H.—State v. Follet, 6 N. H. 53. N. Y.—People v. Taylor, 3 Den. 91; People v. Sturdevant, 23 Wend. 418; Pickett v. People, 8 Hun 83; affirmed, 67 N. Y. 609. PA.—Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475.

4 State v. Kaub, 19 Mo. App. 149.

1 United States v. Conrad, 59 Fed. 458. See Kentline v. State, 58 N. J. L. 462, 37 Atl. 133; affirmed, 59 N. J. L. 468, 36 Atl. 1033, holding that an omission of the date of the alleged offense, by leaving a blank in the indictment, may be amended on the trial by inserting the date.

2 State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848. See Com. v. Sullivan, 72 Mass. (6 Gray) 477; Com. v. Langley, 80 Mass. (14 Gray) 21.

§ 930. —— NEGATIVING EXCEPTIONS IN STATUTE. In those cases in which the words of the statute are general, prohibiting and punishing lotteries and the selling of all lottery tickets, but certain lotteries are by the statute exempted from the operation of the law by virtue of exceptions or provisos, the indictment or information need not negative such exceptions in the statute by declaring that the particular lottery was unlawful; the exception in favor of the particular lottery in question, if one exists, is merely a matter of defense which the prosecution is not bound to anticipate by a denial.[1]

§ 931. —— AIDERS AND ABETTORS. An indictment or information charging aiding or abetting a violation of the statute prohibiting the setting up and conducting and maintaining of lotteries, in any of its phases,[1] must charge the commission of the crime aided and abetted, and state by whom the crime was committed;[2] but where the charge is that of aiding and abetting and assisting in the setting up and establishing and maintaining of any lottery, or of any scheme in the nature of a lottery, as a business, in violation of the statute, it need not be alleged in what manner, or how, the accused aided or assisted in establishing and maintaining the lottery, or what the lottery was.[3]

§ 932. SETTING UP AND MAINTAINING A LOTTERY[1]—IN GENERAL. An indictment or information purporting to charge a lottery must set out facts and circumstances showing that the scheme complained of was one denounced and punished by the statute. Thus, averring

1 Com. v. Bierman, 76 Ky. (13 Bush) 345. See Com. v. Bull, 76 Ky. (13 Bush) 656; Miller v. Com., 76 Ky. (13 Bush) 731; Lawrence v. Simmons, 10 Ky. L. Rep. 347, 9 S. W. 163.

1 As Burns' Ann. Stats. Ind., 1914, § 2464.

2 McDaniels v. State, — Ind. —, 113 N. E. 1004.

3 State v. Miller, 190 Mo. 449, 89 S. W. 377.

1 Form of indictment for setting up and conducting or promoting, in general, see Forms Nos. 1586-1592.

that a single prize was to be distributed among the purchasers of tickets, instead of going to the winner, has been held to be insufficient to charge the offense of maintaining and conducting a lottery.[2] To constitute a lottery the element of risk and loss necessarily enters into the transaction, and any arrangement which eliminates the chance of loss robs the scheme of its unlawful character.[3]

2 Risien v. State, 44 Tex. Cr. Rep. 413, 15 **Am. Cr. Rep.** 649, 71 S. W. 974.

3 Equitable Loan & Security Co. v. Waring, 117 Ga. 615, 97 **Am. St. Rep.** 177, 62 **L. R. A.** 93, 44 S. E. 320; Com. v. Moorhead, 7 Pa. Co. Ct. Rep. 516; France v. State, 65 Tenn. (6 Baxt.) 478; Stearns v. State, 21 Tex. 692; Barry v. State, 39 Tex. Cr. Rep. 240, 45 S. W. 571; Prendergast v. State, 41 Tex. Cr. Rep. 358, 57 S. W. 850; Risien v. State, 44 Tex. Cr. Rep. 413, 15 **Am. Cr. Rep.** 649, 71 S. W. 974.

A prize and chance are necessary elements of lottery. — Equitable Loan & Security Co. v. Waring, 117 Ga. 615, 97 **Am. St. Rep.** 177, 62 **L. R. A.** 93, 44 S. E. 320.

Distribution of prizes to those who shall make the closest estimate of the number of cigars on which a tax is paid during a specified month, held to be a lottery.—People ex rel. Ellison v. Lavin, 179 N. Y. 164, 170, 1 **Ann. Cas.** 165, 66 **L. R. A.** 601, 18 N. Y. Cr. Rep. 480, 71 N. E. 753.

Gift enterprise not involving chance is not within the statute prohibiting lotteries. — Long v. State, 74 Md. 570, 28 **Am. St. Rep.** 268, 12 **L. R. A.** 427, 22 Atl. 4.

Gratuitous distribution of tokens entitling holder of certain numbers to prizes, as a lottery. See note 3, Brit. R. L. Cas. 984.

Guessing contest in newspaper, held to be a lottery, where money is paid for chance of winning a prize. — Stevens v. Cincinnati Times-Star Co., 72 Ohio St. 147, 106 **Am. St. Rep.** 586, 73 N. E. 1058.

Guessing contest on popular vote for president for a prize to subscribers of a magazine, held to be a lottery.—Waite v. Press Pub. Co., 85 C. C. A. 576, 155 Fed. 161, 12 **Ann. Cas.** 319, 11 **L. R. A.** (N. S.) 613.

Offering piano for one holding largest number of tickets given away with merchandise, held not to be a lottery or illegal.—Quatsoe v. Eggleston, 42 Ore. 319, 71 Pac. 66.

Advertisement offering to give away a piano, and a reduction in the price of two other pianos to the first person forwarding the nearest correct solution of a fifteen square puzzle, does not constitute a lottery, gift enterprise, or similar scheme dependent in whole, or in part, on lot or chance within U. S. Pen. Code, § 213 (3 Kerr's Whart. Crim. Law, p. 2523). — Eastman v. Armstrong-Byrd Music Co., 129 C. C. A. 198, 212 Fed. 662, 52 **L. R. A.** (N. S.) 108.

Prize offered for nearest estimate to number of cigarettes on which tax paid, accompanied with coupons, held not a lottery.—

Thus, the gratuitous distribution of property by chance for which no consideration is received, directly or indirectly, does not constitute a lottery;[4] e. g., sale of lots to persons, the lots to be apportioned as the purchasers might decide among themselves;[5] and the distribution of prizes by lot or chance to holders of tickets given away, does not constitute carrying on a lottery, although the transaction is done with a view of drawing a large crowd together in the hope of profiting from such as may choose to buy wares from the distributer.[6]

§ 933. —— SUFFICIENCY OF ALLEGATION. Where the statute prohibits "lotteries for money, goods," and the like, an indictment or information must allege that the lottery set up by the accused was for money or something of value within the prohibition of the statute;[1] but it may properly merely set out the establishment of a lottery without any allegation as to the disposition of the property by means of such lottery.[2] It is not necessary to describe the nature of the lottery or the manner in

United States v. Rosenblum, 121 Fed. 182.

Trading stamps held not a lottery.—State v. Dalton, 22 R. I. 83, 84 Am. St. Rep. 818, 48 L. R. A. 779, 46 Atl. 234.

Trading stamps given to purchaser of goods, entitling holder to premiums, is within the statute prohibiting lotteries. — Lansburgh v. District of Columbia, 11 App. D. C. 529.

4 Cross v. People, 18 Colo. 324, 36 Am. St. Rep. 292, 32 Pac. 821.

5 Chancy Park Land Co. v. Hart, 104 Iowa 596, 73 N. W. 1059.

6 **Or tickets to performances** to be given by him, or to pay for seats in the tent where the prizes are selected, where no payment is required as a condition of receiving a prize.—Yellowstone Kit v. Alabama, 88 Ala. 196, 16 Am. St. Rep. 38, 7 L. R. A. 599, 7 So. 338.

1 State v. Shorts, 32 N. J. L. (3 Vr.) 398, 90 Am. Dec. 668.

2 Risien v. State, 44 Tex. Cr. 413, 15 Am. Cr. Rep. 649, 71 S. W. 974.

Alleging that the accused "did set up and promote a certain lottery, the name and more particular description of which said lottery being to said grand jurors unknown, which said lottery was then and there for money, said lottery not being then and there authorized by law in said commonwealth," is sufficient.—Com. v. Sullivan, 146 Mass. 142, 15 N. E. 491.

"That the defendants did publicly set up, open and make a certain lottery and scheme of chance,

which its object would be promoted;[3] and it is not necessary that the indictment or information should disclose the name of the person prosecuting, who is entitled to a portion of the penalty under the statute.[4]

"As owner or otherwise" being provided in the statute[5] prohibiting setting up, conducting and maintaining any lottery or scheme of chance, an indictment or information charging the setting up and establishing and conducting a lottery must allege the capacity in which the accused acted.[6]

"Policy lottery" being charged as having been set up and conducted by the accused, the indictment or information must show on its face that the lottery was ille-

under the name and denomination of 'The Great Miltonian Tableaux of Paradise Lost, or The Great Rebellion in Heaven,' by means of which said lottery and scheme of chance the said" accused "then and there did expose and set to sale, amongst other things," describing them, was held to sufficiently charge the conducting of a lottery.—State v. Shorts, 32 N. J. L. (3 Vr.) 398, 90 Am. Dec. 668.

3 Dunn v. People, 27 Hun (N. Y.) 272; reversed on another point, 90 N. Y. 104; People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128, 1 N. Y. Cr. Rep. 495, affirming 29 Hun 461, 1 N. Y. Cr. Rep. 252.

An indictment charging that accused "did then and there, under the pretense of selling and vending a certain article of merchantable personal property called candy, establish a lottery, which lottery was then and there set on foot for the purpose of unlawfully disposing of personal property, to wit, money, rings, and other articles of jewelry, by chance, by then and there exposing to sale divers candy boxes for fifty cents each, which boxes were then and there represented by the said" accused "to contain candy and prizes, one of said lot, not specified, being then and there represented by said" accused "to contain ten dollars, and other of said boxes being then and there represented by said" accused "to contain five dollars each, that the said" accused "did then and there dispose of, by said lottery, to" a person named "ten dollars, same being personal property, and did then and there dispose of, and by said lottery, to divers persons, certain property, to wit" etc., held to charge setting up and maintaining a lottery.—Holoman v. State, 2 Tex. App. 610, 28 Am. Rep. 439.

4 State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848; Ginandt v. State, 3 Ohio Dec. 400, 1 Ohio N. P. 327.

5 As in Nebraska Crim. Code, § 225.

6 State v. Dennison, 60 Neb. 157, 82 N. W. 383.

gal;[7] but the words "prize in a lottery" in such indictment or information are sufficient for that purpose,[8] it not being necessary to set out the ordinary constituents or features of the game.[9] An averment that the accused "did unlawfully make and put up a pretended lottery called 'policy,'" etc., has been held to be good.[10]

"Raffle" charged to have been set up and conducted, the indictment or information must allege the name of the property to be raffled.[11]

§ 934. ——— As AGENT,[1] ETC. We have already seen[2] that under the provisions of some statutes it is required that the indictment or information shall set out whether the accused set up and conducted the lottery "as owner or otherwise." An agent who has knowledge of the character and purpose of the business is equally liable with his principal for running a lottery,[3] but the indictment or information must charge that the accused was concerned in the scheme charged "as agent."[4]

§ 935. ADVERTISING LOTTERIES OR LOTTERY TICKETS.[1] Under a statute prohibiting the advertising of lotteries, or of lottery tickets, an indictment or information charging either offense need not set out the kind of lottery, or

7 Com. v. Manderfield, 8 Phila. (Pa.) 457, 1 Pa. Leg. Gaz. 37.

"Policy," conviction of conspiracy in carrying on, upheld.—Reilley v. United States, 46 C. C. A. 34, 106 Fed. 904.

8 Com. v. Manderfield, 8 Phila. (Pa.) 457, 1 Pa. Leg. Gaz. 37.

Compare: Crews v. State, 38 Ind. 28.

9 Knoll v. United States, 26 App. D. C. 457.

10 State v. Martin, 68 N. H. 463, 44 Atl. 605.

11 Hickman v. State, 64 Tex. Cr. Rep. 161, 141 S. W. 973.

1 As to form of indictment of agent, see Form No. 1593.

2 See, supra, § 933, footnote 6.

3 Fidelity Fund Co. v. Vaughn, 18 Okla. 26, 11 L. R. A. (N. S.) 1128, 90 Pac. 34.

4 Ginandt v. State, 3 Ohio Dec. 400, 1 Ohio N. P. 327.

1 As to forms of indictment for advertising lotteries, or lottery tickets, see Forms Nos. 1595-1597.

of lottery tickets advertised,[2] or state where the lottery is located or the place in the state where tickets can be purchased,[3]—although a different rule prevails under the Kentucky statute,[4]—or allege that the name of the accused was attached to the advertisement;[5] but it must be averred that the accused was interested in and connected with the circulation of the advertisement within the jurisdiction where the indictment was found.[6] The advertisement need not, as a rule, be set out in the indictment, but where it is set out in hæc verba and shows on its face that it is within the statute, the indictment will be sufficient, although there is no direct averment as to its illegality;[7] but where set out such advertisement shows upon its face that it is not within the statute, any allegation as to its illegality will be overcome by the instrument itself, and the indictment will be insufficient.[8] The charge against the accused being that he inserted the advertisement in a newspaper published in another state, the indictment or information must allege that the accused had knowledge that such paper circulated within the state wherein the indictment was found.[9]

"Suit club" advertised, charged in the indictment as the advertisement of a lottery, will be insufficient to charge an offense under a statute making it an offense to advertise a lottery.[10]

2 Com. v. Hooper, 22 Mass. (5 Pick.) 42.

3 Id.; Com. v. Hooper, 22 Mass. (5 Pick.) 42.

4 Louisville Courier-Journal Co. v. Com., 92 Ky. 22, 17 S. W. 163.

5 Lohman v. State, 81 Ind. 15.

6 State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848.

7 Lohman v. State, 81 Ind. 15; Louisville Courier Journal Co. v. Com., 92 Ky. 22, 17 S. W. 163; State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848; People v. Charles, 3 Den. 212; affirmed in Charles v. People, 1 N. Y. 180, How. App. Cas. 359, 4 How. Pr. 292.

8 State v. Sykes, 28 Conn. 225.

9 State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848.

10 State v. Bailey, 183 Ind. 215, 108 N. E. 753.

§ 936. SELLING LOTTERY TICKET[1]—SUFFICIENCY OF ALLEGATION. An indictment or information charging the selling of lottery tickets should set out the name of the lottery,[2] and the number of tickets sold should be specified[3] under some statutes, although it seems not to be necessary under others,[4] and some cases hold, also, that the ticket need not be set out.[5] Thus, it has been said that charging accused with being unlawfully concerned in a lottery "by selling to one A, one ticket" is sufficient, the element of time not entering into such an offense and the phrase "then and there" selling not being essential to the validity of the charge.[6] Charging accused unlawfully sold to a named person, for a specified sum of money, then and there paid, "one share, chance, and opportunity to draw in a certain lottery scheme and gift enterprise" for the division of certain sums of lawful money to be determined by such chance and lot, being substantially in the language of the statute,[7] is sufficiently certain.[8] Charging accused sold "a part of a ticket, to wit, a quarter of a ticket, in a certain lottery not authorized by the legislature of this state," without any description of the ticket or of the lottery to which it belonged, was held to be sufficient under the statutes of New Hampshire, for the

1 For form of indictment charging selling of lottery tickets, see Form No. 1599.

2 Indictment or information charging "wrongful and unlawful sale of a certain share or shares in a certain lottery and device in the nature of a lottery, known as the 'Louisiana Lottery,'" held to be sufficient.—State v. Kaub, 19 Mo. App. 149.

3 Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

4 See, infra, § 937.

5 Id.

6 State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848.

"Then and there" need not be repeated to an averment which merely declares a legal conclusion. The averment of being concerned in a lottery was of that nature although preceding other allegations, the potent fact being the sale of a ticket.— State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848. See Com. v. Sullivan, 72 Mass. (6 Gray) 477; Com. v. Langley, 80 Mass. (14 Gray) 21.

7 As Ind. Rev. Stats., 1881, § 2077.

8 Trout v. State, 111 Ind. 499, 12 N. E. 1005; Watson v. State, 111 Ind. 599, 12 N. E. 1008.

reason that no lottery is authorized by the legislature.[9] An indictment or information charging accused sold "policies" entitling the purchaser to receive money on the drawing of numbers in a lottery, sufficiently charges the sale of a lottery ticket.[10] Conspiring to sell a lottery ticket or tickets being charged, an indictment or information will be sufficient without further description, because the conspiracy, which is the gist of the offense, is to sell lottery tickets, and not to sell the tickets of any particular lottery but of any and all lotteries.[11]

§ 937. —— SETTING OUT TICKET. An indictment or information charging the selling of lottery tickets may or may not be required to set out the ticket alleged to have been sold, depending upon the wording of the particular statute under which the prosecution is had, setting out being necessary under some statutes,[1] and not under others. The general rule is that it is sufficient for the indictment or information to give a general description of the ticket without setting forth the ticket,[2] or the purpose of the lottery;[3] and it has been said that the words "lottery ticket," need not be used in the indictment or information.[4] Where, however, the ticket is set forth by copy in the indictment or information, no other description or averment is necessary;[5] but if it does not appear from the face of the ticket that it is a lottery ticket, it may be

9 State v. Follet, 6 N. H. 53.

10 Smith v. State, 68 Md. 168, 11 Atl. 758.

11 Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

1 State v. Scribner, 2 Gill & J. (Md.) 246.

2 Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

3 See, supra, § 393.

4 State v. Kennon, 21 Mo. 262.

"Unlawfully did sell divers, to wit, ten tickets in a certain device in the nature of a lottery, called a raffle, to certain persons to the jurors aforesaid unknown, for the price and sum of three dollars for each of said tickets, and which said raffle was then and there created for the purpose of disposing of land, a piano, and divers other property, the description of which is unknown to the jurors," etc.,—held to be sufficient.—State v. Kennon, 21 Mo. 262.

5 Com. v. Thacher, 97 Mass. 583, 93 Am. Dec. 125.

alleged and proved to be such.[6] The lottery ticket being set out, any variance in the spelling of a name on such ticket has been said to be fatal.[7]

All lottery tickets being prohibited by law, any description of the ticket, or of the lottery, will be mere surplusage, it being wholly immaterial what kind of tickets were sold and to what lottery they belonged;[8] and neither need it be alleged that the lottery for the selling of tickets in which the accused is prosecuted was not expressly authorized by law.[9] But in those cases where any tickets in any lottery may be lawfully sold, the indictment or information must allege what kind of tickets they are, or at least, to what lottery they belong, to the end that it may be seen whether the sale was lawful or not.[10]

§ 938. —— FALSE AND FICTITIOUS LOTTERY TICKETS.[1] In the case where an indictment or information charges accused with the sale, or offering for sale, of false and fictitious lottery tickets, it need not show in what respect the ticket is false or fictitious, and it need not set forth the nature of the lottery, or negative the existence of any lottery.[2]

§ 939. UNLAWFUL USE OF THE MAILS. An indictment in various counts charging accused with plotting land into lots of varying sizes and value, and with improving a few, and with offering all the lots for sale at a uniform price of one hundred and thirty dollars each, alleging the unimproved lots to be worth from four to ten dollars each, while the few lots improved with buildings were valuable, and charging accused wilfully, knowingly, unlawfully, and

6 State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848.

7 Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

8 State v. Moore, 63 N. H. 9, 56 Am. Rep. 478.

9 People v. Sturdevant, 23 Wend. (N. Y.) 418.

10 State v. Moore, 63 N. H. 9, 56 Am. Rep. 478.

1 Form of indictment for selling false and fictitious lottery tickets, see Form No. 1600.

2 Com. v. Harris, 95 Mass. (13 Allen) 534.

feloniously deposited in the post office matter concerning the plan and in furtherance thereof, is good either under the United States Revised Statutes,[1] or the United States Penal Code,[2] punishing the depositing in the mails of matter concerning any lottery or gift enterprise.[3]

§ 940. PERMITTING PREMISES TO BE USED FOR LOTTERY.[1] Under a statute making it a penal offense to permit premises to be used for purposes of a lottery, an indictment or information charging that accused "did unlawfully and knowingly permit, in the dwelling-house and building then and there actually used and occupied by him, the setting up of a lottery, in which certain articles of personal property and of value were disposed of, by the way of a lottery," is sufficient without alleging that the lottery so permitted to be set up was a lottery not authorized by law, and also without further stating the name of the lottery or describing the articles disposed of, or stating their value, or giving the names of their owners or of the persons who received the property as prizes.[2]

§ 941. JOINDER OF COUNTS—REFERENCE FROM ONE COUNT TO ANOTHER. Under the general rule permitting an indictment or information to contain different counts charging various grades of an offense growing out of the same transaction,[1] the various phases of the offense of setting up, carrying on, and conducting a lottery, advertising the same, selling lottery tickets, and the like, may be joined in one indictment. Thus, under the federal statute,[2] pro-

1 U. S. Rev. Stats., § 3894, 5 Fed. Stats. Ann., 1st ed., p. 846.

2 U. S. Pen. Code, § 213, 3 Kerr's Whart. on Crim. Law, p. 2523.

3 Glass v. United States, 138 C. C. A. 321, 222 Fed. 773.

1 For form of indictment for permitting property to be used for purposes of a lottery, see Forms Nos. 1603, 1604.

2 Com. v. Horton, 68 Mass. (2 Gray) 69.

1 See Bueno v. State, 40 Fla. 160, 23 So. 862; People v. Emerson, 6 N. Y. Cr. Rep. 157, 5 N. Y. Supp. 374; Prendergast v. State, 41 Tex. Cr. Rep. 538, 57 S. W. 850.

2 2 Fed. Stats. Ann., 1st ed., p. 337, 2 Fed. Stats. Ann., 2d ed., p. 676.

viding that several charges against the same person for the same act, or for two or more acts connected together, may be joined in one indictment, in separate counts, accused may be charged with the different acts based on the mailing of matter concerning a lottery scheme, or any portion thereof, the several acts being set out in distinct counts.[3] And where the first count in an indictment has set out in full a lottery scheme alleged to have been set up by the accused, subsequent counts may refer to such first count, in charging the doing of matters and things in furtherance of such scheme; e. g., mailing of advertising matter, selling of tickets, and the like.[4]

§ 942. Duplicity—Election. Under the general rule of criminal pleading which permits a series of acts denounced by a statute as constituting a crime when done singly or together, and are similarly punished, an indictment or information charging a violation of the statute prohibiting and punishing lotteries, may charge, in the same count, two or more acts denounced and prohibited without being duplicitous. Thus, it has been held that the accused may be charged with advertising, exposing for sale, and selling lottery tickets;[1] with being concerned in a lottery by printing, publishing, and circulating an advertisement of a lottery;[2] with depositing and causing to be deposited in the post office mailing matter concerning lotteries;[3] with depositing on a specified day a certain number of circulars concerning a lottery, at the post office to be sent by mail;[4] with being engaged in a lottery, scheme, or device of chance;[5] with knowingly suffering

3 Glass v. United States, 138 C. C. A. 321, 222 Fed. 773.

4 Glass v. United States, 138 C. C. A. 321, 222 Fed. 773.

1 State v. McWilliams, 4 Mo. App. 582.

2 State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848. See, also, Lohman v. State, 81 Ind. 15.

3 Glass v. United States, 138 C. C. A. 231, 222 Fed. 773.

4 United States v. Patty, 9 Biss. 429, 2 Fed. 664.

5 **Not bad for duplicity,** nor is it bad for the same reason in alleging that accused "was concerned in a lottery by printing and circulating an advertisement of it and

money or other property to be raffled for in a house owned by accused and to be there won and lost by the throwing of dice;[6] with offering for sale and selling a lottery ticket;[7] with setting up and promoting a lottery[8] and disposing of property by lottery,[9] conducting draws and selling lottery tickets.[10] But it has been said that where the statute makes it criminal to carry on a lottery "either publicly or privately," an indictment or information charging accused with carrying on a lottery "publicly and privately," is bad for duplicity.[11] Under a statute charging accused with setting up and maintaining a lottery, the several things specified as having occurred on a designated day, and the evidence tending to show that they were all part of one continuous setting up and promoting of a lottery, the prosecution will not be required to elect some particular transaction complete in itself on which to rely for conviction.[12]

also in other ways."—State v. Willis, 78 Me. 70, 6 Am. Cr. Rep. 284, 2 Atl. 848.

6 Com. v. Coleman, 184 Mass. 198, 62 N. E. 220.

7 Com. v. Eaton, 32 Mass. (15 Pick.) 273; Com. v. Tobias, 141 Mass. 129, 6 N. E. 217.

8 Com. v. Harris, 95 Mass. (13 Allen) 534.

9 State v. Randall, 41 Tex. 292; Prendergast v. State, 41 Tex. Cr. Rep. 538, 57 S. W. 850.

10 Smith v. State, 40 Fla. 203, 23 So. 854.

11 State v. Dennison, 60 Neb. 192, 82 N. W. 628.

12 Com. v. Sullivan, 146 Mass. 142, 15 N. E. 491.

CHAPTER LVIII.

INDICTMENT—SPECIFIC CRIMES.

Malicious Mischief.

§ 943. Requisites and sufficiency of indictment—At common law.
§ 944. —— Under statute—Vi et armis.
§ 945. —— Following language of statute.
§ 946. —— Time of offense.
§ 947. —— Place of offense.
§ 948. —— Intent and malice.
§ 949. —— Feloniously, unlawfully, wilfully, etc.
§ 950. —— Negative averments.
§ 951. Description of property injured.
§ 952. Means and manner of injury—In general.
§ 953. —— Unlawful entry upon land.
§ 954. —— Poison or poisonous substance.
§ 955. Character and nature of injury.
§ 956. Value of property and extent of injury.
§ 957. Damage to property or owner.
§ 958. Ownership of property injured.
§ 959. Duplicity.

§ 943. REQUISITES AND SUFFICIENCY OF INDICTMENT[1]—AT COMMON LAW. As to whether an indictment for malicious mischief can be had at common law in the jurisdictions of this country depends, it would seem, upon whether or not the common law is the foundation of the jurisprudence of the particular jurisdiction, and whether the early English statutes are considered as a part of the common law of the jurisdiction.[2] In most of the reported cases in which the point is discussed the early English statutes have been considered and have been held

1 For forms of indictment for malicious mischief, see Forms Nos. 1619-1665.

2 Com. v. Leach, 1 Mass. 59; People v. Moody, 5 Park. Cr. Rep. (N. Y.) 568; State v. Mairs, 1 N. J. L. (Coxe) 385, 518.

not to be a part of the common law of the particular jurisdiction.[3] Both at common law and under the statutes, alike, an indictment or information charging malicious mischief must set out the malice of the accused, describe the property, allege the ownership, and state with particularity the special acts which constituted the mischief complained of.[4]

§ 944. —— UNDER STATUTE—VI ET ARMIS. The general rules of criminal pleading governing the charging of statutory offenses generally apply in the case of malicious mischief, in any of its various forms, and an indictment or information which clearly and positively, and not vaguely and indefinitely or by way of argument or inference,[1] sets out the precise nature of the offense charged,[2] in language which the jury can readily understand,[3] will be sufficient where it contains all the elements of the offense as defined by the statute under which the prosecution is had. The act charged being by the statute in general terms prohibited, simply, it is unnecessary that the indictment or information should state in terms that the offense is either a felony[4] or a misdemeanor;[5] and where this is attempted to be

3 State v. Hamilton, 1 Houst. Cr. Cas. (Del.) 281; State v. Campbell, T. U. P. Charlt. (Ga.) 166; Brown's Case, 3 Me. 177; State v. Briggs, 1 Aik. (Vt.) 226.

4 ALA. — Burgess v. State, 44 Ala. 190. CAL.—People v. Seldon, 68 Cal. 434, 9 Pac. 457. DEL.—State v. Hamilton, 1 Houst. Cr. Cas. 281. IND.—Sample v. State, 104 Ind. 289, 4 N. E. 40; State v. McKee, 109 Ind. 497, 10 N. E. 405. KAN.—State v. Blakesley, 39 Kan. 152, 18 Pac. 170. MASS.—Com. v. Leach, 1 Mass. 59. N. H.—State v. Batchelder, 5 N. H. 549. N. Y.—People v. Smith, 5 Cow. 258; People v. Moody, 5 Park. Cr. Rep. 568. N. C.—State v. Simpson, 9 N. C. (2 Hawks) 460; State v. Scott, 22 N. C. (2 Dev. & B. L.) 35. VT.—State v. Briggs, 1 Aik. (Vt.) 226. FED.—Respublica v. Teischer, 1 Dall. 335, 1 L. Ed. 163.

1 Woodward v. State, 33 Tex. Cr. Rep. 554, 28 S. W. 204.

2 Com. v. Johnson, 13 Pa. Co. Ct. Rep. 543.

3 Com. v. Bryant, 3 Kulp (Pa.) 290.

4 **As to charging act "feloniously" done**, see, infra, § 949.

5 People v. Boren, 139 Cal. 210, 72 Pac. 899.

Appellation of offense, as felony or misdemeanor, need not be

given and is a misnomer, it will not vitiate an indictment or information which gives the acts constituting the offense as defined by the statute.[6] Thus, under a statute providing a penalty for "a person who unlawfully and wilfully destroys or injures any real or personal property of another, in a case where the punishment thereof is not specifically provided for by statute, shall be punishable" as designated, an indictment or information charging accused "unlawfully injured and destroyed a boat, the same being the property of A, and being of the value of sixty dollars," etc., is sufficient;[7] but where it was charged that accused maliciously pursued a cow, the property of A, of the value of ten dollars, with the intent unlawfully and wickedly to wound and kill said cow, and did kill her, the indictment was held to charge an injury to personal property, but not to charge an act of malicious mischief.[8]

Combination of elements of malicious mischief with elements of other wrongs prohibited and punished by statute, the indictment or information should consist of a blending of the elements of the different wrongs into one offense as the emergencies of the particular case may require,—e. g., breaking the windows, in the night-time, of a building inhabited, to the terror of the people in the dwelling-house;[9] discharging guns to the

given where the facts constituting the act charged, and the name of the offense, are given.—People v. War, 20 Cal. 117; People v. Garcia, 25 Cal. 531; People v. Phipps, 39 Cal. 326; People v. Girr, 53 Cal. 629; People v. Dalton, 58 Cal. 226; People v. Sheldon, 68 Cal. 434.

6 People v. Phipps, 39 Cal. 326; State v. Johnson, 9 Nev. 175; State v. Angelo, 18 Nev. 427, 4 Pac. 1081; State v. Clark, 32 Nev. 145, 104 Pac. 593; State v. Crook, 16 Utah 212, 51 Pac. 1091.

7 People v. Kane, 60 Hun 585, 15 N. Y. Supp. 612; reversed on another point, 131 N. Y. 111, 27 Am. St. Rep. 574, 10 N. Y. Cr. Rep. 107, 29 N. E. 1005.

8 State v. Allen, 72 N. C. 114.

9 State v. Batchelder, 5 N. H. 549.

terror of people in a dwelling-house;[10] fully or partially tearing down a dwelling-house,[11] and the like.

Vi et armis, or "with force and arms," a phrase generally used in all cases wherein a trespass is charged, is not necessary in charging malicious mischief, even though it involve a trespass upon real property.[12]

§ 945. —— FOLLOWING LANGUAGE OF STATUTE. An indictment or information charging malicious mischief must be drawn in each instance so as to meet the particular language of the statute under which the prosecution is had;[1] and to meet this requirement it is usually sufficient to follow the language of the particular statute, or to state the offense in the substance of the language of such statute,[2] where as thus drawn the indictment or information meets the statutory requirement that it shall inform the accused of the nature of the charge against him,[3] and fully apprise him of the pre-

10 State v. Langford, 10 N. C. (3 Hawks) 381.

11 State v. Wilson, 3 Mo. 125.

12 Taylor v. State, 25 Tenn. (6 Humph.) 285; State v. Pratt, 54 Vt. 484.

1 IND. — Maskill v. State, 8 Blackf. 299; State v. Slocum, 8 Blackf. 315; Bates v. State, 31 Ind. 72; Birdg v. State, 31 Ind. 88. KY.—Com. v. Turner, 71 Ky. (8 Bush) 1. ME.—State v. Hussey, 60 Me. 410, 11 Am. Rep. 209. MASS.—Com. v. Bean, 65 Mass. (11 Cush.) 414; Com. v. Dougherty, 72 Mass. (6 Gray) 349. MISS.—Rembert v. State, 56 Miss. 280. MO.—State v. Clifton, 24 Mo. 376; State v. Batson, 31 Mo. 343. N. H.—Glines v. Smith, 48 N. H. 259. N. J.—State v. Mallory, 34 N. J. L. (5 Vr.) 410. N. C.—State v. Staton, 66 N. C. 640; State v. Allen, 72 N. C. 114; State v. Simpson, 73 N. C. 269; State v. Hill, 79 N. C. 656; State v. Parker, 81 N. C. 548; State v. Boyd, 86 N. C. 634. TENN.—Taylor v. State, 25 Tenn. (6 Humph.) 285; State v. Pennington, 40 Tenn. (3 Head) 119. TEX.—State v. Pine, 30 Tex. 399; State v. Stalls, 37 Tex. 440; State v. Arnold, 39 Tex. 74. VA.—Com. v. Butcher, 45 Va. (4 Gratt.) 544. ENG. — Allan v. Kirton, 2 W. Bl. 842, 96 Eng. Repr. 496; sub nom. Allen v. Kirkton, 3 Wils. 318, 95 Eng. Repr. 1076; R. v. Ashton, 2 Barn. & Ad. 750, 22 Eng. C. L. 314; R. v. Mogg, 4 Car. & P. 364, 19 Eng. C. L. 555; R. v. Morris, 9 Car. & P. 89, 38 Eng. C. L. 64; R. v. Chalkey, 1 Russ. & R. 258.

2 State v. Davis, 88 S. C. 229, 34 L. R. A. (N. S.) 295, 70 S. E. 811.

3 Harris v. State, 73 Ga. 41; State v. Martin, 107 N. C. 904, 12

cise thing he must meet and defend against;[4] otherwise all the facts and circumstances must be alleged which are necessary to charge the specific offense as defined by the statute,[5] incorporating into the indictment or information all those words in the statute which are essential to a correct description of the offense[6] as defined by the statute,[7] being careful to make the charge as specific as the proof is required to be in order to warrant a conviction.[8] Thus, where a statute punishes acts of malicious mischief perpetrated after an unlawful entry upon land, either to the land or to crops or products growing thereon, the act of unlawful entry is an essential element of the offense charged and must be specifically alleged.[9]

S. E. 194; State v. Doig, 2 Rich. L. (S. C.) 179; R. v. Ashton, 2 Barn. & Ad. 750, 22 Eng. C. L. 314.

4 ARK.—Lemon v. State, 19 Ark. 171; State v. Hoover, 31 Ark. 676. CAL.—People v. Keeley, 81 Cal. 210, 22 Pac. 593. GA.—Harris v. State, 73 Ga. 41. ILL.—Mettler v. People, 135 Ill. 410, 25 N. E. 748. IND. — State v. Kuns, 5 Blackf. 314; Hennel v. State, 4 Ind. App. 485, 30 N. E. 1118. MICH.—McKinney v. People, 32 Mich. 284. MISS.—Duncan v. State, 49 Miss. 331. MO.—State v. Woodward, 95 Mo. 129. NEB.—State v. Priebnow, 14 Neb. 484, 16 N. W. 907. NEV.—State v. McMahon, 17 Nev. 365, 30 Pac. 1000. N. C.—State v. Staton, 66 N. C. 640; State v. Allen, 69 N. C. 23; State v. Painter, 70 N. C. 70; State v. Wilson, 94 N. C. 1015; State v. Combs, 120 N. C. 607, 27 S. E. 30. OHIO—Sewall v. State, Wright 485. S. C. — Shubrick v. State, 2 S. C. 21. TEX.—Welsh v. State, 11 Tex. 368; State v. Warren, 13 Tex. 46; Brewer v. State, 5 Tex. App. 248; Spears v. State, 24 Tex. App. 537, 7 S. W. 245. ENG.—R. v. Ashton, 2 Barn. & Ad. 750, 22 Eng. C. L. 314; R. v. Clegs, 3 Cox C. C. 295; R. v. Salmon, Russ. & R. C. C. 26.

5 See State v. Costello, 62 Conn. 128; Brown v. State, 76 Ind. 85; Com. v. Moore, 17 Ky. L. Rep. 212, 30 S. W. 873; State v. West, 10 Tex. 553; Todd v. State, 39 Tex. Cr. Rep. 232, 45 S. W. 596.

6 See, infra, § 949; also, State v. Pratt, 54 Vt. 484.

7 IND. — Maskill v. State, 8 Blackf. 299; Johnson v. State, 68 Ind. 43; Hewitt v. State, 121 Ind. 245, 23 N. E. 83. KY.—Com. v. Puckett, 92 Ky. 206, 17 S. W. 353. N. J.—State v. Mallory, 34 N. J. L. (5 Vr.) 410. N. C.—State v. Deal, 92 N. C. 802. VT.—State v. Jones, 33 Vt. 443; State v. Pratt, 54 Vt. 484. ENG.—R. v. Bowyer, 4 Car. & P. 559, 19 Eng. C. L. 527.

8 State v. Hill, 79 N. C. 656.

9 Arbuckle v. State, 32 Ind. 34; State v. Scott, 68 Ind. 267; Com. v. Dougherty, 72 Mass. (6 Gray) 349.

§ 946. —— TIME OF OFFENSE. Regarding the pleading of the time of the offense the decisions are not harmonious; some of the cases, and what would seem to be the better doctrine, require that the time of the offense shall be laid,[1] although there are other cases to the effect that time, not being of the essence of the offense, is not a material element, and the omission to lay the time will not render bad an indictment or information otherwise sufficient.[2] An error in using the present for the past tense has been said not to vitiate.[3]

§ 947. —— PLACE OF OFFENSE. The place where the malicious mischief was committed should be stated,[1] in order to give the court jurisdiction; but it is sufficiently laid if the place of the offense can be gathered from the indictment as a whole.[2] It is sufficient to lay the place of the offense in a designated city, town, or village,[3] or county,[4] within the jurisdiction of the court, in the absence of statutory provisions requiring a more definite

1 **Defective for not naming day or month when offense committed.**—Bailey v. State, 65 Ga. 410.

2 State v. Hoover, 31 Ark. 676; Lott v. State, 9 Tex. App. 206.

3 **"Kill one cow"** instead of "killed," or "did kill," held to be sufficient.—Walker v. State, 89 Ala. 74, 8 So. 144.

1 State v. Slocum, 8 Blackf. (Ind.) 315.

2 ALA.—Caldwell v. State, 49 Ala. 34. IND.—State v. Slocum, 8 Blackf. 315; Jay v. State, 69 Ind. 158. N. H.—State v. Wentworth, 37 N. H. 196. TENN.—Taylor v. State, 25 Tenn. (6 Humph.) 285. ENG.—R. v. Watkins, 4 Car. & P. 548, 19 Eng. C. L. 520; R. v. Williams, 1 Leach C. C. 529.

Mistake in name of place where offense alleged to have occurred immaterial where the charge is transitory and not local.—R. v. Woodward, 1 Moo. C. C. 323.

3 State v. Semotan, 85 Iowa 57, 51 N. W. 1161; Com. v. Tolman, 149 Mass. 229, 14 Am. St. Rep. 414, 3 L. R. A. 747, 21 N. E. 377; State v. Wentworth, 37 N. H. 196.

Attempt to destroy dam charged, the dam is sufficiently located if alleged to be within a certain town which is named.—Com. v. Tolman, 149 Mass. 229, 14 Am. St. Rep. 414, 3 L. R. A. 747, 21 N. E. 377, citing: Com. v. Hall, 15 Mass. 240; Com. v. Newbury, 19 Mass. (2 Pick.) 51; Com. v. Logan, 78 Mass. (12 Gray) 136; Com. v. Welsh, 83 Mass. (1 Allen) 1; Com. v. Gallagher, 83 Mass. (1 Allen) 592.

4 Ostler v. State, 3 Ind. App. 122, 29 N. E. 270.

description of the place,[5]—e. g., the location of the land upon which the offense was committed, in which case it is sufficient to give the name of the owner of the land and the county in which located.[6]

§ 948. ——INTENT AND MALICE. An indictment or information charging malicious mischief should allege that the act was maliciously done,[1] except in those instances in which malice is not an ingredient of the offense by the statute under which the action is prosecuted;[2] but the malice is against the owner of the property and not against the property injured or destroyed,[3] although there are cases holding that malice against the owner

5 **As to place of deposit of poison,** for instance. See, infra, § 954.

6 Arbuckle v. State, 32 Ind. 34; Johnson v. State, 68 Ind. 43; State v. Murphy, 7 Ind. App. 44, 34 N. E. 248; State v. Smith, 7 Ind. App. 166, 24 N. E. 127.

1 MINN.—United States v. Gideon, 1 Minn. 292. MISS.—Thompson v. State, 51 Miss. 353. N. C.—State v. Jackson, 34 N. C. (12 Ired. L.) 329. TENN. — Boyd v. State, 21 Tenn. (2 Humph.) 39. TEX.—State v. Rector, 34 Tex. 565. WIS.—State v. Delue, 2 Pin. 204, 1 Chand. 166.

An indictment for violating Gen. St. 1913, § 8934, subd. 1, was held not bad though it failed to charge that the defendant had acted "maliciously." — State v. Ward, 127 Minn. 510, 150 N. W. 209.

2 People v. O'Brien, 60 Mich. 8, 26 N. W. 795.

3 State v. Lightfoot, 107 Iowa 344, 78 N. W. 41; State v. Leslie, 138 Iowa 104, 128 Am. St. Rep. 160, 115 N. W. 897; State v. Hill, 79 N. C. 656; State v. Click, 115 Tenn. 283, 90 S. W. 855.

Charging malicious mischief, indictment or information must either expressly charge malice against the owner, or otherwise fully describe the offense; it is not sufficient to allege that the act was done "feloniously, wilfully, and maliciously," without averring that it was done mischievously, or with malice against the owner.—State v. Jackson, 34 N. C. 329.

"**With but few exceptions,** most of which grow out of the particular statute being construed, malicious mischief, which is made punishable as a crime, is not mischief or injury done to the property through mere wantonness, or a mere intent to injure the property, but is mischief or injury inflicted with the malicious intent to injure some person, ordinarily the owner of the property. It need not be shown that the offender knew who the owner was; but it will be sufficient if it be established that he was bent on mischief against the owner, whoever he might be proved to be. But the malice must have some object

need not be alleged.[4] The form of the allegation of malice depends upon the provisions of the statute under which the accused is prosecuted, and where the statute specifies acts done "maliciously or mischievously," the indictment or information should allege the act to have been done maliciously and mischievously.[5] Under a statute providing whoever shall "wantonly and wilfully injure the property of another" shall be guilty of a misdemeanor, an indictment or information charging accused "wantonly and wilfully did injure," without charging the act was unlawful, is sufficient.[6] But where the stat-

other than the thing injured."—Weaver, J., in State v. Leslie, 138 Iowa 104, 128 Am. St. Rep. 160, 115 N. W. 897, citing: ALA.—Northcot v. State, 43 Ala. 330; Hobson v. State, 44 Ala. 380. CONN.—State v. Foote, 71 Conn. 737, 43 Atl. 488. IND.—Dawson v. State, 52 Ind. 478. IOWA—State v. Linde, 54 Iowa 139, 6 N. W. 168; State v. Williamson, 68 Iowa 351, 27 N. W. 259; State v. Phipps, 95 Iowa 491, 64 N. W. 411; State v. Lightfoot, 107 Iowa 344, 78 N. W. 41. MASS.—Com. v. Walden, 57 Mass. (3 Cush.) 558; Com. v. Williams, 110 Mass. 401. MINN.—United States v. Gideon, 1 Minn. 292. MISS.—Duncan v. State, 49 Miss. 331. N. C.—State v. Newby, 64 N. C. 23; State v. Hill, 79 N. C. 656. TENN.—State v. Wilcox, 11 Tenn. (3 Yerg.) 278, 24 Am. Dec. 569; Goforth v. State, 27 Tenn. (8 Humph.) 37; State v. Stone, 50 Tenn. (3 Heisk.) 457. WYO.—State v. Johnson, 7 Wyo. 512, 54 Pac. 502.

4 State v. Scott, 19 N. C. 35.

5 IND.—State v. Maddox, 85 Ind. 585. IOWA—State v. Lightfoot, 107 Iowa 344, 78 N. W. 41. KY.—Com. v. Turner, 71 Ky. (8 Bush) 1. MASS.—Com. v. Walden, 57 Mass. (3 Cush.) 558. MICH.—People v. O'Brien, 60 Mich. 8, 26 N. W. 795. N. C.—State v. Tweedy, 115 N. C. 704, 20 S. E. 183. TENN.—State v. Click, 115 Tenn. 283, 90 S. W. 855.

Charging malicious disfigurement of a horse, it must be averred that the act was done maliciously.—Boyd v. State, 21 Tenn. (2 Humph.) 39.

Charging accused unlawfully, maliciously and wantonly, broke and destroyed designated property of a named person, is sufficient.—Com. v. Cunningham, 1 Pa. Dist. Ct. Rep. 573.

"Did shoot and wound one horse with a gun," etc., without stating that the act was mischievously or maliciously done is insufficient.—Thompson v. State, 51 Miss. 353.

"Wilfully and unlawfully," without the word "maliciously," will be insufficient.—State v. Lightfoot, 107 Iowa 344, 78 N. W. 41.

6 State v. Martin, 107 N. C. 904, 12 S. E. 194.

ute makes it penal to "wilfully or maliciously kill, maim, etc., any animal of another, with intent to injure the owner thereof," an intent to injure the owner must be alleged, because that is the essential ingredient of the offense charged under such a statute.[7] Failing to charge malice toward the owner of the property injured, the indictment or information must charge that the act was committed "mischievously," where that term is used in the description and prohibition of the offense,[8] because unless it is charged that the act was done "maliciously" or "mischievously," a trespass, only, will be charged, and the indictment or information will be fatally defective,[9] although there are cases which hold that to charge the act was done "unlawfully, wilfully and maliciously" is sufficient.[10]

§ 949. —— FELONIOUSLY, UNLAWFULLY, WILFULLY, ETC. In those cases in which malicious mischief is made a felony by the statute under which the prosecution is had, an indictment or information must charge the act complained of to have been "feloniously done," in the absence of a statutory provision to the contrary.[1] No other word can be substituted for the word "feloniously"; "unlawfully," or "wilfully," or both together, will not be sufficient, although used in the statutory description of the offense. Where the statute uses a series of words or phrases in describing the offense, the careful pleader will always use all such particular statutory descriptive words,[2] notwithstanding the fact that where those words

7 State v. Rector, 34 Tex. 565.

Malice against owner should be alleged on the charge of maliciously killing a dog. — United States v. Gideon, 1 Minn. 292.

8 State v. Scott, 19 N. C. 35; State v. Jackson, 34 N. C. 329; State v. Hill, 79 N. C. 656; Com. v. Cunningham, 1 Pa. Dist. Ct. Rep. 573.

9 State v. Lightfoot, 107 Iowa 344, 78 N. W. 41; Thompson v. State, 51 Miss. 353; Boyd v. State, 21 Tenn. (2 Humph.) 39; State v. Delue, 2 Pin. (Wis.) 204, 1 Chand. 166.

10 Com. v. Falvey, 108 Mass. 304.

1 R. v. Gray, 9 Cox C. C. 417.

2 Com. v. McLaughlin, 105 Mass. 460; Thompson v. State, 51 Miss.

are used in pairs, and in the disjunctive, it has been said to be necessary to allege and prove one, only,[3] although the contrary has been held;[4] or the pairs in the disjunctive may be joined in the conjunctive without laying the pleading open to the objection of duplicity;[5] where such series embraces a word of higher import than the others, which includes such others in its legal significance, such word can not be omitted, although the others of the series probably may.[6] Under a statute providing for the punishment of any one "who shall wilfully and maliciously, by any means whatever, kill, maim or wound any animal of another, which it is made larceny to steal," an indictment or information charging the offense must include the words "did wilfully and maliciously wound."[7]

§ 950. —— Negative averments. There may be instances in which it is necessary that an indictment or information charging malicious mischief should negative the right of the accused to do the act complained of,[1] but in all those cases in which the offense is defined in general words in the statute, although there are provisos and exceptions, the general rule of criminal plead-

353; Boyd v. State, 21 Tenn. (2 Humph.) 39; Uecker v. State, 4 Tex. App. 234; Woolsey v. State, 14 Tex. App. 57.

3 Rountree v. State, 10 Tex. App. 110; Werner v. State, 93 Wis. 266, 67 N. W. 417.

4 Com. v. Williams, 110 Mass. 401.

5 See, infra, § 959.

6 Kellogg v. Ford, 70 Ore. 213, 139 Pac. 751.

7 Lemon v. State, 19 Ark. 171; Swartzbaugh v. People, 85 Ill. 457; Thompson v. State, 51 Miss. 353.

"Wilfully" or "maliciously" omitted, indictment or information will be fatally defective.—State v. Delue, 2 Pin. (Wis.) 204, 1 Chand. 166.

1 See: ALA.—Brazleton v. State, 66 Ala. 96. FLA.—McGahagin v. State, 17 Fla. 665. MISS.—Murrah v. State, 51 Miss. 675. MO.—State v. Crenshaw, 41 Mo. App. 24; State v. Coy, 47 Mo. App. 187; State v. Stanley, 63 Mo. App. 654. NEB.—Ex parte Eads, 17 Neb. 145, 22 N. W. 352. N. C.—State v. Purdie, 67 N. C. 326; State v. Allen, 69 N. C. 23; State v. Painter, 70 N. C. 70; State v. Tomlinson, 77 N. C. 528. TEX.—State v. Smith, 21 Tex. 748; Woodward v. State, 33 Tex. Cr. Rep. 554, 28 S. W. 204.

ing applies, under which when such provisos and exceptions are not in the enacting clause or the statutory definition, it is not necessary to negative them, because where the case falls within either the proviso or exception it is merely a matter of defense, which the prosecution is not bound to anticipate.[2] Thus, the statute punishing injury to a dwelling-house "in which such person has no interest," the indictment or information must negative this qualification, which constitutes a part of the description of the offense.[3]

§ 951. DESCRIPTION OF PROPERTY INJURED. An indictment or information charging malicious mischief should show that designated property was injured,[1] and should describe such property with reasonable certainty,[2] and

2 ALA. — Bellinger v. State, 92 Ala. 86, 9 So. 399. ARK.—Dean v. State, 37 Ark. 57. D. C.—Smith v. District of Columbia, 12 App. Cas. 33. IND. — Hewitt v. State, 121 Ind. 245, 23 N. E. 83. MO.—State v. Batson, 31 Mo. 343. TEX.—State v. West, 10 Tex. 553; Ritter v. State, 33 Tex. 608.

Charging killing dog, it need not be stated that the case does not come within the exception contained in a proviso of the statute that the act shall not apply where the dog is killed while committing damage to another's property.—Hewitt v. State, 121 Ind. 245, 23 N. E. 83.

3 State v. Crenshaw, 41 Mo. App. 24; State v. Stanley, 63 Mo. App. 654.

1 State v. McKee, 109 Ind. 497, 10 N. E. 405.

Charging accused with throwing a missile at a railroad car or locomotive, which fails to charge that such car or locomotive was in actual motion, or stopped for a temporary purpose, held to be defective.—State v. Boyd, 86 N. C. 634.

Charging malicious mischief in cutting down telegraph poles, the property of a telegraph company, need not allege that they were erected where they might lawfully be, or that they were not erected on defendant's land without right or permission, or that the injury was done secretly in the night time or in such a way as to inflict peculiarly wanton injury, or that it was accompanied by any breach of the peace.—State v. McCallister, 7 Penn. (Del.) 301, 76 Atl. 226.

2 IND.—Birdg v. State, 31 Ind. 88. MASS. — Com. v. Bean, 65 Mass. (11 Cush.) 414; Com. v. Cox, 89 Mass. (7 Allen) 577. NEB.—State v. Priebnow, 14 Neb. 484, 16 N. W. 907. N. C.—State v. Hill, 79 N. C. 656. TENN.—State v. Pearce, 7 Tenn. (Peck.) 66; Taylor v. State, 25 Tenn. (6 Humph.) 285. TEX. — Ritter v.

state the character of the injury.[3] The description of the property in the statute defining the offense being in general terms, the indictment or information may follow the statute in this particular, specifically alleging the kind of property injured;[4] but it is not necessary after such

State, 33 Tex. 608; Brown v. State, 16 Tex. App. 245; Pratt v. State, 19 Tex. App. 276.

3 IND.—Read v. State, 1 Ind. 511; State v. Clevinger, 14 Ind. 366; State v. Williams, 21 Ind. 206; Brown v. State, 76 Ind. 85. OHIO—Oviatt v. State, 19 Ohio St. 573. TENN.—Boyd v. State, 21 Tenn. (2 Humph.) 39. TEX.—State v. Anderson, 34 Tex. 611.

4 People v. O'Brien, 60 Mich. 8, 26 N. W. 795; State v. Hambleton, 22 Mo. 452; R. v. Chalkley, Russ. & R. C. C. 258.

"Beast" includes cows (Taylor v. State, 25 Tenn. (6 Humph.) 285), and horses.—State v. Pearce, 7 Tenn. (Peck.) 66.

"Cattle" includes asses (R. v. Whitney, 1 Moo. C. C. 3), colts (R. v. Paty, 2 W. Bl. 721, 96 Eng. Repr. 423, 1 Leach C. C. 72), geldings (R. v. Mortis, 1 Leach C. C. 73), mares (State v. Hambleton, 22 Mo. 452; State v. Clifton, 24 Mo. 376; R. v. Paty, 2 W. Bl. 721, 96 Eng. Repr. 423, 1 Leach C. C. 72), pigs (R. v. Chapple, Russ. & R. C. C. 77), and steers.—State v. Lange, 22 Tex. 591; State v. Abbott, 20 Vt. 537.

"Chattels" includes horses.—State v. Phipps, 95 Iowa 491, 64 N. W. 411.

"Corn or grain" includes barley (R. v. Swatkins, 4 Car. & P. 548, 19 Eng. C. L. 520), and flax.—R. v. Spencer, 7 Cox C. C. 189.

"Domestic animals" includes fowls (R. v. Brown, 61 L. T. 594; 38 W. R. 95), hogs (State v. Enslow, 10 Iowa 115), and horses.—Swartzbaugh v. People, 85 Ill. 457.

"Hog" includes sow.—Shubrick v. State, 2 S. C. 21.

"Horse" includes colt (State v. Major, 14 Rich. L. (S. C.) 76), gelding (State v. Divine, 2 Ohio Dec. 80, 1 West. L. M. 331), mare (State v. Dunnavant, 3 Brev. L. (S. C.) 9, 5 Am. Dec. 530; State v. Garey, 3 Brev. L. (S. C.) 10; Goldsmith v. State, 38 Tenn. (1 Head) 154), and mules.—Goldsmith v. State, 38 Tenn. (1 Head) 154.

"Other house or building" includes a jail, jail house or building.—State v. Bryan, 89 N. C. 531.

"Personal property" includes due bills, promissory notes, and all evidences of debt.—State v. Sneed, 121 N. C. 614.

"Pulse" includes beans.—R. v. Woodward, 11 Moo. C. C. 323.

"Stack" does not include hay or thrashed wheat stored in barns (Erskine v. Com., 49 Va. (8 Gratt.) 624), or wheat growing in the field.—Parris v. People, 76 Ill. 274.

"Stack of hay" does not include a cock of hay.—People v. Doyle, 13 Cal. App. 611, 110 Pac. 458; R. v. McKeever, 1 Ir. R. C. L. 86.

"Swine" includes hogs.—Rivers v. State, 10 Tex. App. 177.

"Timber" does not include fence rails.—McCauley v. State, 43 Tex. 374.

specific allegation to set out the general statutory words descriptive of the property.[5] Thus, charging malicious destruction of cabbage "situated and growing on land," does not sufficiently charge the injury to personal property within the meaning of the statute, because the indictment or information does not show that the cabbage was not a part of the realty;[6] malicious destruction of glass being charged, the indictment or information must aver that the glass was a part of a building, an allegation that it was "in" a certain building not being sufficient;[7] under a statute making it criminal to maliciously injure or wound any horse, cattle, or other domestic beast of any person, an indictment or information charging the wounding of a hog, without averring that it was a "domestic beast," is sufficient;[8] under a statute punishing any person who shall deface or destroy, etc., any promissory note for the payment of money or property, an indictment or information charging accused with the offense should state whether the note destroyed was payable in money or in property;[9] defacing a public building being charged, unless the building defaced is one of the buildings specified in the statute, the indictment or information should allege that the building was "a public building held for public use," otherwise it will be insufficient,[10] although it has been

5 State v. Hambleton, 22 Mo. 452; Taylor v. State, 25 Tenn. (6 Humph.) 285; Rivers v. State, 10 Tex. App. 177; State v. Abbott, 20 Vt. 537.

6 Com. v. Dougherty, 72 Mass. (6 Gray) 349.

7 Com. v. Bean, 65 Mass. (11 Cush.) 414.

8 State v. Emslow, 10 Iowa 115.

Charging maliciously killing a cow, indictment sufficient without alleging that it is a "beast."—Taylor v. State, 25 Tenn. (6 Humph.) 285.

"One horse beast" sufficient description in an indictment under a statute punishing maliciously killing beasts.—State v. Pearce, 7 Tenn. (Peck.) 66.

9 Birdg v. State, 31 Ind. 88.

10 Brown v. State, 16 Tex. App. 245; Pratt v. State, 19 Tex. App. 276; Burkhalter v. State, (Tex. Cr.) 104 S. W. 901; Hughes v. State, 59 Tex. Cr. Rep. 360, 128 S. W. 904.

held in Arkansas that an indictment charging accused wilfully and maliciously injured, etc., a church building, being public property, is a sufficient description of the building injured.[11]

§ 952. MEANS AND MANNER OF INJURY—IN GENERAL. It has been said that the manner of the injury should be alleged in an indictment or information charging malicious mischief,[1] although there are cases to the contrary; thus, it has been said that in an indictment or information charging accused with killing a horse, the manner of killing need not be alleged,[2] and if alleged, will be surplusage;[3] charging accused with killing a dog, with intent to injure its owner, has been said to be sufficient.[4] The manner of injury is sufficiently described by setting out the injury actually done. Thus, charging accused, at a certain time and place, "did then and there unlawfully, maliciously and mischievously, injure and cause to be injured, a certain fence," the property of a person named, "by then and there unlawfully, maliciously and mischievously tearing down, breaking down and knock-

11 Saffell v. State, 113 Ark. 97, 167 S. W. 483.

1 State v. Costello, 62 Conn. 128, 25 Atl. 477; State v. Aydelott, 7 Blackf. (Ind.) 157.

Charging accused "did wilfully injure" a designated public building and house of worship, located at a stated place, although substantially in the language of the statute, is insufficient because it fails to show particularly the manner of the injury.—State v. Costello, 62 Conn. 128, 25 Atl. 477.

Charging accused "did maliciously and mischievously injure and cause to be injured a certain house," the property of a designated person, situated in a designated place, "of the value of fifty dollars, to the damage of the said" owner of five dollars, held to insufficiently describe the property, in that it failed to specify the injury done to the house.—State v. Aydelott, 7 Blackf. (Ind.) 157.

2 Hayworth v. State, 14 Ind. 590; Com. v. Sowle, 75 Mass. (9 Gray) 304, 69 Am. Dec. 289; Com. v. Brigham, 108 Mass. 457 (malicious torture of a horse).

3 Hayworth v. State, 14 Ind. 590.

4 State v. Pine, 30 Tex. 399.

Charging malicious shooting and killing sheep of a person named, wilfully and unlawfully, without the owner's consent, is sufficient.—Com. v. Smith, 69 Ky. (6 Bush) 263.

ing down, and removing a large portion of said fence,'' sufficiently charges malicious injury;[5] charging accused on a day and at a place named in the county ''a certain harness, of the value of fifty dollars, of the personal property of A, etc., feloniously, wilfully and maliciously did then and there injure and destroy, by then and there cutting the lines and martingales of said harness, and taking the rings from said martingales,'' etc., sufficiently charges the destruction of personal property of the value of fifty dollars;[6] charging wilful and malicious injury to an omnibus, of the value of five hundred dollars, by wilfully and maliciously driving the pole of a horse-railroad car at, against, and through a panel of the said omnibus, by means of which the said panel was broken in pieces, and the said omnibus was otherwise greatly injured, is a sufficient allegation of the value of the property injured, and that the panel was a part of the omnibus;[7] charging accused did maliciously and mischievously injure one wagon, the property of A, of the value of forty dollars, by then and there removing certain mentioned parts thereof, where the said A could never find them, which said removed parts were of the value of five dollars, all to the damage of said A of five dollars, is sufficient.[8] The statute providing ''every person who shall wilfully and maliciously break, destroy, or injure,'' etc., the property of another, the offense is properly described as a ''breaking'' alone, or as ''destroying,'' or as ''injuring,'' as the doing of either act is to commit an offense under the statute, and one or all these things may be charged, according to the facts in the case.[9]

5 Squires v. State, 59 Ind. 261.

Charging tearing down the fence of two persons, must allege want of consent of each of such persons. — Gavitt v. State, 25 Tex. App. 419, 8 S. W. 478.

6 McKinney v. People, 32 Mich. 284.

7 Com. v. Cox, 89 Mass. (7 Allen) 577.

8 State v. Williams, 21 Ind. 206.

9 State v. Batson, 31 Mo. 343.

§ 953. —— UNLAWFUL ENTRY UPON LAND. In those cases in which the statute defining and punishing malicious mischief contains a provision regarding such mischief done after unlawful entry upon lands of another, such unlawful entry is a material ingredient in the offense charged and must be specifically alleged.[1] Thus, malicious destruction of trees, shrubs or vines on the land of another being charged, unlawful entry by the accused upon the land must be averred;[2] and where the malicious mischief charged is the tearing down of the fence of two persons, in addition to an averment of the unlawful entry, there must be an allegation of the want of consent of each of the owners.[3]

§ 954. —— POISON OR POISONOUS SUBSTANCE. Under a statute penalizing the injury to, or killing of, animals or fowls by means of poison or poisonous substance, an indictment or information charging the offense in the language of the statute is sufficient;[1] it not being necessary to specifically name the poison or poisonous substance, or aver that it was a substance[2] or in a quantity[3] sufficient to kill or injure, or to allege that the act was maliciously done.[4] But the provisions of the statute in relation to the place of putting or depositing the poison or poisonous substance must be strictly followed. Thus, depositing poison or poisonous substance upon lands belonging to another, or in the buildings of another, being denounced and punished by statute, an indictment or information which charges accused deposited poison on

1 Arbuckle v. State, 32 Ind. 34; State v. Scott, 68 Ind. 267; Com. v. Dougherty, 72 Mass. (6 Gray) 349.

2 Com. v. Dougherty, 72 Mass. (6 Gray) 349.

3 Gavitt v. State, 25 Tex. App. 419, 8 S. W. 478.

1 People v. Keeley, 81 Cal. 210, 22 Pac. 593; Com. v. Falvey, 108 Mass. 304; State v. Labounty, 63 Vt. 375.

2 People v. Keeley, 81 Cal. 210, 22 Pac. 593.

3 State v. Labounty, 63 Vt. 376.

4 People v. Keeley, 81 Cal. 210, 22 Pac. 593.

the hay of another person, but without stating upon whose land, or in whose building the hay was situated, or the act done, was held to be insufficient to charge the offense under the statute;[5] and an allegation of exposing poison intending another's horse should take it charged to have been "wilfully and unlawfully" done, does not charge an offense under a statute making it malicious mischief to "maliciously" administer poison to such animals, or to expose any poison with intent that the same shall be taken by them.[6]

§ 955. CHARACTER AND NATURE OF INJURY. The character and nature of the injuries inflicted should be set forth with such minuteness and detail as will accurately describe and sufficiently identify the transaction, and inform the accused of the nature and extent of the charge he must meet;[1] but the manner or means of injury or destruction, as we have already seen,[2] is not usually required to be set out.[3] In a case where the statute specifically provides against the wounding or killing of stock or domestic animals, as to whether the instrument used, or the manner of wounding, or the extent of the wounding should be set out, depends upon the wording of the particular statute under which the prosecution is had.[4]

5 State v. Pratt, 54 Vt. 484.

6 State v. Lightfoot, 107 Iowa 344, 78 N. W. 41.

1 CAL.—People v. Boren, 139 Cal. 210, 72 Pac. 899. CONN.—Hotchkiss v. Tuttle, 1 Root 438; State v. Costello, 62 Conn. 128, 25 Atl. 477. IND.—State v. Merrill, 3 Blackf. 346; State v. Aydelott, 7 Blackf. 157; Read v. State, 1 Ind. 511; State v. Jackson, 7 Ind. 270; Hayworth v. State, 14 Ind. 590. MO.—State v. Doerssett, 19 Mo. 383; State v. Batson, 31 Mo. 343. N. H.—State v. Webster, 17 N. H. 543. N. C.—State v. Langford, 10 N. C. (3 Hawks) 381. TENN.—Shell v. State, 25 Tenn. (6 Humph.) 283. TEX.—Todd v. State, 39 Tex. Cr. Rep. 323, 45 S. W. 596.

2 See, supra, § 952.

3 Hayworth v. State, 14 Ind. 590; Taylor v. State, 25 Tenn. (6 Humph.) 285.

4 See: ALA.—Turnipseed v. State, 6 Ala. 664. ARK.—State v. Collins, 19 Ark. 587. IND.—State v. Williams, 21 Ind. 260. IOWA—State v. Brant, 14 Iowa 180. LA.—State v. Keogh, 13 La. Ann. 243. ME.—State v. Burgess, 40

§ 956. VALUE OF PROPERTY AND EXTENT OF INJURY. The decisions are not harmonious upon the question as to whether an indictment or information charging malicious mischief should state the value of the property injured or the amount of the injuries inflicted, the difference in decision being controlled by the variance in the statutes of the various jurisdictions; and even in the same jurisdiction a later statute may vary the rule. Thus, under an early statute in Alabama the value of the property damaged was required to be alleged,[1] but under a later statute[2] the value of the property,—an animal,—need not be alleged.[3] It has been said that value need not be stated where there is an averment that the property, or its owner, was damaged in a specified amount.[4] The same want of uniformity prevails among the decisions in relation to an allegation as to the damages resulting from the injury complained of, one line of cases holding that the amount of damages should be stated,[5] and another line that it need not be stated.[6] The general rule may be said

Me. 592. MASS.—Com. v. Soule, 43 Mass. (2 Metc.) 21; Com. v. Walden, 57 Mass. (3 Cush.) 558; Com. v. Bean, 65 Mass. (11 Cush.) 414; Com. v. Sowle, 75 Mass. (9 Gray) 304, 69 Am. Dec. 289; Com. v. Cox, 89 Mass. (7 Allen) 577; Com. v. Falvey, 108 Mass. 304; Com. v. Williams, 110 Mass. 401. MICH.—McKinney v. People, 32 Mich. 284. N. C.—State v. Staton, 66 N. C. 640; State v. Painter, 70 N. C. 70. OHIO—Oviatt v. State, 19 Ohio St. 573. S. C.—State v. Cantrell, 2 Hill L. 389. ENG.—R. v. Whiteman, 1 Dears. 353, 25 Eng. L. & Eq. 590; R. v. Pembliton, L. R. 2 C. C. 119.

1 State v. Garner, 8 Port. (Ala.) 447.

Charging maliciously killing a dog, should aver its value.—United States v. Gideon, 1 Minn. 292.

2 Ala. Rev. Code, § 3733.

3 Caldwell v. State, 49 Ala. 34.

4 Sample v. State, 104 Ind. 289, 4 N. E. 40.

5 State v. McKee, 109 Ind. 497, 10 N. E. 405.

The amount of damage inflicted, not the value of the animal killed, constituting the basis upon which the penalty for the offense is estimated, an indictment or information should distinctly aver the damage occasioned by the injury, even though the value of the animal is stated.—Harness v. State, 27 Ind. 425.

6 Harris v. State, 73 Ga. 41; State v. Clevinger, 14 Ind. 366; Com. v. Cox, 89 Mass. (7 Allen) 577.

to be that the value of the property injured need not be alleged,[7] it being necessary simply to charge the amount of the damage done.[8] Thus, where a statute provides punishment for defacing or injuring any real or personal property, or thing of value, there need be no allegation of value where the thing is either personal or real property.[9] In those cases where the value of the property injured or destroyed determines the punishment to be inflicted on conviction,[10] the value is required to be alleged, but in no other cases.[11] Thus, the punishment being not less than three times the amount of the injury done to the owner, an indictment charging the killing of an animal must allege the amount of the injury done to the owner, an allegation of the value of the animal alone not being sufficient.[12] Where value is required to be al-

7 ALA. — Caldwell v. State, 49 Ala. 34. ARK.—State v. Culbreath, 71 Ark. 80, 71 S. W. 254. D. C.—Nation v. District of Columbia, 34 App. 453, 26 L. R. A. (N. S.) 996. GA.—Harris v. State, 73 Ga. 41; Holder v. State, 127 Ga. 51, 56 S. E. 71. IND.—State v. Clevinger, 14 Ind. 366. MASS.—Com. v. Cox, 89 Mass. (7 Allen) 577. MISS.—Funderburk v. State, 75 Miss. 20, 21 So. 658. TEX. — Stanton v. State, 45 Tex. Cr. 168, 74 S. W. 771.

8 Sample v. State, 104 Ind. 289, 6 Am. Cr. Rep. 416, 4 N. E. 40; State v. McKee, 109 Ind. 497, 10 N. E. 406; State v. Heath, 41 Tex. 426.

Amount of injury need not be alleged.—Harris v. State, 73 Ga. 41.

Omission is not cured by an averment of the value of the animal.—Wecker v. State, 4 Tex. App. 234.

9 Com. v. Sears, 7 Ky. L. Rep. 219.

10 ALA.—State v. Garner, 8 Port. 447. D. C.—Nation v. District of Columbia, 34 App. 453, 26 L. R. A. (N. S.) 996. IND.—State v. Shadley, 16 Ind. 230; State v. McKee, 109 Ind. 497, 10 N. E. 405. TEX.—State v. Heath, 41 Tex. 426; Nicholson v. State, 3 Tex. App. 31; Beaufier v. State, 37 Tex. Cr. Rep. 50, 33 S. W. 608. ENG.—R. v. Thoman, 12 Cox C. C. 54.

11 ALA. — State v. Garner, 8 Port. 447; Caldwell v. State, 49 Ala. 34. ARK.—State v. Culbreath, 71 Ark. 80, 71 S. W. 254. IND.—State v. Aydelott, 7 Blackf. 157; State v. Blackwell, 3 Ind. 529. MASS.—Com. v. Soule, 43 Mass. (2 Metc.) 21. MISS.—Funderburk v. State, 75 Miss. 20, 21 So. 658. N. C.—State v. Simpson, 9 N. C. (2 Hawks) 460. TEX.—Nutt v. State, 19 Tex. 340; Maines v. State, 20 Tex. 38; Stanton v. State, 45 Tex. Cr. Rep. 168, 74 S. W. 771.

12 Thomas v. State, 42 Tex. 235; Nicholson v. State, 3 Tex. App. 31; Wecker v. State, 4 Tex. App. 234.

leged, and several articles are enumerated as having been maliciously destroyed, the collective value may be given;[13] but in such cases the proof must show the destruction of all the articles alleged or the prosecution must fail.[14] The careful pleader in such cases will state the value of the articles separately.

§ 957. DAMAGE TO PROPERTY OR OWNER. We have already seen that an indictment or information charging malicious mischief to property should charge malice against the owner and not against the property injured or destroyed.[1] As to whether the allegation respecting damages shall be to the property or to the owner depends largely upon the statute under which prosecution is had. Where the statute simply provides for the punishment of any one who shall maliciously injure "any property" of another, it is not necessary to charge any damage to the property, or any damage to the owner of the property, in a prosecution under such statute.[2] In the absence of statutory provision to the contrary it is immaterial whether the damage is alleged to have been done to the property injured or destroyed or to the owner thereof;[3] but where the statute provides a punishment for wilfully killing, wounding, etc., any animal, with intent to injure the owner thereof, the amount of the injury done to the owner by the act must be averred, such amount being necessary in the determination of the punishment.[4]

§ 958. OWNERSHIP OF PROPERTY INJURED. The ownership of the property injured or destroyed should generally be alleged, both at common law and under statute,[1] and the

13 Com. v. Falvey, 108 Mass. 304.

14 Id.

1 See, supra, § 948.

2 Kinsman v. State, 77 Ind. 132.

3 State v. Spark, 60 Ind. 298; State v. Pitzer, 62 Ind. 362; Kinsman v. State, 77 Ind. 132.

4 State v. Heath, 41 Tex. 426. See, supra, § 956.

1 ALA.—Morning Star v. State, 52 Ala. 405. GA.—Smith v. State, 63 Ga. 168. ILL.—Staaden v. People, 82 Ill. 432, 25 Am. Rep. 333. IND.—Read v. State, 1 Ind. 511; State v. Jackson, 7 Ind. 270.

rightful possession thereof should be alleged to have been in a person other than the accused,[2] unless the ownership is unknown, in which case that fact should be averred.[3] But these requirements are not universal; some of the statutes require,[4] and others do not require,[5] that the

IOWA—State v. Brant, 14 Iowa 180. KAN. — State v. Haney, 32 Kan. 428, 4 Pac. 831. NEB.—Ex parte Eads, 17 Neb. 145, 22 N. W. 352. N. C.—State v. Mason, 35 N. C. (13 Ired. L.) 341; State v. Sears, 61 N. C. 146; State v. Knox, 61 N. C. 312; State v. Hill, 79 N. C. 656; State v. Deal, 92 N. C. 802. PA.—Davis v. Com., 30 Pa. St. 421. R. I.—State v. Gilligan, 23 R. I. 400, 50 Atl. 844. TENN.—Haworth v. State, 7 Tenn. (Peck.) 89; State v. Click, 115 Tenn. 283, 90 S. W. 855. TEX.—State v. Faucett, 15 Tex. 584; State v. Smith, 21 Tex. 748; Ritter v. State, 33 Tex. 608; Brown v. State, 16 Tex. App. 245; Pratt v. State, 19 Tex. App. 276; Woodward v. State, 33 Tex. Cr. Rep. 554, 28 S. W. 204; Cleavinger v. State, 43 Tex. Cr. Rep. 273, 65 S. W. 89. ENG.—R. v. Jones, 1 Car. & K. 181, 47 Eng. C. L. 181; R. v. Patrick, 2 East 1059.

Animal charged to have been wounded, ownership of the animal must be alleged.—State v. Deal, 92 N. C. 802.

Growing trees alleged to have been destroyed under a statute making it a crime to wilfully and maliciously, and without lawful authority, injure or destroy trees "standing or growing in an orchard, nursery, or grove, the property of another," the indictment or information must allege that the trees were "the property of another."—Ex parte Eads, 17 Neb. 145, 22 N. W. 352.

Inanimate property charged to have been maliciously injured or destroyed, the ownership must be alleged.—Davis v. Com., 30 Pa. St. 421.

Malicious injury to stock charged, ownership should be stated in direct terms.—State v. Jackson, 7 Ind. 270.

Under some statutes, and possibly under some circumstances, the common-law rule requiring the allegation of ownership may be omitted.—Benson v. State, 1 Tex. App. 6; State v. Brocker, 32 Tex. 611; Owens v. State, 52 Ala. 400.

2 Woodward v. State, 33 Tex. Cr. Rep. 554, 28 S. W. 204.

Breaking lock on door of church building being charged, indictment or information should allege that the rightful possession of the property was in some person other than the accused. — Woodward v. State, 33 Tex. Cr. Rep. 554, 28 S. W. 204.

3 State v. Anderson, 34 Tex. 611.

4 IND.—State v. Jackson, 7 Ind. 270. NEB. — Ex parte Eads, 17 Neb. 145, 22 N. W. 352. N. C.—State v. Deal, 92 N. C. 802. PA.—Davis v. Com., 30 Pa. St. 421. TEX. — State v. Smith, 21 Tex. 748; Woodward v. State, 33 Tex. Cr. Rep. 554, 28 S. W. 204.

5 State v. Brocker, 32 Tex. 611.

An indictment charging that defendants injured or defaced the

ownership of the property injured should be alleged. Under a statute making it an offense and providing that any one who shall wantonly kill, etc., any "dumb animal," or "domestic animal," or the like, enumerated in the statute, shall be fined, etc., an indictment or information charging the offense need not allege the ownership of the property injured.[6] Where an allegation as to the ownership is required, the name of the owner is material, and an indictment or information in which the name of the owner is left blank,[7] or wrongly given,[8] will be insufficient. Where the owner of the property is a natural person, it will be sufficient to name him, and where the owner is a corporation, its name should be given and the fact of incorporation averred;[9] and ownership may be laid in one in possession,[10]—it is never necessary to deraign the title.[11] The ownership of public property need

property of a person named is good as against the objection that it does not allege the ownership, and that it charges the defendants with jointly committing the offense.—Perry v. State, 149 Ala. 40, 43 So. 18.

6 State v. Brocker, 32 Tex. 611.

7 Alleging the property injured to be the property of ——— is fatally defective in not stating the name of the owner or that the property did not belong to the accused. — State v. Smith, 21 Tex. 748.

8 Haworth v. State, 7 Tenn. (Peck.) 89.

9 Staaden v. People, 82 Ill. 432, 25 Am. Rep. 333.

10 CAL.—People v. Coyne, 116 Cal. 295, 48 Pac. 218. IND.—Read v. State, 1 Ind. 511. KAN.—State v. Gurnee, 14 Kan. 111. ME.—State v. Whittier, 21 Me. 341, 38 Am. Dec. 272. NEV.—State ex rel. Murphy v. Rising, 10 Nev. 97. PA.—Davis v. Com., 30 Pa. St. 421. R. I.—State v. Gilligan, 23 R. I. 400, 50 Atl. 844. TENN.—State v. Mathes, 71 Tenn. (3 Lea) 36. TEX. — Woodward v. State, 33 Tex. Cr. Rep. 554, 28 S. W. 204.

Malicious severing of corn from the freehold charged, indictment or information must allege the owner of the corn had some possessory right in the land.—State v. Haney, 32 Kan. 428, 4 Pac. 831.

Title or right of possession of real estate not involved in an action for malicious mischief done on such property.—State ex rel. Murphy v. Rising, 10 Nev. 97.

Wantonly defacing a building being charged, an allegation that the building was occupied by a named person at the time of the offense is sufficient, it not being necessary to allege who was the owner thereof.—State v. Mathes, 71 Tenn. (3 Lea) 36.

11 State v. Brant, 14 Iowa 180; State v. Semotan, 85 Iowa 57, 51 N. W. 1161.

not be laid further than the designating of it as such.[12] Thus, the defacing of a public building being charged, it is sufficient to allege it to have been a public building, but it must also be averred that it was held for public use.[13] It is not necessary to allege that the accused knew who the owner of the property was, where the indictment or information shows that he was bent on mischief against the owner, whoever he might be proved to be.[14] The ownership required to be alleged must be proved as set out,[15] but proof of possession is sufficient proof of ownership,[16] even when the injury is to real property.[17]

§ 959. Duplicity. The general rules governing duplicity in the pleading of statutory crimes apply equally in the charge of malicious mischief. Where the statute enumerates different acts, or a series of acts, any one or all of which may constitute the offense, they may all be charged in one count; and the accused may be alleged to

12 Owens v. State, 52 Ala. 400.

13 Brown v. State, 16 Tex. App. 245.

A school house must be alleged to be a public building.—Pratt v. State, 19 Tex. App. 278.

Benches and books in a church edifice described as the public property of the church means that they are the property of the church for the common use of the members of the congregation.—Smith v. State, 63 Ga. 168.

Charging destruction of windows in county seminary building, the property of a named county, sufficiently characterizes a malicious injury of public property under the statute, and charges the offense with sufficient certainty.—Read v. State, 1 Ind. 511.

Malicious injury to a church edifice charged, it is not necessary to set forth the character of the title and interest in the church building, or to allege corporate existence, it being sufficient to aver the ownership.—State v. Brant, 14 Iowa 180.

14 State v. Leslie, 138 Iowa 104, 128 Am. St. Rep. 160, 115 N. W. 897.

15 IND. — Hughes v. State, 103 Ind. 344, 2 N. E. 956. ME.—State v. Weeks, 30 Me. 182. N. Y.—People v. Horr, 7 Barb. 9. N. C.—State v. Hill, 79 N. C. 656. R. I.—State v. Gilligan, 23 R. I. 400, 50 Atl. 844. TEX.—Nutt v. State, 19 Tex. 340; Belverman v. State, 16 Tex. 130; Phillips v. State, 17 Tex. App. 169.

16 State v. Leasman, 137 Iowa 191, 114 N. W. 1032.

17 People v. Ferguson, 119 Mich. 373, 78 N. W. 334; State v. Jaynes, 78 N. C. 504.

have injured or caused to have been injured,[1] maliciously destroyed and maliciously caused to be destroyed,[2] the property described, without the indictment or information being open to the objection of duplicity because charging two offenses.[3] Charging accused entered a designated edifice, broke and injured an organ and defiled it with ordure, and at the same time and place defiled certain benches and books, charges but one offense, notwithstanding the fact the organ belonged to an individual and the benches and books belonged to the church.[4]

1 Squires v. State, 59 Ind. 261.

2 State v. Kuns, 5 Blackf. (Ind.) 314; State v. Slocum, 8 Blackf. 315.

3 State v. Kuns, 5 Blackf. 314; State v. Slocum, 8 Blackf. 315; Sample v. State, 104 Ind. 289, 6 Am. Cr. Rep. 416, 4 N. E. 40; State v. Hockenberry, 11 Iowa 269; State v. Harris, 11 Iowa 414; State v. Phipps, 95 Iowa 491, 64 N. W. 411; State v. Batson, 31 Mo. 343; Ratcliffe v. Com., 46 Va. (5 Gratt.) 657.

4 Smith v. State, 63 Ga. 168.

CHAPTER LIX.

INDICTMENT—SPECIFIC CRIMES.

Mayhem.

§ 960. Sufficiency of indictment—In general.
§ 961. —— Language of the statute.
§ 962. —— Negative averments.
§ 963. Allegation as to time and place.
§ 964. Alleging intent.
§ 965. Alleging act "feloniously" done.
§ 966. Alleging malice and premeditation.
§ 967. Alleging "lying in wait."
§ 968. Allegation of the mayhem.
§ 969. Duplicity.

§ 960. SUFFICIENCY OF INDICTMENT[1]—IN GENERAL. An indictment or information charging accused with the crime of mayhem need not allege that he assaulted the person disfigured or maimed,[2] but there must be an allegation that the person was disfigured or maimed,[3] or an allegation of the facts in other words to meet the provision of the statute under which the prosecution is had. On a charge of cutting with intent to maim, the indictment or information need not specify the instrument with which the injury was inflicted,[4] or the manner of its use;[5] and where the charge is that the injury was caused by means of acid, the indictment or information need not describe the character of the acid, or the manner of its use.[6] The nature of the injury inflicted is not required to

1 As to forms of indictment for mayhem of the various grades and by different means, see Forms Nos. 1670-1685.

2 Benham v. State, 1 Iowa 542.

3 Chick v. State, 26 Tenn. (7 Humph.) 161.

4 State v. Gibson, 67 W. Va. 548, 28 L. R. A. (N. S.) 965, 68 S. E. 295.

5 See State v. Nerzinger, 220 Mo. 36, 119 S. W. 379.

6 Id.

Accessory before the fact in a

be set out more specifically than in the general words of the statute.[7]

Attempt to commit mayhem is carried by a charge of an assault with intent to maim and disfigure,[8] on the general theory of the criminal law that the greater crime includes the less, which is but a stage or step in the commission of the consummated offense.

§ 961. —— LANGUAGE OF THE STATUTE. It is sufficient for an indictment or information to allege the commission of the acts constituting mayhem or maiming as defined in the statute under which the prosecution is had.[1] The word "mayhem" is properly used, although that word does not occur in the statute under which the prosecution is had;[2] and where the word "mayhem" occurs in the statute, it is necessary that it be used in the indictment or information.[3] An indictment or information charging mayhem is sufficient where it describes the offense in the language of the statute,[4] or in words equivalent in their import to the words used in the statute.[5] But the charge must be either in the words of the statute which defines the crime, or in words which convey the clear

charge of mayhem by throwing vitriol held sufficiently charged, in People v. Rozelle, 78 Cal. 84, 20 Pac. 36.

7 See, infra, § 968.

8 People v. Demasters, 105 Cal. 669, 39 Pac. 35; Pool v. State, 59 Tex. Cr. Rep. 482, 129 S. W. 1135.

Under a statute providing that "to maim" is to wilfully deprive a person of a hand, arm, finger, toe, foot, leg, nose, or ear, or to put out an eye, or deprive a person of a member of his body; and "to disfigure" is to wilfully place any mark on the face or other part of the person, an indictment or information charging "maiming and disfiguring" carries with it a charge of assault with intent to maim and disfigure.—Pool v. State, 59 Tex. Cr. Rep. 482, 129 S. W. 1135.

1 Davis v. State, 22 Tex. App. 45, 2 S. W. 631.

2 State v. Vowels, 4 Ore. 324.

3 State v. Absence, 4 Port. (Ala.) 397.

4 State v. Absence, 4 Port. (Ala.) 397; State v. Briley, 8 Port. (Ala.) 472; People v. Yuskauskas, 268 Ill. 328, 109 N. E. 677; Ridenour v. State, 38 Ohio St. 272.

5 Tully v. People, 67 N. Y. 15, 2 Cow. Cr. Rep. 253.

meaning of the language of the statute;[6] and an indictment following the language of the statute need not allege that by reason of, and by means of, the facts alleged therein, the party assaulted was maimed or disfigured.[7] Where the exact language of the statute is not employed, the pleader must be careful to use words the exact equivalent, or embracing within their meaning the import of the words of the statute. The statutory words being "cut off or disable," an indictment or information introducing the word "destroy" has been held to be sufficient, because that word includes the statutory "disable."[8] The word "disable" used in a statute defining mayhem refers to a permanent and not to a temporary disability;[9] yet charging mayhem in the language of the statute, without charging permanent disfigurement, although the latter is necessary to conviction, is good in the absence of a demurrer.[10] The statutory words being "slit the lip," the words "bit the lip" can not be substituted therefor.[11] The statute providing that certain injury inflicted "with malicious intent to maim or disfigure," the word "maim" is used in its technical sense, and the indictment must charge the act was done "with intent to maim," only when the wound is a common-law mayhem; in all other cases the act should be characterized as done "with intent to disfigure."[12] Under a statute providing punishment where any person "shall be maimed, wounded, or disfigured" by the act of another, under circumstances which would constitute murder or manslaughter should death ensue, an indictment or information charging that

6 State v. Watson, 41 La. Ann. 598, 8 Am. Cr. Rep. 543, 7 So. 125.

7 United States v. Gunther, 5 Dak. 234, 38 N. W. 79.

8 Tully v. People, 67 N. Y. 15, 2 Cow. Cr. Rep. 253.

9 State v. Briley, 8 Port. (Ala.) 472.

10 State v. Enkhouse, (Nev.) 160 Pac. 23.

11 People v. Demasters, 105 Cal. 669, 39 Pac. 35.

12 State v. Johnson, 58 Ohio St. 417, 65 Am. St. Rep. 769, 11 Am. Cr. Rep. 603, 51 N. E. 40.

accused did unlawfully assault and cut with a knife, a person named, whereby he was "maimed, wounded and disfigured, and received great bodily harm," was held to sufficiently charge the offense.[13]

§ 962. —— NEGATIVE AVERMENTS. The general rule governing negative averments applies in the case of a charge of mayhem, and when the proviso or exception is not in the enacting clause, or in the definition of the mayhem, the indictment or information is not required to negative such proviso or exception.[1] Thus, it has been said that an indictment or information charging mayhem under a statute containing a proviso which reduces the offense from a felony to a misdemeanor, need not negative the proviso where that proviso is in a subsequent clause of the statute.[2]

§ 963. ALLEGATION AS TO TIME AND PLACE. An allegation as to the time when, and the place where, the act complained of occurred is necessary to give jurisdiction to the court on the face of the indictment or information, but is formal rather than essential, and an omission of the time of the offense will not vitiate,[1] except, it seems, in those jurisdictions in which the offense of mayhem is by statute made a felony, and the accused, on the trial, is convicted of a misdemeanor, only; in which case the indictment or information must show on its face that the prosecution was commenced within the period of limitations applicable to misdemeanors.[2]

13 State v. Vaughn, 164 Mo. 536, 65 S. W. 236.

1 Foster v. People, 1 Colo. 293; Geiger v. State, 5 Ohio Cir. Ct. Rep. 283; Worley v. State, 30 Tenn. (11 Humph.) 176.

2 Foster v. People, 1 Colo. 293.

1 State v. Fulton, 19 Mo. 680; State v. Gibbs, 65 Tenn. (6 Baxt.) 238.

2 Straw v. State, 14 Ark. 549; Turley v. State, 50 Tenn. (3 Heisk.) 11.

§ 964. ALLEGING INTENT. In those jurisdictions in which, under the statute defining mayhem, intent is a necessary element,—e. g., as where it is required that the act shall have been done "with an intent to injure, disfigure, or disable,"[1]—the indictment or information must specifically allege such intent or purpose,[2] and the intent specified in the indictment or information must be an intent to accomplish the specific injury denounced and punished by the statute,[3] for the reason that if the injury described in the indictment or information is other than that designated in the statute, the indictment or information will be insufficient.[4]

§ 965. ALLEGING ACT "FELONIOUSLY" DONE. "Feloniously" is a technical word, which was essential in every indictment at common law which charged a felony, and which felony, on conviction, occasioned a forfeiture of land or goods, to which was superadded other punishment.[1] In American law the word has no well-defined meaning, but is used to designate offenses which were declared a felony at common law, or offenses of considerable gravity which are declared felonies by statute.[2] Hence, where the crime of mayhem is declared to be a felony by statute, an indictment or information charging the offense under that statute should allege that the act was feloniously done;[3] but in those cases in which the

1 As under Minnesota Code.—State v. Hair, 37 Minn. 351, 34 N. W. 893.

2 State v. Briley, 8 Port. (Ala.) 472; State v. Elborn, 27 Md. 483; State v. Hair, 37 Minn. 351, 34 N. W. 893; State v. Ormond, 18 N. C. (1 Dev. & B. L.) 119.

3 Tully v. People, 67 N. Y. 15, 2 Cow. Cr. Rep. 253.

4 See, infra, § 968; State v. Johnson, 58 Ohio St. 417, 65 Am. St. Rep. 769, 11 Am. Cr. Rep. 603, 51 N. E. 40.

1 State v. Watson, 41 La. Ann. 598, 8 Am. Cr. Rep. 543, 7 So. 125; Com. v. Newell, 7 Mass. 245.

2 State v. Watson, 41 La. Ann. 598, 8 Am. Cr. Rep. 543, 7 So. 125; Com. v. Read, 4 Pa. L. J. Rep. 459, 10 Pa. L. J. 141; Com. v. Porter, 1 Pittsb. (Pa.) 502.

3 State v. Feaster, 25 Mo. 324; Trimble v. Com., 4 Va. (2 Va. Cas.) 143.

word "felony" or "feloniously" does not enter into the statutory definition of mayhem, the act need not be alleged to have been feloniously done.[4] Where the act is charged to have been committed "wilfully and maliciously," it need not be alleged to have been feloniously done;[5] and charging mayhem by means of acid with which accused put out the eyes of the person maimed or disfigured, is sufficient without alleging that the act was "feloniously" done.[6] Where the statute requires the infliction of the wound described to have been done "wilfully and maliciously," an indictment or information charging it to have been inflicted "feloniously" will not be sufficient, because it is not the equivalent of the statutory words.[7] In such a case the use of the word "feloniously" in the indictment is meaningless, and surplusage, because the offense is required to be charged and described in the words of the statute, or in words which convey the clear meaning of the language used in the statute.[8] And it has been said that charging accused with "feloniously" inflicting a wound less than mayhem, and omitting the statutory definition of the offense, is insufficient, because it does not charge any offense under the statute.[9]

§ 966. Alleging malice and premeditation. In those jurisdictions in which "premeditated design" is a necessary element under the statutory definition of the crime of mayhem, premeditated design must be averred, but the indictment or information need not allege the manner in

4 State v. Absence, 4 Port. (Ala.) 397.

5 State v. Absence, 4 Port. (Ala.) 397; Davis v. State, 22 Tex. App. 45, 2 S. W. 630.

6 State v. Nerzinger, 220 Mo. 36, 119 S. W. 379.

7 State v. Watson, 41 La. Ann. 598, 8 Am. Cr. Rep. 543, 7 So. 125.

8 State v. Williams, 37 La. Ann. 776; State v. Watson, 41 La. Ann. 598, 8 Am. Cr. Rep. 543, 7 So. 125.

9 State v. Watson, 41 La. Ann. 598, 8 Am. Cr. Rep. 543, 7 So. 125; State v. Johnson, 58 Ohio St. 417, 65 Am. St. Rep. 769, 11 Am. Cr. Rep. 603, 51 N. E. 40.

which the premeditated design was evinced.[1] "Maliciously" in an indictment or information means on purpose and with evil intent, but does not necessarily mean with an intent to commit the particular mayhem,[2] and under the California statute, does not mean with premeditated malice, a malicious intent formed upon the instant being sufficient.[3] Malice aforethought is not an essential element of the crime of mayhem under the California statute, and proof of premeditation or deliberation is not required; it is sufficient to prove the commission of the act, from which the law will presume it to have been done in pursuance of an intent formed during the conflict, and that it was unlawful and malicious, unless the evidence tends to show that it was done in self-defense.[4]

§ 967. Alleging "lying in wait." Where "lying in wait" is not a specified element in the statutory definition of the offense of mayhem, the indictment or information need not charge the accused with "lying in wait,"[1] even though lying in wait may evince premeditated design,[2] although the rule seems to have been otherwise at an early date in some of the jurisdictions, at least.[3]

§ 968. Allegation of the mayhem. It has been said that an indictment or information charging a common-law mayhem must allege that the person assaulted was "maimed";[1] but that in charging mayhem under the stat-

1 Tully v. People, 67 N. Y. 15, 2 Cow. Cr. Rep. 253.

2 Molette v. State, 49 Ala. 18.

3 People v. Wright, 93 Cal. 564, 29 Pac. 240.

"Maliciously" in California Code section defining mayhem merely imports "a wish to injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."—People v. Wright, 93 Cal. 564, 29 Pac. 240.

4 People v. Wright, 93 Cal. 564, 29 Pac. 240.

1 State v. Holmes, 4 Penn. (Del.) 196, 55 Atl. 343.

2 Tully v. People, 67 N. Y. 15, 2 Cow. Cr. Rep. 253.

3 Respublica v. Reiker, 3 Yeates (Pa.) 282.

1 Guest v. State, 19 Ark. 405; Com. v. Newell, 7 Mass. 245; Chick v. State, 26 Tenn. (7 Humph.) 161; Terrell v. State, 86 Tenn. 523, 2 S. W. 212.

utes, it is sufficient to allege that the person assaulted was "disabled" or "disfigured."[2] The matter of the sufficiency of the charge of the mayhem depends, to a certain extent at least, upon the wording of the particular statute under which the indictment or information is drawn. It is thought that it will never be necessary that the nature of the injury be set out more specifically than the crime is defined by the words of the statute,[3] and that the allegation will be sufficient without the use of the word "maimed,"[4] although it has been held otherwise.[5] Charging the specific mayhem committed will be sufficient, notwithstanding the actual intent of the accused was to commit some other act of mayhem than that which he succeeded in committing.[6] Under a statute including in the definition of mayhem slitting the ear of a human being, and it being immaterial under the statute how the injury was inflicted, an indictment or information charging accused bit off a portion of the ear of a named person, is sufficient;[7] and charging mayhem by biting off the ear, the indictment or information need not designate which ear.[8] Charging accused feloniously assaulted a named person with a knife and of his malice aforethought cut and slit the nose of such person, with intent to maim and disfigure him, sufficiently charges the crime of mayhem.[9] Under a statute providing that whoever shall on purpose, and of malice aforethought, among other things, put out the eye of any person, with intent to kill, maim, or disfigure such person, shall be guilty of mayhem, an indictment or information charging A, with force and arms,

2 Tully v. People, 67 N. Y. 15, 2 Cow. Cr. Rep. 253; Terrell v. State, 86 Tenn. 523, 2 S. W. 212.

3 Kitchen v. State, 80 Ga. 810, 7 S. E. 209.

4 Guest v. State, 19 Ark. 405.

5 Chick v. State, 26 Tenn. (7 Humph.) 161.

6 Molette v. State, 49 Ala. 18.

7 State v. Enkhouse, (Nev.) 160 Pac. 23.

8 State v. Green, 29 N. C. (7 Ired. L.) 39.

At common law it was otherwise. See Archb. Cr. Pl. 315.

9 State v. Bunyard, 253 Mo. 347, 161 S. W. 753.

in and upon B, feloniously did make an assault, and the said A, with a large quantity of sulphuric acid, then and there feloniously, etc., did put out the eyes of the said B, by then and there burning the said eyes of said B with said sulphuric acid, with the intent, then and there, her, the said B, feloniously to maim and disfigure, sufficiently charges the crime of mayhem against the objection that it does not state the act was "feloniously" done, and does not describe the character of the acid nor state the manner in which it was used.[10] But it has been said that under a statute providing that "whoever, with malicious intent to maim or disfigure, cuts, bites, or slits the nose, ear or lip," etc., is declared guilty of the crime of mayhem, an indictment or information which charges the accused with maliciously biting the ear of another, with intent to maim, can not be supported as to the particular intent charged, as the biting of an ear does not in law constitute a mayhem.[11]

§ 969. DUPLICITY. The statute providing that the crime may be committed in one manner "or" another, the person offending, at one time, in one or all the manners designated, incurs but a single penalty, and an indictment or information charging the accused may properly allege, in a single count, that he did the things forbidden, employing the conjunctive "and" where the statute uses the disjunctive "or," without being open to the objection of duplicity.[1] The general rule that where the statute enumerates two or more ways in which the act denounced and punished may be committed, an indictment or information may join all these various ways in one count, joining the disjunctive clauses with the conjunctive "and," applies

10 State v. Nirzinger, 220 Mo. 36, 119 S. W. 379.

11 State v. Johnson, 58 Ohio St. 417, 65 Am. St. Rep. 769, 11 Am. Cr. Rep. 603, 51 N. E. 40.

1 Coleman v. State, 94 Miss. 860,

to a charge of the crime of mayhem.[2] Thus, it has been said that under a statute providing that mayhem may be committed in different ways, its commission by different means may be charged in one count, as by assaulting with a whip and burning with a hot stove-lid lifter, the two acts constituting the offense of "wounding and disfiguring" under the statute, even though a period of time elapsed between the assault with the whip and the assault with the stove-lid lifter, and the lapse of time between the assaults is not sufficient to render the affair other than a single transaction.[3]

48 So. 181; State v. Nieuhaus, 217 Mo. 332, 117 S. W. 73.

[2] State v. Ailey, 50 Tenn. (3 Heisk.) 8; Derieux v. Com., 4 Va. (2 Va. Cas.) 379; Angel v. Com., 4 Va. (2 Va. Cas.) 231; Canada v. Com., 63 Va. (22 Gratt.) 899; R. v. Briggs, 1 Lew. C. C. 61, 1 Moo. C. C. 318.

[3] State v. Nieuhaus, 217 Mo. 332, 117 S. W. 73.

CHAPTER LX.

INDICTMENT—SPECIFIC CRIMES.

Miscegenation.

§ 970. Requisites and sufficiency of indictment.

§ 970. Requisites and sufficiency of indictment. The crime of miscegenation, which consists in the intermarriage, or cohabitation in a state of fornication and adultery, of persons of white and colored blood, is purely a statutory offense, and an indictment or information charging the offense should do so in the language of the statute, or in words substantially of equivalent import with the words of the particular statute under which the prosecution is had,[1] and where so drawn will be sufficient.[2] The statute denouncing and punishing "marriage by a white person with a negro or person of mixed blood," an indictment or information charging marrying a negro may disregard the alternative clause in the statute,[3] or may insert a separate count on each clause, so as to meet the evidence under either;[4] but the offense can not be charged in the alternative in one count.[5] It has been said that the omission of an indictment or information to set out the name of the accused's negro consort renders it insufficient on motion to quash, but that the objection is not

1 ALA.—Green v. State, 58 Ala. 191, 29 Am. Rep. 739; Hoover v. State, 59 Ala. 57; Pace v. State, 69 Ala. 231, 44 Am. Rep. 513; Linton v. State, 88 Ala. 216, 7 So. 261; Love v. State, 124 Ala. 82, 27 So. 217. IND.—State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42. LA.—Minvielle's Succession, 15 La. Ann. 342. TEX.—Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131; Moore v. State, 7 Tex. App. 608; François v. State, 9 Tex. App. 145. VA.—Jones v. Com., 80 Va. 538.

2 Jones v. Com., 79 Va. 213.

3 Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131.

4 Robeson v. State, 50 Tenn. (3 Heisk.) 266; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131.

5 Linton v. State, 88 Ala. 216, 7 So. 261; Robeson v. State, 50 Tenn. (3 Heisk.) 266.

available on motion in arrest of judgment.[6] An indictment or information charging miscegenation should specifically allege that one of the parties named had negro blood, or other prohibited colored blood, in his veins, or in her veins, in excess of the amount named in the statute,—e. g., "a negro within the third generation inclusive," or other phraseology of the particular statute,—otherwise it is thought that it will not state an offense under the statute.[7] The fact of intermarriage,[8] or the fact

6 Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131.

7 As to what constitutes a negro or colored person within the statute is a question upon which the courts are not fully agreed. In Connecticut a person with one-fourth negro blood has been held to be a negro (Johnson v. Norwich, 29 Conn. 407); in the District of Columbia it has been held that a child having no physical characteristics of a negro, but which has one-sixteenth negro blood in its veins, is colored within the provisions of the statute (Wall v. Oyster, 36 App. Cas. 50, 31 L. R. A. (N. S.) 180); in Louisiana a colored person is any one having an appreciable admixture of negro blood in his veins (Lee v. New Orleans G. N. R. Co., 125 La. 236, 51 So. 182; State v. Treadway, 126 La. 300, 52 So. 500); in Maine a woman having one-sixteenth Indian blood in her veins was held to be a white woman (Bailey v. Fiske, 34 Me. 77); in Michigan it has been held that only those are white who have less than one-fourth of negro blood in their veins (People v. Dean, 14 Mich. 408); in Mississippi persons having less than one-fourth of negro blood in their veins are regarded as white (Heirn v. Bridault, 37 Miss. 209); in North Carolina a person descended from a negro within the fourth degree inclusive is held to be a "person of color," so that accused having only one-sixteenth of negro blood, he was held to be negro, but that if he had had any less, he would have been considered white (State v. Dempsey, 31 N. C. (9 Ired. L.) 384); in Ohio a "colored person" is any one having an appreciable admixture of negro blood (Van Camp v. Board of Education, 9 Ohio St. 406); in Virginia a person who has less than one-fourth of negro blood in his veins, however small this lesser quantity may be, is regarded as white.—McPherson v. Com., 69 Va. (28 Gratt.) 939, 2 Am. Cr. Rep. 636.

As to who is a negro or colored person within statutory provision, see note, 31 L. R. A. (N. S.) 180.

8 Charging that A, a negro man, and B, a white woman, did intermarry, sufficiently charges the crime of miscegenation.—Linton v. State, 88 Ala. 216, 7 So. 261.

Judicial notice will be taken of the invalidity of a marriage between white and colored persons. —Munger v. State, 57 Tex. Cr. Rep. 384, 122 S. W. 874.

Knowingly marrying a negro sufficiently charges miscegena-

of cohabitation in a state of adultery and fornication,[9] is an essential element under such statutes and must be directly and positively stated, and not alleged by way of argument or inference.[10]

tion; it is not necessary to allege that accused married a negro "within the third generation inclusive."—Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131.

9 Charging A, a negro man, and B, a white woman, did live in adultery and fornication with each other, sufficiently charges the crime of miscegenation.—Linton v. State, 88 Ala. 216, 7 So. 261.

Charging that accused, a white man, and one A, a negro woman, did live together in a state of adultery or fornication, sufficiently charges the offense of adultery or fornication as defined by the code providing that if any white person and any negro live in adultery or fornication with each other, each on conviction must be imprisoned. —Love v. State, 124 Ala. 82, 27 So. 217.

Charging that A, a negro, or the descendant of a negro to the third generation inclusive, a man, and B, a white woman, did live together in a state of adultery and fornication, sufficiently charges the offense denounced, of white and colored persons living in adultery or fornication with each other.—Pace v. State, 69 Ala. 231, 44 Am. Rep. 513.

10 Moore v. State, 7 Tex. App. 608.

CHAPTER LXI.

INDICTMENT—SPECIFIC CRIMES.

Nuisance.

§ 971. In general.
§ 972. Sufficiency of indictment—At common law.
§ 973. —— Conclusion at common law.
§ 974. ——Under statute—In general.
§ 975. —— —— Conclusion.
§ 976. —— Continuando clause.
§ 977. —— Negative averments.
§ 978. —— Bill of particulars.
§ 979. Public character of offense charged.
§ 980. Time of offense.
§ 981. Place of offense.
§ 982. Unlawfulness—Want of care and precaution.
§ 983. Intent.
§ 984. Particular nuisances.
§ 985. Persons liable.
§ 986. Duplicity.

§ 971. IN GENERAL. The various classes of public nuisances differ in their elements, and an indictment or information charging a nuisance must be drawn with especial care to the particular nuisance, in such form and language as will fully describe the particular nuisance sought to be charged. Various classes of public nuisances have already been sufficiently treated, and will be hereafter treated,—such as affray;[1] barratry;[2] bawdy houses;[3] common scolds;[4] disorderly conduct,[5] such as discharging arms in or near a public highway,[6] eavesdropping,[7] night-walking or street-walking,[8] and the like;

1 See, supra, §§ 408, 409.
2 See, supra, §§ 441-443.
3 See, supra, §§ 562 et seq.
4 See, supra, §§ 503 et seq.
5 See, supra, § 560.
6 See, supra, § 556.
7 See, supra, § 557.
8 See, supra, § 558.

exposure of person;[9] and gaming-houses.[10] This chapter will be given up to the discussion of the indictments or informations charging those offenses against the public which are classed as public nuisances pure and simple.

§ 972. SUFFICIENCY OF INDICTMENT[1]—AT COMMON LAW. At common law the remedy for a public nuisance was by indictment,[2] fine and imprisonment,[3] with a judgment directing abatement, where the nuisance was a continuing one, and that fact properly pleaded.[4] An indictment or information charging a public nuisance was required to particularly describe the nuisance complained of according to the circumstances,[5] and where the indictment was not sufficiently definite and certain to enable the accused to make his defense, on application therefor, the court would direct that a bill of particulars be furnished.[6] All the elements entering into the particular nuisance charged were required to be stated in due and legal form, and in legal language with verbosity and circumlocution, setting forth facts sufficient to enable the court to determine whether the acts charged, if established as alleged, constituted a nuisance, and whether the accused was liable therefor.

§ 973. —— CONCLUSION AT COMMON LAW. At common law the indictment or information was required to charge that the act was done ad commune nocumentum,[1] "to

9 See, supra, § 895; infra, chapter on "Obscenity," etc.

10 See, supra, §§ 708 et seq.

1 As to form of indictment for public nuisance in all of the various phases, see Forms Nos. 1268-1272, 1691-1713, 1856, 1914-1917.

2 See 1 Russ. on Crimes (9th ed.) 454.

3 See, id., 456.

4 See, infra, § 976.

5 1 Russ. on Crimes (9th ed.) 454; R. v. Stead, 8 T. R. 142, 101 Eng. Repr. 1312.

6 See, infra, § 978.

1 Nocumentum, or annoyance, signifies anything that works hurt, inconvenience, or damage; and whatever is injurious to a large class of the community is a nuisance at common law.—Lansing v. Smith, 8 Cow. (N. Y.) 146; affirmed, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89.

the common nuisance of all the liege subjects,'' etc.[2] Archbold expands the conclusion ''to the great damage and common nuisance, not only of all the liege subjects of our Lady the Queen near the same place inhabiting, being, and residing, but also of all the liege subjects of our said Lady the Queen, going and returning, passing and repassing, along, by and through the said public and common highway, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.''[3] Chitty's form of conclusion is still more verbose.[4] An indictment at common law charging nuisance and concluding ''to the common nuisance of divers of the commonwealth's citizens,'' was held insufficient,[5] because the act was required to be laid to the common nuisance ''of all the citizens of the commonwealth residing in the neighborhood,'' or ''of all citizens, etc., residing, etc., and passing thereby.''[6] It was otherwise in those cases of nuisances in which the indictment or information set out acts and a state of facts constituting a public nuisance per se, in which case the conclusion ad commune nocumentum could be omitted;[7]

2 See Bac. Abr., tit. Nuisance (B); Vin. Abr., tit. Indictment (Q), Nuisance 13; 2 Roll. Abr. 83; 1 Hawk. P. C. Ch. 75, §§ 3-5; Prat v. Stearn, Cro. Jac. 382, 79 Eng. Repr. 326; Hayward's Case, Cro. Eliz. 148, 78 Eng. Repr. 405; Anonymous, 1 Ventr. 26, 86 Eng. Repr. 26; R. v. Reynell, 6 East 315, 8 Rev. Rep. 493.

Changed by statute in England.—R. v. Holmes, 1 Dears. C. C. 207.

3 2 Archbold's Crim. Proc. & Pl., Pomeroy's 8th ed., p. 1754 [*607].

4 3 Chit. Crim. Law, p. 607a.

5 Com. v. Faris, 26 Va. (5 Rand.) 691.

"All," not "divers," persons must be charged; to charge a common nuisance of "divers" persons is to charge a private as distinguished from a public nuisance. See State v. Houck, 73 Ind. 37; Com. v. Sweeny, 131 Mass. 579; Com. v. Faris, 26 Va. (5 Rand.) 691; Hayward's Case, Cro. Eliz. 148, 78 Eng. Repr. 405; Anonymous, 12 Mod. 504, 88 Eng. Repr. 1478.

6 Com. v. Faris, 26 Va. (5 Rand.) 691.

7 Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665; State v. Baldwin, 21 N. C. (1 Dev. & B. L.) 195; State v. Wilson, 93 N. C. 608.

"Ad commune nocumentum, though always proper and safe to be inserted, may be omitted,

as in case of a charge of a nuisance to a public highway plainly appearing as such, or to a public navigable river plainly appearing as such,[8] although there are authorities to the contrary.[9]

Ad commune nocumentum alleged of the acts charged, must be justified by the facts set out, or it will be simply a mistaken conclusion of law, and such formal conclusion will not render good an indictment or information otherwise insufficient;[10] it is for the court, and not for the grand jury, to determine from the facts the question of law involved in such formal conclusion.[11]

§ 974. —— UNDER STATUTE—IN GENERAL. Under statute, as well as at common law, the remedy for a public nuisance is by indictment,[1] and any practice which is

for they neither describe the crime nor the facts which constitute it. Such facts necessarily show the crime. If the facts charged show the offense inconvenient and troublesome, that may have extended its annoyance to the community, or may have reached only certain individuals of that community, the averment of ad commune nocumentum becomes indispensable. It then involves an actual inquiry as a matter of fact for the injury into the extent of the annoyance. But an allegation in an indictment that certain facts charged were 'to the common nuisance of all the good citizens of the state' will not make it a good indictment for a common nuisance, unless those facts be of such a nature as may justify that conclusion as one of law as well as of fact."—State v. Baldwin, 21 N. C. (1 Dev. & B. L.) 195.

8 1 Hawk. P. C., ch. 75, § 5.

9 See: IOWA — State v. Schilling, 14 Iowa 455. ME.—State v. Stevens, 40 Me. 559. VA.—Com. v. Faris, 26 Va. (5 Rand.) 691. ENG.—R. v. Holmes, 3 Car. & K. 360, 20 Eng. L. 7 Eq. 597, 6 Cox C. C. 20; Thorowgood's Case, 1 Mod. 170, 86 Eng. Repr. 768; Anonymous, 1 Ventr. 26, 86 Eng. Repr. 26.

10 IND.—Mains v. State, 42 Ind. 327, 13 **Am. Rep.** 364. ME.—State v. Haines, 30 Me. 65. MD.—Horner v. State, 49 Md. 277. N. C.—State v. Baldwin, 21 N. C. (1 Dev. & B. L.) 195. PA.—Com. v. Linn, 158 Pa. St. 22, 22 **L. R. A.** 353, 9 **Am. Cr. Rep.** 412, 27 Atl. 843.

Conclusion does not cure defect. See, supra, § 332.

11 See Morris & E. R. Co. v. State, 36 N. J. L. (7 Vr.) 553.

1 Hellams v. Switzer, 24 S. C. 39.

As to public nuisance as a crime, see 78 **Am. St. Rep.** 256, 257.

Offense charged being a public nuisance injurious to the health, which is punishable under the statute by imprisonment not exceeding one year or a fine not

deemed injurious to the public may be declared a nuisance by the legislature and punished as such.[2] The fact that any other or a private remedy is provided by statute does not take away the remedy by common-law indictment, or indictment under the statute, such other or private remedy being merely cumulative;[3] and the general rule is that a nuisance is a subject of indictment and not of action.[4] An indictment or information under statute charging the setting up and maintaining, or the setting up or the maintaining, a public nuisance, must set forth all the elements of the alleged offense under the particular statute,[5] the same as in an indictment at common law,[6] alleging the facts in such a manner (1) as to make out a prima facie case against the accused;[7] (2) to enable the

exceeding one thousand dollars, is not within the jurisdiction of a justice's court. — In Matter of Hawes, 68 Cal. 412, 9 Pac. 449.

2 Bepley v. State, 4 Ind. 264, 58 Am. Dec. 628.

An indictment or information alleging that accused, one of them a female, in pursuance of a conspiracy for the purpose, laid a plan to get to the prosecutor, in an indecent and compromising situation with a female in a public place, and while in such position to direct the attention of a large concourse of citizens together, thereby making a public exposition of their attitude, which thereafter sets out specifically the acts committed to carry out the conspiracy, resulting in an apparent criminal assault by the prosecutor on the female, sufficiently charges an act which openly outrages public decency, and is an injury to good morals, and within a statute punishing any person who shall commit any act which outrages public decency and is injurious to public morals.—State v. Waymire, 52 Ore. 281, 132 Am. St. Rep. 699, 21 L. R. A. (N. S.) 56, 97 Pac. 46.

3 State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.

4 South Carolina R. Co. v. Moore, 28 Ga. 398, 73 Am. Dec. 778.

5 St. Paul (City of) v. Hennessey, 38 Minn. 94, 35 N. W. 576; State v. Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299.

6 See, supra, § 972.

7 ALA.—Stein v. State, 37 Ala. 123. ARK.—West v. State, 71 Ark. 144, 71 S. W. 482. ILL.—Wabash, St. L. & Pac. R. Co. v. People, 12 Ill. App. 448. IND.—Crane v. State, 3 Ind. 193; Boyer v. State, 16 Ind. 451; Mains v. State, 42 Ind. 327, 13 Am. Rep. 364; Lipschitz v. State, 33 Ind. App. 648, 72 N. E. 145. KY.—Paris (City of) v. Com., 29 Ky. L. Rep. 483, 93 S. W. 907; Ehrlick v. Com., 31 Ky. L. Rep. 401, 102 S. W. 289. ME.—State v. Sturdivant, 21 Me. 9; State v. Hart, 34 Me. 36; State v. Davis, 80 Me. 488, 15 Atl. 41. MASS. — Com. v. Twitchell, 58

court to determine whether the acts charged, if true as alleged, constitute a public or merely a private nuisance;[8] and (3) also fully describe and identify the alleged nuisance, and (4) apprise the accused of the precise character of the offense and the particular acts he is expected to meet and defend against on the trial.[9] It has been said that two things, only, are necessary to constitute the offense. First, that from the nature of the establishment it may be an annoyance; and, secondly, that from its situation it has actually become so. These two things, therefore, are all that are necessary to be set out in the indictment.[10] A specific description of the offense charged is required; alleging conclusions of law merely is insufficient.[11] An indictment or information charging accused with permitting a public nuisance charges a mere conclusion of law, unless it is supported by allegations of facts showing how the

Mass. (4 Cush.) 74; Com. v. Perry, 139 Mass. 198, 29 N. E. 656. MICH. — Shepard v. People, 40 Mich. 487; Messersmidt v. People, 46 Mich. 437, 9 N. W. 485. N. H.—State v. Noyes, 30 N. H. 279. N. Y.—People v. Monteverde, 43 Hun 447. OHIO — State v. Frieberg, 49 Ohio St. 585, 31 N. E. 881. ORE.—State v. Waymire, 52 Ore. 281, 132 Am. St. Rep. 699, 21 L. R. A. (N. S.) 56, 97 Pac. 46. PA. — Respublica v. Arnold, 3 Yeates 417; Com. v. Linn, 158 Pa. St. 22, 22 L. R. A. 353, 9 Am. Cr. Rep. 412, 27 Atl. 843. R. I.—State v. Doyle, 15 R. I. 527, 9 Atl. 90. VT.—State v. Matthews, 42 Vt. 542; State v. Hanley, 47 Vt. 290. ENG.—R. v. Haddock, Andr. 137, 95 Eng. Repr. 333; R. v. White, 1 Burr. 333, 97 Eng. Repr. 338; R. v. Watts, 2 Car. & P. 486, 12 Eng. C. L. 690.

8 United States Board & Paper Co. v. State, 174 Ind. 460, 91 N. E. 953.

9 ILL.—Seacord v. People, 121 Ill. 623, 13 N. E. 194. KAN.—State v. Reno, 4 Kan. 674. KY.—Wilson v. Com., 51 Ky. (12 B. Mon.) 4. ME.—State v. Hart, 34 Me. 36. MD.—Horner v. State, 49 Md. 277. MASS.—Com. v. Rumford Chemical Works, 82 Mass. (16 Gray) 231. MONT.—Territory v. Ashby, 2 Mont. 89. OHIO—Matthews v. State, 25 Ohio St. 536; State v. Frieberg, 49 Ohio St. 585, 31 N. E. 881. S. C. — State v. Purse, 4 McC. L. 472. TEX.—Allen v. State, 34 Tex. 230.

10 State v. Purse, 4 McC. L. (S. C.) 472.

11 State v. Bridgewater, 171 Ind. 1, 85 N. E. 715; State v. Brooks, 171 Ind. 725, 85 N. E. 795; State v. Henson, 171 Ind. 725, 85 N. E. 718; State v. Larter, 171 Ind. 725, 85 N. E. 719; State v. Romaine, 171

offense charged was committed.[12] The existence of circumstances which make the act or thing a nuisance must be stated in the indictment,[13] and to properly charge the offense the facts showing it must also be stated.[14] Charging accused with the offense of maintaining a common nuisance and stating the facts showing the nuisance, is sufficiently clear and direct as to the offense charged.[15] It is not necessary that the indictment or information should set forth facts pertinent to the liability of the accused.[16] It is sufficient to charge merely the keeping of the place where the forbidden acts are committed, where it is not attempted to seek an abatement or establish a lien against the premises.[17] Where wilfulness is a substantial element of the offense under the statute, the act must be charged to have been wilfully done.[18] Where a continuance of a nuisance previously erected by another is charged, the facts should be set forth circumstantially showing that

Ind. 725, 86 N. E. 73; State v. Turner, 171 Ind. 725, 85 N. E. 1027.

12 Louisville & N. R. Co. v. Com., 130 Ky. 47, 113 S. W. 517.

13 Lipman v. South Bend (City of), 84 Ind. 276; State v. Sturdivant, 21 Me. 9; People v. Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296, where it was held that an indictment alleging the keeping 50 barrels of gunpowder near certain dwelling-houses was insufficient unless it was charged to have been negligently and improvidently kept; State v. Purse, 4 McC. L. (S. C.) 472.

14 Ehrlick v. Com., 31 Ky. L. Rep. 401, 10 L. R. A. (N. S.) 995, 102 S. W. 289.

Plea of guilty to charge in general terms of maintaining a nuisance, instead of setting out the specific facts and circumstances as required, cures the legal defects raised by such insufficient averment.—State v. Knowles, 34 Kan. 393, 8 Pac. 861.

15 Ehrlick v. Com., 10 L. R. A. (N. S.) 995, 31 Ky. L. Rep. 401, 102 S. W. 289.

Corporation indicted for nuisance, the indictment need only set forth the facts constituting the offense. — Delaware Division Canal Co. v. Com., 100 Am. Dec. 570.

An indictment against a corporation for nuisance, averring that the latter is situated in a certain borough, is a sufficient averment of being in the neighborhood of dwellings, especially after verdict, without objection before trial.—Ib.

16 State v. Eyermann, 115 Mo. App. 660, 90 S. W. 1168.

17 State v. Kruse, 19 N. D. 203, 124 N. W. 385.

18 Vandever v. State, 1 Marv. (Del.) 209, 11 Am. Cr. Rep. 355, 40 Atl. 1105.

the accused continued or maintained such nuisance previously established.[19]

§ 975. ——— CONCLUSION. An indictment or information charging a nuisance made such by statute does not require the stately, formal and verbose conclusion required in an indictment at common law,[1] to an indictment charging nuisance;[2] it being sufficient to affix the usual statutory conclusion[3] in charging a statutory offense, that is contra forma statuti, contrary to the form of the statute.[4]

§ 976. —— CONTINUANDO CLAUSE. An indictment or information charging the creation or existence of a nuisance need not also charge its maintenance or continuance,[1] or contain such a continuando clause as will warrant an order of abatement in case of conviction, such order not being a necessary part of the judgment.[2] The charge that the nuisance alleged is a continuing nuisance is not allowed, except for the purpose of enabling the court to abate such nuisance, should it be found to exist.[3] In those cases where the nuisance charged is an existing and continuing one, and its abatement is sought by the proceeding, the indictment or information must contain the proper continuando clause; otherwise, on conviction of the accused, there can be no judgment to abate.[4] Charg-

19 State v. Brown, 16 Conn. 54.

1 See, supra, § 973.

2 State v. Stevens, 40 Me. 559; Com. v. Parker, 86 Mass. (4 Allen) 313; Com. v. Boon, 68 Mass. (2 Gray) 74; Com. v. Buxton, 76 Mass. (10 Gray) 9.

3 See, supra, §§ 329 et seq.

4 Ex parte Taylor, 87 Cal. 91, 25 Pac. 258; State v. Stevens, 40 Me. 559.

1 State v. Hull, 21 Me. 84.

2 State v. Barnes, 20 R. I. 525, 40 Atl. 374.

3 Chesapeake & O. R. Co. v. Com., 8 Ky. L. Rep. 534.

4 State v. Murray, 237 Mo. 158, 140 S. W. 899; R. v. Stead, 8 T. R. 142, 101 Eng. Repr. 1312; see R. v. Justices of Yorkshire, 7 T. R. 468, 101 Eng. Repr. 1080.

A continuando must be alleged in order to warrant the abatement of the nuisance on a judgment of conviction.—State v. Murray, 237 Mo. 158, 140 S. W. 899.

ing accused with maintaining a common nuisance on the first day of May of a named year, and up to and including the date of the finding of the indictment, sufficiently charges the continuing offense;[5] and an indictment or information alleging that on a designated date and thereafter until the time of presenting the indictment, or filing the information, accused "did annoy," held to be sufficient, on conviction of accused, to confer jurisdiction to abate a public nuisance.[6] Where the nuisance is properly stated to be a continuing one, and does in fact exist at the time of the conviction and judgment, the accused may be by the judgment commanded to abate or remove it at his own cost[7] by a given day, and in case of his failure to do so, order the sheriff to abate it.[8] Judgment of abatement on conviction of nuisance must be adapted to the nature of the nuisance, and must not be inconsistent with the legal rights of the party convicted. The most accessible and consistent legal means of abatement of the nuisance must be adopted.[9] Only so much of the thing as causes the nuisance ought to be removed; thus, if a house be built too high, only so much of it as is too high should be pulled down;[10] and if the indictment be for keeping a dye-house, or carrying on any other stinking trade, the judgment should be to pull down the building where the trade was carried on;[11] but in the case of a glass-house, and other similar nuisances, the judgment

5 Miller v. Com., (Ky.) 113 S. W. 518.

6 People v. High Ground Dairy Co., 166 App. Div. 81, 151 N. Y. Supp. 710.

7 2 Roll. Abr. 84; 1 Hawk. P. C., ch. 75, § 14; R. v. Pappineau, 1 Str. 686, 93 Eng. Repr. 784.

8 Ashbrook v. Com., 64 Ky. (1 Bush) 139, 89 Am. Dec. 616.

Accused sentenced to abate a nuisance, being shown to have no control of the premises on which the nuisance exists, the sheriff can not be required to remove the nuisance under such sentence.—Com. v. McLaughlin, 120 Pa. St. 518, 14 Atl. 377.

9 Palatka & I. River R. Co. v. State, 23 Fla. 546, 11 Am. St. Rep. 395, 3 So. 158.

10 1 Russ. on Crimes (9th ed.) 456.

11 R. v. Pappineau, 1 Str. 686, 93 Eng. Repr. 784.

should be to abate the nuisance, not by pulling the house down, but only by preventing the accused from using the house again as a glass-house.[12]

§ 977. —— NEGATIVE AVERMENTS. In harmony with the general rules of criminal pleading as to the pleading of statutory offenses generally, an indictment or information charging nuisance must negative exceptions in the statute under which drawn,[1] but is not required to negative mere matters of defense. Thus, it has been said that an indictment charging nuisance is not bad because it fails to allege that the acts of the accused complained of were not authorized by a city ordinance passed under a general state law.[2] But there may be circumstances or cases in which a negative averment is wise, if not absolutely necessary. Thus, it has been said that an indictment or information charging a public nuisance in maintaining a maternity hospital for wilfully, wrongfully, and unlawfully committing, producing, and procuring abortions, and charging accused with actually having done all these things, to the outrage of public decency and the injury of public morals, etc., should negative an exception in the general statute of the state permitting abortions under specified circumstances and in designated cases.[3]

§ 978. —— BILL OF PARTICULARS. We have already seen that an indictment or information charging nuisance must set forth the facts and circumstances with such certainty and precision as to describe and designate the particular act complained of, and to enable the accused to know with reasonable certainty what he is expected to meet and defend.[1] If the indictment or information be so

12 1 Russ. on Crimes (9th ed.) 457; Co. Ent. 92b.

1 State v. Atwood, 54 Ore. 526, 21 Ann. Cas. 516, 102 Pac. 295; affirmed on rehearing, 104 Pac. 195.

2 Mergentheim v. State, 107 Ind. 567, 8 N. E. 568.

3 State v. Atwood, 54 Ore. 526, 21 Ann. Cas. 516, 102 Pac. 295; affirmed, 104 Pac. 195.

1 See, supra, § 974.

general as not to comply with these requirements, and not to convey sufficient information to the accused to enable him to prepare his defense, the court will, on application, order the prosecutor to give to the accused a bill of particulars of the several acts of nuisance upon which he intends to rely.[2] Thus, where the indictment or information is for the obstruction or nonrepair of highways,[3] which highways are described generally, a bill of particulars of the several highways obstructed or out of repair may be obtained on application therefor.[4]

§ 979. Public character of offense charged. Charging a nuisance the indictment or information must allege a public and not merely a private nuisance.[1] Sufficient facts must be set out to show the public character of the offense alleged;[2] that the acts complained of and described annoy, injure, or endanger a number of people;[3] and also state facts and circumstances showing that the injurious consequences set out are the natural, direct, and proximate result of the acts of the accused complained of.[4] That is to say, it must be alleged that the

2 R. v. Curwood, 3 Ad. & E. 815, 30 Eng. C. L. 370.

3 As to obstruction or non-repair of highways and bridges, see, infra, § 984.

4 R. v. Marquis of Downshire, 4 Ad. & E. 696, 31 Eng. C. L. 309; R. v. Probert, 1 Dears. C. C. 32(a); R. v. Flower, 7 D. P. C. 665.

1 United States Board & Paper Co. v. State, 174 Ind. 460, 91 N. E. 953.

2 IND.—State v. Houck, 73 Ind. 37. IOWA — State v. Smith, 82 Iowa 423, 48 N. W. 727. KY.—Illinois Cent. R. Co. v. Com., 29 Ky. L. Rep. 754, 96 S. W. 467. ME.—State v. Haines, 30 Me. 65. MASS. — Com. v. Sweeney, 131 Mass. 579. MICH. — Messersmidt v. People, 46 Mich. 437, 9 N. W. 485. MO.—State v. Brown, 66 Mo. App. 280. N. J.—State v. Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299. PA.—Barker v. Com., 19 Pa. St. 412.

3 People v. Kings County Iron Foundry, 78 Misc. (N. Y.) 191, 28 N. Y. Cr. Rep. 304, 139 N. Y. Supp. 447; affirmed in 156 App. Div. 912, 141 N. Y. Supp. 1138; People v. Bink, 151 App. Div. (N. Y.) 271, 27 N. Y. Cr. Rep. 372, 135 N. Y. Supp. 733.

To charge that the acts annoyed a number of persons includes disturbing their comfort and repose. —People v. Bink, 151 App. Div. (N. Y.) 271, 27 N. Y. Cr. Rep. 372, 135 N. Y. Supp. 733.

4 Injurious consequences caused by acts of others, accused not

noisome effects of the acts complained of pollute the air,[5] or reach public streets and highways, or the dwelling-houses of citizens of the community.[6] Thus, on a charge of a public nuisance committed by profane swearing,[7] the indictment or information must allege that the unlawful and offensive language was uttered in the presence and hearing of some person or persons.[8] At common law[9] it was required to be alleged that the act complained of was to the great damage and common nuisance of all the citizens of the commonwealth,[10] or an averment substantially equivalent thereto;[11] but where the statute under which an indictment is drawn does not use the words "to the common nuisance," it is not necessary to charge the acts were such.[12] Thus, it has been said that an indictment or information charging accused's acts annoyed a considerable number of persons is sufficient to charge

liable therefor.—State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737.

5 **"Per quod the air is thereby corrupted,** the act is punishable as a public nuisance."—State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; Corey v. Brooks, 1 Hill (S. C.) 367; R. v. Pappineau, 1 Str. 686, 93 Eng. Repr. 784.

See, also, infra, § 984.

Burning infected bedding and clothing by city authorities to prevent the spread of small-pox, using proper means and precautions for the safety of others, is not an indictable nuisance, although such burning causes inconvenience to a few persons by noxious smoke and vapors.—State v. Knoxville (Mayor etc.), 80 Tenn. (12 Lea) 140, 47 Am. Rep. 331.

6 KY.—Com. v. Megibbon Co., 101 Ky. 195, 40 S. W. 694. MD.—Horner v. State, 49 Md. 277. N. J. — State v. Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299. PA.—Com. v. McCormick, 5 Pa. Dist. Rep. 535. VA.—Com. v. Webb, 27 Va. (6 Rand.) 726.

7 See, supra, §§ 449, 555; infra, chapter on "Profanity."

8 Com. v. Linn, 158 Pa. St. 22, 22 L. R. A. 353, 9 Am. Cr. Rep. 412, 27 Atl. 843.

9 See, supra, § 973.

10 MASS. — Com. v. Smith, 60 Mass. (6 Cush.) 80; Com. v. Boon, 68 Mass. (2 Gray) 74. N. H.—State v. Bailey, 21 N. H. 343. PA.—Com. v. Mohn, 52 Pa. St. 243, 91 Am. Dec. 153. VA.—Com. v. Faris, 26 Va. (5 Rand.) 691.

11 **"To the common nuisance of all the people"** need not be the conclusion if it contain words of substantial import.—State v. Middlesex & S. Traction Co., 67 N. J. L. 14, 50 Atl. 354.

12 Com. v. Howe, 79 Mass. (13 Gray) 26; Com. v. Goulding, 135 Mass. 552; State v. Noyes, 30 N. H. 279.

him, not only with annoying them, but with disturbing their comfort and repose, in violation of the provisions of the statute;[13] but an indictment or information charging a public nuisance, which does not allege the acts described annoy, injure, or endanger any considerable number of people, is insufficient under the New York code,[14] in that it does not conform to the requirements of such code.[15] An indictment or information charging the erection and maintenance of a building for the manufacture of products from the bodies of dead animals, and the carrying on of the business of manufacturing products from the bodies of dead animals, is sufficient to show that such building was used or maintained for the exercise of a trade, employment, or business which might constitute a public nuisance.[16] And charging accused with conveying to its premises and permitting to assemble there large numbers of persons who engaged in dancing, drinking, swearing, making loud noises, and otherwise misbehaving, and alleging that such premises were on a named public highway located in a specified village, near to divers dwelling-houses of various persons, and near the public highway, and alleging that the acts disturbed the peace and pleasures of persons residing in the village near the highway, has been held to sufficiently charge the acts took place within the sight and hearing of those passing the premises, or living in the vicinity.[17]

§ 980. TIME OF OFFENSE. While the time of the alleged offense should be laid in the indictment or information, great particularity in the allegation as to time and place

13 People v. Bink, 151 App. Div. (N. Y.) 271, 27 N. Y. Cr. Rep. 372, 135 N. Y. Supp. 733.

14 N. Y. Code Cr. Proc., § 275.

15 People v. Kings County Iron Foundry, 78 Misc. (N. Y.) 191, 28 N. Y. Cr. Rep. 304, 139 N. Y. Supp. 447; affirmed, 156 App. Div. 912, 141 N. Y. Supp. 1138; reversed, 209 N. Y. 207, 120 N. E. 298.

16 Acme Fertilizer Co. v. State, 34 Ind. App. 346, 107 Am. St. Rep. 190, 72 N. E. 1037.

17 Com. v. Cincinnati N. O. & T. P. R. Co., 18 L. R. A. (N. S.) 699, 33 Ky. L. Rep. 1056, 112 S. W. 613.

is not required for a continuing nuisance;[1] but it must be made to appear that the acts constituting the offense were committed within the time limited by law for the commencement of a prosecution,[2] and previously to the finding of the indictment or the filing of the information.[3] It is insufficient to charge the acts constituting the offense in the present tense, without an allegation showing that the acts complained of were committed prior to the finding of the indictment or the presentment of the information.[4] It is sufficient to allege that the act complained of occurred, "on or about" a designated date, which was before the date of the finding of the indictment, as above pointed out as necessary.[5] An allegation that the offense was committed on a day certain "and on divers other days" between that day and the day of the finding of the indictment,[6] charges but one offense,[7] is a sufficient pleading of the time of the offense,[8] and is good as to the day certain.[9]

§ 981. PLACE OF OFFENSE. The place where a nuisance was set up or maintained, like the time when the act complained of was done,[1] need not be specifically designated in the indictment or information,[2] it being sufficient to

1 State v. Pennsylvania R. Co., 84 N. J. L. 550, 87 Atl. 86.

2 Alleging maintenance at some past time, merely, without showing that the offense was committed within the statute of limitations, is insufficient.—State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.

3 State v. Schaffer, 31 Wash. 305, 71 Pac. 1088. See People v. Squires, 99 Cal. 327, 33 Pac. 1092; State v. Emmett, 23 Wis. 632.

4 State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.

5 State v. Schilling, 14 Iowa 455.

6 Day of verification included within time offense is charged to have been committed is good.—State v. Youngberg, 70 Kan. 296, 78 Pac. 421.

7 Com. v. Sheehan, 143 Mass. 468, 9 N. E. 839.

8 Baugh v. State, 14 Ind. 29; Ashbrook v. Com., 64 Ky. (1 Bush) 139, 89 Am. Dec. 616; Com. v. Langley, 80 Mass. (14 Gray) 21; Com. v. Shea, 150 Mass. 314, 23 Atl. 47.

9 Wells v. Com., 78 Mass. (12 Gray) 326; R. v. Dixon, 10 Mod. 335, 88 Eng. Repr. 753.

1 See, supra, § 980.

2 ILL.—Seacord v. People, 121 Ill. 623, 13 N. E. 194. IND.—Wertz v. State, 42 Ind. 161; Dennis v.

allege that it was within the county and the state wherein the prosecution is had,[3] unless the locality is an essential element in the offense,[4] as where it must be local to some particular neighborhood or town,[5] or where an abatement of the nuisance is sought through the prosecution,[6] in which latter case the indictment or information must describe the premises with sufficient definiteness to enable a sheriff to find the same after the entry

State, 91 Ind. 291; Dornberger v. State, 112 Ind. 105, 13 N. E. 259. IOWA — McClure v. Barniff, 75 Iowa 38, 39 N. W. 171; Jasper County v. Sparham, 125 Iowa 464, 101 N. W. 134. KY.—Com. v. Megibbon Co., 101 Ky. 195, 40 S. W. 694. MASS.—Com. v. Gallagher, 83 Mass. (1 Allen) 592. N. J.—State v. Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299. N. D.—State v. Thoemke, 11 N. D. 386, 92 N. W. 480; State v. Wisnewski, 13 N. D. 649, 102 N. W. 883; State v. Kelly, 22 N. D. 5, Ann. Cas. 1913E, 974, 132 N. W. 223. PA.—Com. v. McCormick, 5 Pa. Dist. Rep. 535. WIS.—Jenks v. State, 17 Wis. 665.

3 ILL.—Seacord v. People, 121 Ill. 623, 13 N. E. 194. IOWA—State v. Jacobs, 75 Iowa 247, 39 N. W. 293. ME.—State v. Sturdivant, 21 Me. 9. MO. — State v. Baker, 74 Mo. 394. N. J.—State v. Uvalde Asphalt Paving Co., 68 N. J. L. 512, 53 Atl. 299. N. D.—State v. Kelly, 22 N. D. 5, Ann. Cas. 1913E, 974, 132 N. W. 223. WIS.—Jenks v. State, 17 Wis. 665.

4 Seacord v. People, 121 Ill. 623, 13 N. E. 194; State v. Davis, 80 Me. 488, 15 Atl. 41.

5 ILL.—Seacord v. People, 121 Ill. 623, 13 N. E. 194. ME.—State v. Stevens, 40 Me. 559. MASS.—Com. v. Logan, 78 Mass. (12 Gray) 136; Com. v. Heffron, 102 Mass. 148; Com. v. Bacon, 108 Mass. 26. WIS.—Jenks v. State, 17 Wis. 665.

6 ILL.—Seacord v. People, 121 Ill. 623, 13 N. E. 194. IND.—Wood v. State, 5 Ind. 433; Howard v. State, 6 Ind. 444; Wertz v. State, 42 Ind. 161; Mergentheim v. State, 107 Ind. 567, 8 N. E. 568; Dorneberger v. State, 112 Ind. 105, 13 N. E. 259. IOWA—State v. Kreig, 13 Iowa 462; State v. Schilling, 14 Iowa 455. KY.—Com. v. Megibbon Co., 101 Ky. 195, 40 S. W. 694. ME.—State v. Stevens, 40 Me. 559. MASS. — Com. v. Hall, 15 Mass. 240; Com. v. Logan, 78 Mass. (12 Gray) 136; Wells v. Com., 78 Mass. (12 Gray) 326; Com. v. Donovan, 82 Mass. (16 Gray) 18; Com. v. Wellington, 89 Mass. (7 Allen) 299; Com. v. Shea, 150 Mass. 314, 23 N. E. 47. MISS. — Handy v. State, 63 Miss. 207, 56 Am. Rep. 803. N. D.—State v. Wisnewski, 13 N. D. 649, 102 N. W. 883. OHIO—Matthews v. State, 25 Ohio St. 536. TENN.—State v. Sneed, 84 Tenn. (16 Lea) 450. VA. — Stephen v. Com., 29 Va. (2 Leigh) 759. WIS.—Jenks v. State, 17 Wis. 665. ENG.—R. v. Taylor, 3 Barn. & C. 502, 10 Eng. C. L. 166.

of a judgment of abatement;[7] but the description will be sufficiently certain where so to a common intent.[8] Thus, charging a public nuisance by operating a pool-room, describing the premises as a place where a pool-room was conducted by accused, at which large numbers of persons daily congregated, and alleging that the room was "located on the east side of the Alexandria pike, south of the city of Newport," in a county named, was held to be a sufficient description of the premises.[9]

Place particularly designated, although such designation may not have been necessary, the place becomes material and must be proved as laid in the indictment or information.[10]

§ 982. UNLAWFULNESS—WANT OF CARE AND PRECAUTION. That the business out of the conducting of which the charged nuisance arises,—as conducting a stone quarry within the city limits, where blasting is done with large charges of powder or dynamite,—is unlawfully conducted, need not be alleged in the indictment or information;[1] neither need it be alleged that the business was conducted carelessly, negligently, or without proper care and precaution.[2]

§ 983. INTENT. An indictment or information charging the erection or maintenance of a nuisance prohibited by statute need not charge a criminal or evil intent,[1]

7 Ehrlick v. Com., 33 Ky. L. Rep. 979, 112 S. W. 565; State v. Jackson, 2 Ohio Dec. Repr. 250, 2 West. L. Month. 150.

8 State v. Sturdivant, 21 Me. 9.

9 Ehrlick v. Com., 33 Ky. L. Rep. 979, 112 S. W. 565.

10 IND.—Wertz v. State, 42 Ind. 161. MASS.—Com. v. Wellington, 89 Mass. (7 Allen) 299; Com. v. Bacon, 108 Mass. 26. MINN.—Chute v. State, 19 Minn. 271. N. D.—State v. Kelly, 22 N. D. 5, Ann. Cas. 1913E, 974, 132 N. W. 223. ENG.—R. v. Owen, 1 Moo. C. C. 118.

1 Paris (City of) v. Com., 29 Ky. L. Rep. 483, 93 S. W. 907.

2 Id.

1 As to intent as an element in this and allied offenses, see State v. Baltimore, O. & C. R. Co., 120 Ind. 298, 22 N. E. 307; Com. v. Shea, 150 Mass. 314, 23 N. E. 47; State v. Towler, 13 R. I. 661; State v. Vermont Central R. Co., 27 Vt.

or allege that it was unlawfully maintained,[2]—e. g., such as keeping a house of ill-fame;[3] obstructing a public highway;[4] "tumultuous conduct, cursing and swearing;"[5] and the like. But in a case where the accused was charged with the commission of a nuisance in supplying unwholesome and poisonous water to all the citizens and visitors of a named city, the indictment was held to be insufficient because it did not charge that the accused knowingly and intentionally furnished water of the alleged unwholesome quality.[6] Intent to maintain a nuisance in the future can not be charged because it is not an offense against the nuisance statute;[7] overt act is essential to make accused liable to prosecution.

§ 984. Particular nuisances. A selection of instances regarding the sufficiency of the pleading of particular nuisances may be convenient and valuable—arranged alphabetically by the controlling words. *Barber-shop* charged to have been kept open and the business of barbering—or any other usual worldly business or employment aside from barbering,—carried on on Sunday, openly and publicly, to the evil example of others, to the common nuisance of all good citizens and against the peace and dignity of the state, will be sufficient in those jurisdictions in which, by statute, the offense charged is made a crime, but in the absence of such a statute the indictment will not charge an offense.[1] *Blasting stone* in

103; State v. Archibald, 59 Vt. 548, 59 Am. Rep. 755, 9 Atl. 362; State v. Chesapeake & Ohio R. Co., 24 W. Va. 809.

2 "Injuriously" or "wrongfully" maintained is sufficient averment. —State v. Vermont Cent. R. Co., 27 Vt. 103.

3 Com. v. Shea, 150 Mass. 314, 23 N. E. 47.

4 State v. Baltimore, O. & C. R. Co., 120 Ind. 298, 22 N. E. 307.

5 State v. Archibald, 59 Vt. 548, 59 Am. Rep. 755, 9 Atl. 362.

6 Stein v. State, 37 Ala. 123.

7 State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.

1 Authorities much at variance, depending upon the statutes in the various jurisdictions regarding the pursuing of usual avocations on the Sabbath. Some of the authorities are here collected, civil and criminal, without assorting the

quarry and thereby casting rocks on surrounding property and highways, properly set out, charges a public nuisance, both at common law and under statute.[2]

topics, for convenient reference: ALA. — O'Donnell v. Sweeney, 5 Ala. 467, 39 Am. Dec. 336. CONN.—Frost v. Plum, 40 Conn. 111, 16 Am. Rep. 18. GA.—Hill v. Wilkes, 41 Ga. 449, 5 Am. Rep. 540. IND.—Wilkinson v. State, 59 Ind. 416, 26 Am. Rep. 84; Carver v. State, 69 Ind. 61, 35 Am. Rep. 205. KY.—Murphy v. Simpson, 51 Ky. (12 B. Mon.) 419. ME.—Towle v. Larrabee, 26 Me. 464; State v. Lupur, 33 Me. 539; Nason v. Dinsmore, 34 Me. 391; Hilton v. Houghton, 35 Me. 143; Cratty v. Bangor (City of), 57 Me. 423, 2 Am. Rep. 56. MASS.—Robeson v. French, 53 Mass. (12 Metc.) 24, 45 Am. Dec. 236; Pattee v. Greely, 54 Mass. (13 Metc.) 284; Myers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30. N. H.—Allen v. Deming, 14 N. H. 133, 40 Am. Dec. 179; State Bank v. Thompson, 42 N. H. 369. N. Y.—Northrup v. Foot, 14 Wend. 241; Miller v. Roessler, 4 E. D. Smith 234. PA.—Kepner v. Keefer, 6 Watts 231, 31 Am. Dec. 460; Fox v. Mensh, 3 Watts & S. 444; Johnston v. Com., 22 Pa. St. 102; Com. v. Nesbit, 34 Pa. St. 398; Com. v. Jacobus, 1 Penn. Leg. Gaz. Rep. 491. TENN.—State v. Lorry, 66 Tenn. (7 Baxt.) 95, 32 Am. Rep. 555. VT. — Lyon v. Strong, 6 Vt. 219; Lovejoy v. Whipple, 18 Vt. 379, 46 Am. Dec. 157; Adams v. Gay, 19 Vt. 358; McClary v. Lowell, 44 Vt. 116, 8 Am. Rep. 366. WIS.—Hill v. Sherwood, 3 Wis. 343; Sutton v. Wauwatosa (Town of), 29 Wis. 21, 9 Am. Rep. 534. ENG.—Walton v. Gavin, 16 Ad. & E. N. S. (16 Q. B.) 48, 71 Eng. C. L. 48; Fennell v. Ridler, 5 Barn. & C. 406; Phillips v. Innes, 4 Clark & F. 234, 7 Eng. Repr. 90; MacKalley's Case, 9 Co. 65b, 77 Eng. Repr. 828, Cro. Jac. 280, 79 Eng. Repr. 239; Waite v. The Hundred of Stoke, Cro. Jac. 496, 79 Eng. Repr. 423; Begbie v. Levi, 1 Cromp. & J. 180; Scarf v. Morgan, 4 Mees. & W. 279; R. v. Brotherton, 1 Str. 702, 93 Eng. Repr. 794; Drury v. Defontaine, 1 Taunt. 131, 127 Eng. Repr. 781.

2 Charging accused with unlawfully maintaining a stone quarry and place of blasting, and shooting with dynamite stone and rock near and by the dwelling-houses of divers inhabitants of said county, and near certain public highways and streets, and along and throughout which divers inhabitants of such county and state were continually passing, and that accused did then and there shoot dynamite and blast such stone and rock at and in said quarry, causing noisome, loud, shocking and terrifying noises, and hurling rock and stone over and upon the premises and property of said inhabitants, obstructing the public highways and streets at and by said stone quarry, whereby the property of the inhabitants there living is injured in value, their comfortable enjoyment of life prevented and the health and comfort of the public passing along and

Bridge out of repair forming part of a public highway, charged to have been built across its tracks and right of way by the accused railroad corporation, which said bridge it was necessary for the accused to construct and maintain on and across its right of way in order to restore the public highway, and which accused did unlawfully and for a long and unreasonable time, permit to become and remain out of repair and unsafe and dangerous, was held to sufficiently connect the accused with the bridge and charge a public nuisance.[3] *Dam* charged to have been constructed across a stream by the accused over which they had failed to construct, within a reasonable time, and to maintain a fishway, as required by statute, sufficiently charges the maintaining of a nuisance under such statute.[4] *Distillers delivering slops* in a street through pipes extending across the sidewalk, into carts of customers standing in the street, charged to create a public nuisance by reason of the throng of teams and the disorders and strife among drivers in endeavoring to obtain priority over each other, by which public travel was constantly impeded, held to be sufficient.[5] *Failure to repair highway* is an offense in the nature of a nonfeasance, and the question whether an indictment charging such a failure as a public nuisance involves the ques-

upon said highways and streets are endangered, is sufficient to charge a single nuisance.—Keefer v. State, 174 Ind. 588, 92 N. E. 656.

3 Louisville & N. R. Co. v. Com., 144 Ky. 558, 139 S. W. 785.

Railroad company charged with maintaining a nuisance, an allegation in the indictment or information that the company had failed to keep in repair a public bridge extending over its track, but omitting to allege facts showing that it was the duty of the railroad company to keep the bridge in repair except in so far as the allegation was made by the recitation that the accused did "suffer and permit its said bridge to become and remain out of repair and dangerous," is not sufficient to charge upon the railroad the duty to keep the bridge in repair.—Louisville & N. R. Co. v. Com., 130 Ky. 432, 113 S. W. 517.

4 State v. Meek, 112 Iowa 338, 84 Am. St. Rep. 342, 51 L. R. A. 414, 84 N. W. 3.

5 People v. Cunningham, 1 Den. (N. Y.) 524, 43 Am. Dec. 709.

tion as to whether the person or persons charged were liable to be called upon to keep the same in repair; if they are so obligated, the charge in due and regular form, alleging the omission, is sufficient.[6] *Maternity hospital* charged to have been maintained for the committing of abortions by the accused, will be sufficient without alleging that the acts of the accused in producing abortions were done in cases where the operation was unnecessary.[7] *Mill-pond* charged to create a public nuisance by corrupting the air, causing disagreeable smells and sickness, sufficiently charges a public nuisance, notwithstanding the fact that the mill-pond has existed for seventy years.[8] *Obstructing navigable stream* being charged, it shows a public nuisance which may be abated by indictment.[9] *Obstructing public highway* constitutes an indictable nuisance,[10] and the nuisance is sufficiently charged by alleging the continuance of a building erected by others within the limits of a highway;[11] charging that servants of accused, at his command, erected a fence across a public highway passing through his land, or who, after it had been erected, kept it up, charges a public nuisance;[12] an indictment or information in the common-law form

[6] 1 Russ. on Crimes (9th ed.) 494.

[7] State v. Atwood, 54 Ore. 526, 21 Ann. Cas. 516, 102 Pac. 295; affirmed, 104 Pac. 195.

[8] State v. Rankin, 3 S. C. 737, 16 Am. Rep. 737.

[9] McMeekin v. Central Carolina Power Co., 80 S. C. 512, 128 Am. St. Rep. 885, 61 S. W. 1020.

As to indictment for obstruction of navigable streams, see note, 57 Am. St. Rep. 693.

As to form of indictment for obstruction of navigable waters, see Forms Nos. 1709, 1710.

[10] Com. v. Wilkinson, 33 Mass. (16 Pick.) 173, 26 Am. Dec. 654.

Public highways may be proved by prescription or by dedication within its limits, and for a nuisance thereon an indictment will lie. — Stetson v. Faxon, 36 Mass. (19 Pick.) 147, 31 Am. Dec. 123.

[11] Com. v. Wilkinson, 33 Mass. (16 Pick.) 173, 26 Am. Dec. 654.

As to form of indictment for obstructing public highway by building, see Forms Nos. 1700, 1701.

[12] State v. Hunter, 27 N. C. (5 Ired. L.) 369, 44 Am. Dec. 41.

As to form of indictment for obstructing public highway by fence, see Forms Nos. 1703-1705.

alleging accused's acts injured and endangered the comfort, repose, health and safety of persons using the street and living in the neighborhood, is a sufficient charge that the accused injured the comfort, repose, health and safety of a considerable number of persons, and is a valid charge of maintaining a public nuisance;[13] charging a railroad company with obstructing a street by suffering water to flow thereon and form ice, and alleging that the ice obstructed those using the street and prevented their free passage thereon, to the common nuisance of all citizens of the state, is not open to the objection that it is insufficient because it fails to charge that the obstruction was to the common nuisance of all persons passing and repassing, and having the right to pass and repass, on said street,[14] and where the indictment or information alleges that accused unlawfully, unreasonably and unnecessarily maintained and suffered the nuisance to continue, it sufficiently alleges that the ice was permitted to remain in the street for an unreasonable length of time;[15] charging that the public way obstructed was an alley, and alleging that it was in a named town, an ancient highway, known as a designated alley, in a certain block, leading from thence to a designated street, and that the accused erected a fence across said alley near the western end of the street named, and continued such fence to a time named, sufficiently charges the erection and maintenance of a public nuisance.[16] *Polluting air* by maintenance of a mill-pond, we have already seen, constitutes a public nuisance;[17] and charging the setting up or carrying on any kind of a business which pollutes the atmosphere of any

13 People v. Kings County Iron Foundry, 209 N. Y. 207, 120 N. E. 298, reversing 78 Misc. 191, 139 N. Y. Supp. 447 and 156 App. Div. 912, 141 N. Y. Supp. 1138.

14 Illinois Cent. R. Co. v. Com., 29 Ky. L. Rep. 754, 96 S. W. 467.

15 Id.

16 Territory v. Ashby, 2 Mont. 89. As to form of indictment for fence obstructing highway, see Forms Nos. 1703-1705.

17 See footnote 8, this section, and the text going therewith.

public highway or residence district, to the injury and annoyance of the people traveling along such highway, or of the people inhabiting such district, sufficiently charges a public nuisance.[18] *Polluting water* being charged as a common-law nuisance against the accused, by permitting oil and refuse to enter a stream, thereby corrupting the atmosphere, and alleging the particular circumstances of the offense, and charging that the oil and refuse polluted

[18] **Maintaining a factory near public highways and residences or** inhabitants, being charged, and by reason of the manner in which the factory was operated smells were emitted therefrom which rendered the air impure and unhealthful and injured the inhabitants residing in the neighborhood, and the persons traveling on the highways, sufficiently shows that the public highways were injuriously affected within the meaning of the statute punishing one who maintains any building for any business which, by causing noxious exhalations, becomes injurious to individuals or the public.—Myers v. State, 169 Ind. 403, 82 N. E. 763.

Unlawfully causing certain offal, filth and noisome substance to be drained and placed in a named stream of water, charged against a corporation, it being alleged that accused unlawfully suffered and permitted the same to be carried by its current into a named county and there to be collected and remain, which offal, filth and noisome substance occasioned obnoxious and offensive odors, and destroyed animal life therein, causing the stream to become putrid, rotten, and offensive to the sight and smell, all to the damage of divers other citizens and to the damage and prejudice of the public, and which said company by said noisome substance, offal and filth so collected and permitted to be carried into said county, did then and there unlawfully construct and maintain an obstruction to the free use of property by destroying the waters of the stream for domestic purposes and by rendering the same unfit and unwholesome for stock belonging to citizens entitled to have the stock and to use the waters of the stream for drinking purposes, was held to be insufficient to show the maintenance of a nuisance under the statute.—United States Board & Paper Co. v. State, 174 Ind. 460, 91 N. E. 953.

Unlawful removal and placing a great number of dead animals, blood, feathers, and offal in and near a designated public road and highway, being charged, with an allegation that accused knowingly permitted them to remain there for the space of sixty days thereafter to the annoyance of the citizens of the state working and passing upon such road and highway, sufficiently charges the offense of creating a public nuisance under the statute.—State v. Murray, 237 Mo. 158, 140 S. W. 899.

the stream, is sufficient.[19] *Pool-room* charged as a public nuisance, it is proper to state the particular facts relied upon to sustain the charge.[20] *Powder magazine* charged to have been located by the accused in a thickly populated neighborhood within three hundred yards of many occupied buildings, in which accused is alleged to have kept, negligently and unlawfully, large amounts of explosives, to the annoyance, peril, and injury of the public, was held to be insufficient in not setting up the facts constituting the alleged negligence;[21] and where the indictment simply charged the accused with keeping fifty barrels of gun-powder near the dwelling-houses of divers good citizens, and near a certain public highway, it was held not to sufficiently state the setting up or maintaining of the public nuisance, because it failed to charge that the powder was negligently and improvidently kept.[22] *Smoke-stack* charged to be maintained in such a manner as to create a public nuisance, by allowing to issue therefrom thick black smoke, under a statute making the "owner, agent, lessee, or occupant" of a building guilty of a nuisance under such circumstances, the indictment or information may properly go beyond the language of the statute in charging an occupant with the offense by averring that he did "unlawfully cause, permit, and allow the emission," etc., of such thick black smoke.[23]

As to form of indictment for noxious trade, polluting atmosphere, see Forms Nos. 1695-1698.

19 Indian Refining Co. v. Com., (Ky.) 117 S. W. 275.

As to form of indictment for polluting running water, see Forms Nos. 1712, 1713.

20 Ehrlick v. Com., 125 Ky. 742, 128 Am. St. Rep. 269, 10 L. R. A. (N. S.) 995, 102 S. W. 289.

As to form of indictment for keeping a pool-room, see Form No. 1694.

On the trial of an indictment for maintaining a pool-room, prior admissions made by the defendant in police court where he had pleaded guilty to the same offense are competent evidence against him.—Ehrlick v. Com., 125 Ky. 742, 128 Am. St. Rep. 269, 10 L. R. A. (N. S.) 995, 102 S. W. 289.

21 State v. Paggett, 8 Wash. 579, 36 Pac. 487.

22 People v. Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296.

23 Moses v. United States, 16 App. D. C. 428, 50 L. R. A. 532.

Setting spring-guns so as to endanger the public passing on a highway being charged as creating a public nuisance, the court held that there was no such real and substantial danger as would warrant a conviction, where the guns, being placed as a protection against burglars in accused's shop, were loaded with large shot, and so situated as to discharge their contents obliquely toward the highway, the traveled path of which was about a rod and a half from the shop, the shop being lathed and plastered on the inside, and double boarded on the outside, notwithstanding its being possible that scattering shot might pass through the boards at places where, by reason of the cracks between them, there was not a double thickness of boards.[24] *Stockyards* charged to be maintained by the accused in such a manner as to create conditions annoying, and disturbing the peace and comfort of individuals, is sufficient, without alleging injuries to health.[25] *Tippling-house* charged to have been set up and maintained by the accused, in and about which idle and dissolute persons are encouraged to assemble, and permitted to drink, swear, quarrel and shout, by day and by night, to the disturbance and annoyance and common nuisance of the neighborhood, sufficiently charges a public nuisance.[26]

§ 985. PERSONS LIABLE. All persons who set up and maintain, or who set up, or maintain, or continue, a pub-

24 State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

Mere act of setting spring-guns on one's premises for their protection is not unlawful in itself, but the person so doing may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance if the public is thereby subjected to any danger.—State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

A man may not place instruments of destruction for protection of property, where he would not be authorized to take life with his own hand for its protection.—State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

25 State v. Chicago G. W. R. Co., 166 Iowa 494, 147 N. W. 874.

26 State v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442.

lic nuisance are liable to indictment and prosecution therefor; and two or more persons may be convicted for the same nuisance, although one of such persons assisted the other merely as an agent or as a clerk.[1]

A corporation, other than a municipal corporation, as a body corporate, may become accountable to the criminal law in the matter of the creation and maintenance of things which amount to or become a public nuisance.[2] Hence, it is now generally held, although it was formerly otherwise,[3] that an incorporated body, as such, is liable for, and may be indicted and prosecuted for, erecting, continuing, or maintaining a public nuisance,[4] whether

1 State v. Hoxsie, 15 R. I. 1, 2 Am. St. Rep. 838, 22 Atl. 1059.

2 Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570.

3 **Crimes and misdemeanors** can not be committed by a corporation, nor can a corporation, as a corporate body, by any positive or affirmative act, incite others to do so.—State v. Great Works Milling & Mfg. Co., 20 Me. 41, 37 Am. Dec. 38; overruled in State v. Portland (City of), 74 Me. 268, 43 Am. Rep. 586 (holding municipal corporations liable for constructing sewers in such a manner as to create a nuisance). See Cumberland & Oxford Canal Corp. v. Portland (City of), 56 Me. 77; State v. Ohio & M. R. Co., 23 Ind. 362 (deciding corporation can not be held criminally liable for obstructing public highway).

Individuals and not corporation to be indicted, and where the nuisance is the obstruction of a navigable stream, the indictment must be against those persons by whose procurement the nuisance was created.—State v. Great Works Milling & Mfg. Co., 20 Me. 41, 37 Am. Dec. 38.

4 ARK.—St. Louis, A. & T. R. Co. v. State, 52 Ark. 51, 11 S. W. 1035 (indictment of railroad for unlawfully obstructing highway). IND.—State v. Louisville, N. A. & C. R. Co., 86 Ind. 114 (indictment of railroad for public nuisance); State v. Baltimore, O. & C. R. Co., 120 Ind. 298, 22 N. E. 307 (indictment of railroad for maintaining public nuisance); Acme Fertilizer Co. v. State, 24 Ind. App. 346, 107 Am. St. Rep. 190, 72 N. E. 1037 (indictment for maintaining a nuisance in the operation of a factory for the manufacture of products of merchandise from the bodies of dead animals). KY.—Com. v. Pulaski County Agricultural & Mechanical Assoc., 92 Ky. 197, 17 S. W. 442 (incorporated fair association indictable for allowing the nuisance of gaming upon its grounds); Com. v. Paducah (City of), 6 Ky. L. Rep. 292. MASS.—Com. v. Nashua & L. R. Corp., 68 Mass. (2 Gray) 52 (indictment of railroad for unlawfully obstructing highway); Com. v. New Bedford

such nuisance is by statute made a felony or a mis-

Bridge, 68 Mass. (2 Gray) 339 (indictment for nuisance by maintaining bridge obstructing navigable stream); Com. v. Vermont & M. R. Corp., 70 Mass. (4 Gray) 22 (indictment of railroad for obstructing highway). MICH.—People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735 (conviction on indictment charging nuisance in emitting foul odors). N. H.—Boston, C. & M. R. Co. v. State, 32 N. H. 215. N. J.—State v. Morris & E. R. Co., 23 N. J. L. (3 Jab.) 360 (indictment of railroad charging erecting depot on public street sustained); New York & G. L. R. Co. v. State, 50 N. J. L. 303, 13 Atl. 1; affirmed, 53 N. J. L. 244, 23 Atl. 168 (indictment of railroad company for failure to keep bridge across cut intersecting highway in repair); State v. Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680 (indictment for keeping disorderly house). N. Y.—People v. New York, C. & H. R. Co., 74 N. Y. 302 (indictment of railroad for failure to keep highway in repair); Susquehanna & B. Turnp. Road Co. v. People, 15 Wend. 267 (indictment of corporation at common law for suffering road to be out of repair); Waterford & W. Turnp. v. People, 9 Barb. 161 (indictment of turnpike corporation for suffering road to be out of repair); Syracuse & T. Pl. Road Co. v. People, 66 Barb. 205 (indictment of turnpike company for suffering road to be out of repair). N. C.—State v. Western N. C. R. Co., 95 N. C. 602 (indictment of railroad for obstructing highway). PA.—Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570 (indictment for creation and maintenance of a public nuisance by keeping a tow-path in so careless, unskillful and unlawful a manner as to permit the water to escape and form stagnant pools, producing miasma and rendering the air unwholesome); Northern C. R. Co. v. Com., 90 Pa. St. 300 (indictment of corporation for maintaining nuisance); Com. v. North & W. B. R. Co., 5 Kulp 290 (indictment of corporation for maintaining nuisance). TENN.—Memphis, P. P. & Belt R. Co. v. State, 87 Tenn. 746, 11 S. W. 946 (street railway company liable to indictment for failure to keep roadbed in such condition as not to obstruct street traffic across or longitudinal upon it); State v. Louisville & N. R. Co., 91 Tenn. 445, 19 S. W. 229 (railroad company liable to indictment for obstruction of county road for unreasonable length of time); Standard Oil Co. v. State, 117 Tenn. 618, 10 L. R. A. (N. S.) 1015, 100 S. W. 705 (the word "persons" in criminal statutes usually, but not necessarily, includes corporations). VT.—State v. Vermont Cent. R. Co., 27 Vt. 103 (railroad companies indictable for erecting and maintaining common nuisance). W. VA.—State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803; Moundsville v. Ohio River R. Co., 37 W. Va. 92, 20 L. R. A. 161, 16 S. E. 514 (liability of railroad company for maintaining nuisance by failure to restore street to former state and build proper crossings); State v. Monongahela River R. Co., 37 W. Va. 108, 16 S. E.

demeanor,[5] and whether the punishment prescribed therefor be by fine,[6] or imprisonment, or both, in the discretion of the court;[7] but where the penalty described is both fine and imprisonment, from the very nature of the personality of the accused, the latter part of the statute will be inoperative.[8] An incorporated railroad company may be indicted for cutting through and obstructing a highway by a bridge and other works not according to the provisions of the statute empowering it to act; for though a corporation can not be guilty of treason, felony, or other offenses which derive their character from the corrupt mind of the person committing them, and are violations of the social duties that belong to men and subjects, it may be guilty, as a body corporate, for commanding acts to be done to the nuisance of the community at large.[9] A canal corporation may be in-

519 (railroad company failing to restore highway to its former condition, indictable for maintaining nuisance); State v. Ohio River R. Co., 38 W. Va. 244, 18 S. E. 582 (railroad company failing to restore highway to former condition, indictable for mantaining a nuisance); State v. Elk Island Boom Co., 41 W. Va. 799, 24 S. E. 590 (boom company unreasonably or unnecessarily obstructing ordinary use of river, which is a public highway, indictable therefor); State v. Dry Fork R. Co., 50 W. Va. 237, 40 S. E. 447 (indictment of railroad charging unlawful obstruction of highway need not negative authorization of company to construct track). FED.—United States v. John Kelso Co., 86 Fed. 304. ENG.—R. v. Great North of England R. Co., 9 Ad. & E. N. S. (9 Q. B.) 315, 58 Eng. C. L. 314, 7 Brit. Rul. Cas. 466 (indictment of railroad company for cutting through and obstructing highway in course of work not performed conformable to powers conferred by statute); R. v. Birmingham & G. R. Co., 9 Car. & P. 469, 38 Eng. C. L. 278 (indictment of railroad company for failure to keep bridge in repair across cut intersecting highway).

5 See United States v. Alaska Packers' Assoc., 1 Alaska 217.

6 People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735.

7 Southern R. Co. v. State, 125 Ga. 287, 114 Am. St. Rep. 203, 5 Ann. Cas. 411, 53 S. E. 160; State v. Belle Springs Creamery Co., 83 Kan. 389, 111 Pac. 474; United States v. Union Supply Co., 215 U. S. 50, 54 L. Ed. 87, 30 Sup. Ct. 15.

8 Com. v. Pulaski County Agricultural & Mechanical Assoc., 92 Ky. 197, 17 S. W. 442.

9 R. v. Great North of England

dicted for nuisance in maintaining, continuing, and keeping up a tow-path in so careless, unskilful, and unlawful a manner, that the water from their canal escapes through the locks or walls and forms pools or ponds of stagnant water, producing miasma, and corrupting and rendering the air unwholesome, to the nuisance and injury of the public, and producing disease among the inhabitants of the district, and the indictment or information is not bound to do more than to set forth the facts constituting the nuisance.[10]

A municipal corporation is to be indicted and prosecuted through its officers.[11] The officers of a municipality may be prosecuted criminally for erecting or maintaining a nuisance, or failure to abate the same, and the like, but the indictment or information should allege the official power and duty of the accused in respect to the nuisance, and their failure to exercise that power or perform that duty;[12] the indictment or information against the accused should be against them in their official, and not against them in their individual, capacity.[13] A municipal corporation may be indicted for so constructing a sewer that it becomes a public nuisance;[14] for failure to repair a bridge,[15] or a street;[16] for maintaining a public nuisance;[17] for neglect to abate a nuisance it has the power

R. Co., 9 Ad. & E. N. S. (9 Q. B.) 315, 58 Eng. C. L. 314, 7 Eng. Rul. Cas. 466. See R. v. Birmingham & G. R. Co., 3 Ad. & E. N. S. (3 Q. B.) 223, 43 Eng. C. L. 708.

10 Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570.

11 As to indictment of city for maintaining nuisance, see note, 15 Am. St. Rep. 845.

12 Com. v. Kinnaird, 18 Ky. L. Rep. 647, 37 S. W. 840; State v. Justices, 11 N. C. (4 Hawks.) 194; State v. Halifax, 15 N. C. (4 Dev. L.) 345; State v. Fishblate, 83 N. C. 654; State v. Hall, 97 N. C. 474, 1 S. E. 683.

13 Com. v. Berdin, 165 Pa. St. 224, 30 Atl. 921.

14 State v. Portland (City of), 74 Me. 268, 43 Am. Rep. 586.

15 Saukville (Town of) v. State, 69 Wis. 178, 33 N. W. 88.

16 Davis v. Bangor (City of), 42 Me. 522; State v. Portland (City of), 74 Me. 268, 43 Am. Rep. 586; Com. v. Lansford, 3 Pa. Dist. Rep. 365, 14 Co. Ct. Rep. 376; State v. Murfreesboro (City of), 30 Tenn. (11 Humph.) 217.

17 Bower v. New York (Mayor

to abate;[18] for neglect to remove a nuisance in a public river, or basin connected therewith, which it has the power to remove;[19] for permitting a public nuisance to exist on its property;[20] for permitting noisome accumulation of filth at the outlet of a sewer,[21] and the like.

§ 986. DUPLICITY. The general rules respecting duplicity in criminal pleadings apply to indictments and informations charging public nuisances.[1] One offense, only, can be charged in the same count; but where the offense charged is made up of a number of acts, any one or all of which, taken together, constitute a nuisance and but one offense, all these acts may be charged in one count without being open to the objection of duplicity.[2] Charging accused with creating and continuing a nuisance, has been said to allege two distinct offenses, which can not be joined in one count;[3] on the other hand, it has been said that charging accused with erecting a nuisance in the shape of a fence on a public highway, and thereafter continuing and maintaining the same, has been said to

of), 3 Barb (N. Y.) 254; Hurst v. Albany (Mayor of), 9 Wend. (N. Y.) 571; People v. Albany (Corporation of), 11 Wend. 539, 27 Am. Dec. 95.

18 State v. Shelbyville (City of), 36 Tenn. (4 Sneed.) 176.

19 People v. Albany (Corporation of), 11 Wend. (N. Y.) 539, 27 Am. Dec. 95.

20 St. John v. New York City, 3 Bosw. (N. Y.) 483; Harper v. Milwaukee (City of), 30 Wis. 365.

21 **Best judgment** used in adoption of sewer system does not relieve.—State v. Portland (City of), 74 Me. 268, 43 Am. Rep. 586.

1 IND.—Knopf v. State, 84 Ind. 316. MASS. — Com. v. Hart, 76 Mass. (10 Gray) 465; Com. v. Rumford Chemical Works, 82 Mass. (16 Gray) 231. MINN. — Chute v. State, 19 Minn. 271. N. Y.—Reed v. People, 1 Park. Cr. Rep. 481.

2 ILL.—Nicholson v. People, 29 Ill. App. 57. ME.—State v. Hart, 34 Me. 36; State v. Payson, 37 Me. 361. MASS.—Com. v. Twitchell, 58 Mass. (4 Cush.) 74; Com. v. Rumford Chemical Works, 82 Mass. (16 Gray) 231. OHIO—State v. Frieberg, 49 Ohio St. 585, 31 N. E. 881. R. I.—State v. Towler, 13 R. I. 661. VT.—State v. Matthews, 42 Vt. 542.

3 **Statutory provisions**, or wording, doubtless responsible for this ruling.—Burke v. People, 23 Ill. App. 36; Hoardley v. People, 23 Ill. App. 39.

constitute but one offense of public nuisance.[4] Charging accused with keeping a slaughter-house in a designated city, and there butchering cattle, etc., and alleging that the acts complained of "grossly injure the person and property of another," and "grossly disturb the public health," and "openly outrage public decency," does not charge more than one crime.[5] Likewise charging accused with keeping swine in a pen near a public highway, and with feeding them with offal, has been said to constitute but one nuisance.[6] An indictment charging accused operated, near public highways and residences of divers inhabitants, a grease and fertilizer factory; that he hauled to the factory carcasses of dead animals, cut the same to pieces, cooked the bodies thereof, and caused offensive smells to escape; that large quantities of blood and offal of the bodies were permitted to run over the floor of the building; that accused stored in the building and throughout on the ground near by large quantities of the cooked meat and bones, whereby the air in and about the factory became noxious, and that the inhabitants residing in the neighborhood and the persons traveling on the highways were injured thereby,—sufficiently charges the offense of maintaining a public nuisance under the statute, and is not bad for duplicity.[7] Where an indictment or information charges accused, in one count, with maintaining a building which overhangs a public street or highway, and thereby endangering the safety of persons passing and repassing on such public street or highway, and

4 Territory v. Ashby, 2 Mont. 89, remarking: "This proposition is not only sustained upon principle but upon authority," citing People v. Frank, 28 Cal. 513.

5 State v. Bergman, 6 Ore. 341, following State v. Carr, 6 Ore. 33.

Conjunctive indictment charging nuisance in the language of the statute, states but one offense. See State v. Carr, 6 Ore. 33; State v. Bergman, 6 Ore. 341; State v. Humphreys, 43 Ore. 47, 70 Pac. 825; Graynor v. Albany (City of), 43 Ore. 147, 71 Pac. 1043; State v. White, 48 Ore. 421, 87 Pac. 139.

6 State v. Payson, 37 Me. 361.

7 Myers v. State, 169 Ind. 403, 82 N. E. 763.

also with permitting large quantities of filth to collect and remain in such building, emitting offensive stenches and odors, annoying to persons dwelling in the vicinity, and dangerous to the public health, charges two public nuisances, and is, therefore, bad for duplicity;[8] the same is true of thus charging accused with keeping and maintaining "a certain building, to-wit, a dwelling-house, used as a house of ill-fame, resorted to for purposes of prostitution, lewdness, and for illegal gaming, and used for the illegal sale and keeping of intoxicating liquors, the said building so used as aforesaid being then and there a common nuisance," which was held bad for duplicity.[9]

Distinct offenses of nuisance may be created by the same act,[10] in which case they may both be joined in the same indictment or information, in different counts. Thus, it has been said that a count for a common-law nuisance created by keeping a disorderly house may be joined with a count in the same indictment charging the statutory nuisance of keeping a house used for the illegal sale and storing of intoxicating liquors.[11]

8 Chute v. State, 19 Minn. 271.

9 Com. v. Ballou, 124 Mass. 26.

10 State v. Bergman, 6 Ore. 341.

11 Com. v. Kimball, 73 Mass. (7 Gray) 328.

CHAPTER LXII.

INDICTMENT—SPECIFIC CRIMES.

Obscenity, Including Obscene Language and Literature.

§ 987. In general.
§ 988. Requisites and sufficiency of indictment—In general.
§ 989. —— Averment in language of statute.
§ 990. —— —— Indecent exposure of person.
§ 991. —— —— Sending obscene matter through the mail.
§ 992. —— Obscene exhibitions.
§ 993. —— Obscene language.
§ 994. —— Obscene publication, picture or print.
§ 995. —— Negative averments.
§ 996. Time of offense.
§ 997. Place of offense.
§ 998. Publication—As to necessity of alleging.
§ 999. —— Particulars of publication.
§ 1000. Inducement and colloquium.
§ 1001. Intent and knowledge.
§ 1002. Description, setting out and filing—In general.
§ 1003. —— Obscene language.
§ 1004. —— Obscene picture, print or photograph.
§ 1005. —— Obscene publications, writings and signs.
§ 1006. Mailing obscene or indecent matter.
§ 1007. Joinder—Of defendants.
§ 1008. —— Of offenses.
§ 1009. —— Duplicity.

§ 987. IN GENERAL. In those cases where by statute acts of obscenity; or the use of obscene language; or the printing, publishing, selling or keeping for sale, and the like, of obscene literature including pictures and prints,—is merely a misdemeanor, prosecution may be by affidavit and complaint in a justice's court, or other inferior court

not of record.[1] Where prosecution is in a court of record, it may be by either indictment or information;[2] except that in the case of a charge of mailing obscene literature, brought under section 3893 of the United States Revised Statutes,[3] the charge being the commission of an infamous crime,[4] under the provisions of the federal constitution,[5] the accused can not be put upon his trial except upon the presentment of a grand jury,[6] and all the essentials of the accusation must be presented by such grand jury in their indictment;[7] neither the court, nor the parties, can add to or take from the indictment.[8]

§ 988. REQUISITES AND SUFFICIENCY OF INDICTMENT[1]—IN GENERAL. In charging accused with a violation of the statutory prohibition against obscenity, the use of obscene language, the printing or publication or distribution of obscene publications, pictures or prints, the indictment or information need not allege that the act was "unlawfully" done, where the statute defining and describing the offense does not use the word "unlawfully."[2] Where the penalty inflicted for the violation of the statute differs in severity as regards persons over and under twenty-one years of age, the age of one accused of manufacturing and printing indecent and obscene photographs need not be stated; the court may determine the age of the accused should he be adjudged guilty, in some jurisdic-

1 See Ex parte Slattery, 3 Ark. 484.

2 See State v. Hayward, 83 Mo. 299.

3 5 Fed. Stats. Ann. (1st ed.), p. 839.

4 Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89, 5 Sup. Ct. Rep. 935; Mackin v. United States, 117 U. S. 348, 29 L. Ed. 909, 6 Sup. Ct. Rep. 777.

5 U. S. Const. Amendment V; 9 Fed. Stats. Ann. (1st ed.), p. 256.

6 Accused can not waive right to be prosecuted by indictment.—Ex parte McClusky, 40 Fed. 72-74.

7 United States v. Harmon, 34 Fed. 872.

8 See Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849, 7 Sup. Ct. Rep. 781; United States v. Harmon, 34 Fed. 872.

1 As to form of indictment or information charging obscenity, obscene language, obscene publication, picture or print, see Forms Nos. 1718-1757.

2 State v. Murphy, 43 Ark. 178.

tions.[3] An indictment charging the distribution of obscene papers should set out the mode of distribution, under some statutes.[4]

Venue of the offense charged must be laid in the indictment or information, and proof of venue must appear in the record.[5]

§ 989. —— AVERMENT IN LANGUAGE OF STATUTE. As to whether an indictment or information in the language of the statute charging obscenity, in any of its varying phases, is sufficient, depends (1) upon the provisions and wording of the particular statute, and (2) upon the particular phase of the offense charged. Thus, under a statute prohibiting and punishing indecent exposure of the person, an indictment or information charging the offense in the language of the statute, or substantially in the language of the statute, is sufficient;[1] and in an indictment or information under a statute prohibiting the use of obscene or indecent language in or near a dwelling-house, or in the presence of a family, it is sufficient to follow the language defining and prohibiting the offense;[2] the same is true on a charge under a statute prohibiting the sale and giving away of publications principally devoted to the publication of criminal news, police reports, or pictures or stories of deeds of bloodshed, lust and crime,[3] in which case it is not necessary to further allege that the matter was obscene, blasphemous, scandalous or libelous,[4] or that the accused had knowledge that the book, paper, etc., was obscene or indecent.[5] Charging the use of

3 People ex rel. Ziegler v. Court of Special Sessions, 10 Hun (N. Y.) 224.

As to determination of age of child by inspection by court, see note, 40 L. R. A. (N. S.) 470.

4 State v. Smith, 17 R. I. 371, 22 Atl. 282.

5 McNair v. People, 89 Ill. 441.

1 See, infra, § 990.

2 Weaver v. State, 79 Ala. 279.

3 State v. McKee, 73 Conn. 18, 84 Am. St. Rep. 124, 49 L. R. A. 542, 46 Atl. 409; Com. v. Havens, 6 Pa. Co. Ct. Rep. 545.

4 State v. McKee, 73 Conn. 18, 84 Am. St. Rep. 124, 49 L. R. A. 542, 46 Atl. 409.

5 See, infra, § 1001.

obscene language,[6] or an obscene publication, picture or print,[7] in the language of the statute, is thought not to be sufficient; the objectionable spoken words, or objectionable printed matter, should be set out in hæc verba, or a sufficient excuse given for not doing so.[8]

Conclusion need not be ad commune nocumentum—"to the common nuisance," etc.,[9] although a different rule seems to prevail in North Carolina.[10]

§ 990. ——— INDECENT EXPOSURE OF PERSON.[1] Under a statute prohibiting and punishing indecent exposures of the person, an indictment or information charging the offense in the language, or substantially in the language, of the statute defining the offense,[2] will be sufficient in those cases in which the statute under which the prosecution is had contains all the essential elements and facts constituting the offense sought to be charged;[3] otherwise it will be insufficient without setting out and identifying

6 See, infra, § 993.

7 See, infra, § 994.

8 See, infra, §§ 993, 1002.

9 See: GA.—Gilmore v. State, 118 Ga. 299, 45 S. E. 226. MASS.—Com. v. Haynes, 68 Mass. (2 Gray) 72, 61 Am. Dec. 437; Com. v. Reynolds, 81 Mass. (14 Gray) 87, 74 Am. Dec. 665. PA.—Baker v. Com., 19 Pa. St. 412; Com. v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632. ENG.—R. v. Holmes, 3 Car. & K. 360, 6 Cox C. C. 216.

See, supra, §§ 973, 975.

10 See State v. Barham, 79 N. C. 646; State v. Brewington, 84 N. C. 783.

1 As to forms of indictment or information for indecent exposures of person, see Forms Nos. 1240-1245.

2 All essential words necessary to the full statutory description must be used. See Lockhart v. State, 116 Ga. 557, 42 S. E. 787; Stark v. State, 81 Miss. 397, 33 So. 175.

3 ARK.—State v. Hazle, 20 Ark. 156. CAL.—Ex parte Hutchings, 2 Cal. Unrep. 822, 16 Pac. 234. IOWA — State v. Bauguess, 106 Iowa 107, 76 N. W. 508; State v. Martin, 125 Iowa 715, 101 N. W. 637. MO.—State v. Gardner, 28 Mo. 90. TEX.—Moffit v. State, 43 Tex. 346; State v. Griffin, 43 Tex. 538.

Indecent exposure of the person is an offense against those statutes prohibiting "notorious lewdness or other public indecency." —McJunkins v. State, 10 Ind. 140.

Under Cal. Pen. Code, § 311, which declares it an offense to "wilfully and lewdly procure, counsel, or assist," any one to make an indecent exposure of the person, charging that accused "wilfully,

the acts complained of.[4] The statutory requirements as to time and place[5] and persons[6] must be strictly observed in the allegations; but it is not necessary to allege to

unlawfully and lewdly solicited" an indecent exposure, is sufficient. — Ex parte Hutchings, 2 Cal. Unrep. 822, 16 Pac. 234.

4 Williams v. People, 67 Ill. App. 344; State v. Peirce, 43 N. H. 273.

—**Place not far from public highway** where the offense charged committed, the common law offense has not been committed, unless the evidence shows that the exposure was seen by one person, and that others might have seen it had they looked. See R. v. Farrell, 9 Cox C. C. 446.

5 **"In public" or "in a public place"** contained in the statutory definition, the indictment must specifically allege that the offense was committed in such a place; the substitution of other words for the statutory ones will be insufficient, such as "on a public road" (Moffit v. State, 43 Tex. 346) or "on a public highway."—Williams v. State, 64 Ind. 553, 31 Am. Rep. 135.

A place where might have been seen by more than one person necessary to render it "notorious and public."—Morris v. State, 109 Ga. 351, 34 S. E. 577.

—**Making exposure in the view** from the windows of the dwelling-houses of two neighbors constituted the crime under the statute. —Van Houten v. State, 46 N. J. L. 16, 50 Am. Dec. 397, 4 Am. Cr. Rep. 272. See R. v. Holmes, 6 Cox C. C. 216.

Place not required to be alleged in the absence of a statutory provision so requiring. — State v. Hazle, 20 Ark. 156; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170.

"Upon the public street" "unlawfully, wilfully, openly and scandalously exposing to view of divers persons passing and repassing the naked body and person of him" the accused, sufficiently states at common law the offense of indecent exposure.—Com. v. Spratt, 14 Phila. (Pa.) 365, 37 Leg. Int. (Pa.) 234. See, also, Com. v. Sharpless, 2 Serg. & R. (Pa.) 101.

6 **Presence of one or more persons** need not be charged, according to a North Carolina case (State v. Roper, 18 N. C. (1 Dev. & B. L.) 208, but this case has been criticized and practically overruled by a later case in the same state.—State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637.

—**Actual seeing by another** is not necessary to constitute the offense of indecent exposure; if it was made in a public place with the intention that it should be seen, and persons were there who could have seen had they looked, the offense is complete.—Van Houten v. State, 46 N. J. L. 16, 50 Am. Dec. 397, 4 Am. Cr. Rep. 272. See R. v. Farrell, 9 Cox C. C. 446, in which the court remarks, in reversing a conviction on a charge of indecent exposure at a place near a public highway, "it is not to be taken that we lay down that if the person was seen by one person, but there was evidence that others might have witnessed the offense at the time, we would not have upheld the conviction."

whom the exposure was made,[7] or to set out what part of the person was exposed;[8] but where the part of the person exposed is alleged, it must be proved as laid.[9] Intent must be alleged,[10] but the indictment or information need not allege that the act complained of "tended to debauch the morals,"[11] or conclude ad commune nocumentum[12]—to the common nuisance of all the citizens.[13]

§ 991. ———— SENDING OBSCENE MATTER THROUGH THE MAIL.[1] Charging the depositing in the mail, mailing, or sending through the mail, obscene and indecent matter prohibited by law, in the language of the statute, is insufficient, because, although it is not necessary to aver that the matter was of an indecent character,[2] yet it must be alleged that the accused had knowledge of the obscenity

One person witnessing the indecent exposure sufficient to show violation of the statute and make it "open lewdness."—Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; State v. Juneau, 88 Wis. 180, 43 Am. St. Rep. 877, 24 L. R. A. 857, 59 N. W. 580.

7 State v. Bauguess, 106 Iowa 107, 76 N. W. 508; State v. Martin, 125 Iowa 715, 101 N. W. 637.

8 State v. Bauguess, 106 Iowa 107, 76 N. W. 508.

9 **Naked girls**, picture of alleged, evidence showing picture of girls naked to the waist, but clothed below the waist, does not support the allegation.—Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652, 3 Am. Cr. Rep. 290.

10 See, infra, § 1001.

11 Gilmore v. State, 118 Ga. 299, 45 S. E. 266.

12 Gilmore v. State, 118 Ga. 299, 45 S. E. 226.

See, supra, §§ 973, 975.

Tendency to subvert the morals and corrupt is merely descriptive of the act necessary to constitute the common law offense, but constituting no part of the offense itself; the statutory words, "tending to debauch the morals," add nothing to the common law offense, and may be omitted without vitiating the indictment or information. — Gilmore v. State, 118 Ga. 299, 45 N. E. 226.

13 Com. v. Haynes, 68 Mass. (2 Gray) 72, 61 Am. Dec. 437. See Com. v. Reynolds, 81 Mass. (14 Gray) 87, 74 Am. Dec. 665; R. v. Holmes, 3 Car. & K. 360, 6 Cox C. C. 216.

1 **As to mailing obscene matter**, see, infra, § 1006.

2 Timmons v. United States, 85 Fed. 204.

and indecency of the matter,[3] although the contrary has been held.[4]

§ 992. —— OBSCENE EXHIBITIONS.[1] An indictment or information charging an indecent exhibition of the persons of others,[2] or of indecent shows,[3] should charge the facts concisely and fully, but must be sufficiently specific and certain to distinguish, individualize and identify the particular act complained of, and to bring such act within the provisions of the statute under which the prosecution is had, or to bring it within the prohibition of the common law.[4]

§ 993. —— OBSCENE LANGUAGE.[1] The offense of obscene and indecent language was a misdemeanor at common law, and an indictment charging that offense may be

3 United States v. Slenker, 32 Fed. 691.

See, infra, § 1001.

4 United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571.

1 **As to form of indictment** for indecent exhibition, see Form No. 1245.

2 Knowles v. State, 3 Day (Conn.) 103; Britain v. State, 22 Tenn. (3 Humph.) 203.

Charging indecent exhibition of person of another is not sustained by proof that accused posted or pinned upon the back of such other a paper containing obscene words.—Tucker v. State, 28 Tex. App. 541, 13 S. W. 1004.

3 **Booth for indecent exhibition** charged to have been kept by the accused in the first count; a second count charging showing for gain an indecent exhibition in a booth; a third count charging an indecent exhibition in a public place. The evidence disclosing that during the Epsom races the accused, who were traveling showmen, kept a booth at Epsom Downs for the purpose of an indecent exhibition; that they invited people to enter, and that those who would pay entered and saw an indecent exhibition. It was objected on the part of the accused that counts one and two did not charge an indecency to have been committed in a public place, and count three did not charge the acts complained of to have been committed in a public place, because the booth, to which no one was admitted except upon the payment of a fee, was not a public place. Lord Coleridge said that the offense was well pleaded in the indictment, and that the facts as shown by the evidence were abundant to show a common law offense.—R. v. Saunders, L. R. 1 Q. B. Div. 15, 15 Moak's Eng. Repr. 151, 3 Am. Cr. Rep. 436.

4 Knowles v. State, 3 Day (Conn.) 103.

1 **As to forms of indictment** or information for use of obscene

good, although there is no such statutory offense.[2] Where using obscene or indecent language is made an offense by statute, an indictment or information charging the offense must set out every fact which is an essential element under the statute.[3] We have already seen that an indictment or information charging the offense of using obscene and indecent language, alleging the offense in the language of the statute, is not usually regarded as sufficient,[4] although there are cases to the contrary.[5] The better doctrine is thought to be, and surely the better and safer practice for the pleader is, to set out in hæc verba[6] the words relied upon for conviction, or at least to particularly describe them when the words themselves are alleged to be too lascivious, lewd, obscene or vulgar to be set out in the complaint,[7] indictment or information.[8]

and indecent language, see Forms Nos. 555, 1718-1727.

2 **Use of obscene language** charged, indictment was held to be good as a common law indictment, although the statutory offense did not exist in the state.—State v. Appling, 25 Mo. 315, 69 Am. Dec. 469.

3 Ivy v. State, 61 Ala. 58; Zabriskie v. State, 43 N. J. L. (14 Vr.) 640, 39 Am. Rep. 610; State v. Smith, 46 N. J. L. 491, 4 Am. Cr. Rep. 275.

In Pennsylvania, charging speaking, publicly in the streets, wicked, scandalous and infamous words, representing men and women in obscene and indecent positions, has been held to be sufficient as charging an act indictable as a misdemeanor without alleging "to the common nuisance."—Barker v. Com., 19 Pa. St. 412.

Singing lewd songs and the use of obscene language can not be properly brought within the meaning of statutes prohibiting "notorious lewdness or other public indecency."—McJunkins v. State, 10 Ind. 140.

4 See, supra, § 989.

5 State v. Hazle, 20 Ark. 156; State v. Fare, 39 Mo. App. 110, overruling State v. Beach, 25 Mo. App. 554, but thought to be in turn overruled by State v. Hayward, 83 Mo. 299; State v. Griffin, 43 Tex. 558.

In Missouri, it has been held that an information that charges, in the terms of the statute, a disturbance of the peace by using offensive and indecent conversation, is sufficient.—State v. Fare, 39 Mo. App. 110, overruling State v. Bach, 25 Mo. App. 554. But the contrary was held in State v. Hayward, 83 Mo. 299.

6 See, infra, § 1002.

7 Id.

8 ARK.—State v. Moser, 33 Ark. 140; Hearn v. State, 34 Ark. 550; State v. Hutson, 40 Ark. 361;

Under a statute[9] making it an offense to use "to or of another" opprobrious words or abusive language, tending to cause a breach of the peace, an indictment or information charging conjunctively that the language was used to and of another, is sufficient, although the evidence shows that the words were used of but not to such person, and the other features of the offense being properly charged, a conviction will be sustained.[10] The name of the person in reference to whom language was used must be alleged, if known;[11] and it has been said that the indictment or information must allege that the language was used in the presence of the complainant or of some member of his family, where the language complained of was concerning the family of another,[12] although the contrary

Moore v. State, 50 Ark. 25, 6 S. W. 17. CONN.—Knowles v. State, 3 Day 103. GA.—Stevenson v. State, 90 Ga. 456, 16 S. E. 95. ILL.—McNair v. People, 89 Ill. 441; Fuller v. People, 92 Ill. 182; Strohm v. People, 60 Ill. App. 128; affirmed in Strohm v. People, 160 Ill. 582, 43 N. E. 622. IND.—State v. Burrell, 86 Ind. 313; State v. Coffing, 3 Ind. App. 304. MASS.—Com. v. Holmes, 17 Mass. 336 (modified by Com. v. Wright, post); Com. v. Tarbox, 55 Mass. (1 Cush.) 66; Com. v. Wright, 139 Mass. 382 (modifying Com. v. Holmes, supra). MICH.—People v. Girardin, 1 Mich. 90. MO.—State v. Hayward, 83 Mo. 299. N. Y.—People v. Kaufman, 14 App. Div. 305, 12 N. Y. Cr. Rep. 263, 43 N. Y. Supp. 1046; People v. Hallenbeck, 2 Abb. N. C. 66, 52 How. Pr. 502; People v. Danihy, 63 Hun 579, 10 N. Y. Cr. Rep. 192, 18 N. Y. Supp. 467. PA.—Com. v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632. TENN.—State v. Pennington, 73 Tenn. (5 Lea) 506; Young v. State, 78 Tenn. (10 Lea) 165. VT.—State v. Brown, 27 Vt. 619. WIS.—Steuer v. State, 59 Wis. 472, 18 N. W. 433; Peters v. State, 66 Wis. 339, 28 N. W. 138. FED.—Bates v. United States, 11 Biss. 70, 10 Fed. 92; United States v. Harmon, 34 Fed. 872. ENG.—Bradlaugh v. R., L. R. 3 Q. B. Div. 607, 28 Moak's Eng. Repr. 482, 3 Am. Cr. Rep. 470.

9 As 3 Ga. Code (1895), § 396.

10 Lecroy v. State, 89 Ga. 335, 15 S. E. 463.

Written language not contemplated as an offense under this section. — Stevenson v. State, 90 Ga. 456, 16 S. E. 95.

11 **Naming person to whom words were spoken.** — Complaint for using abusive and obscene language tending to provoke an assault or any breach of the peace should name person before whom it was spoken and to whom said, and if not known, so allege. — State v. Clarke, 31 Minn. 207, 17 N. W. 344.

12 Peters v. State, 66 Wis. 339, 28 N. W. 138.

has been held.[13] And where the statute prohibits and punishes the use of obscene language in or near a dwelling-house in the presence of the owner thereof, or his family, or some member thereof, or of any female, the fact of such presence must be averred,[14] but it need not be alleged or shown that the obscene language was heard by any member of the family or a female.[15]

§ 994. —— OBSCENE PUBLICATION, PICTURE OR PRINT.[1] We have already seen[2] that an indictment or information charging an obscene publication, picture or print in the language of the statute is not ordinarily sufficient.[3] Publication must be alleged and the particulars set out.[4] Exhibiting an obscene or indecent picture[5] being charged at common law, it was not necessary to aver that the exhibition was public or that the place where the exhibition took place was a public nuisance, it was sufficient to state that it was shown to sundry persons on the payment of a fee.[6] Under a statute prohibiting the publishing, selling or sending an obscene book, paper, letter, picture or print, it has been held sufficient for the indictment to charge the offense in the language of the statute,[7] on the ground that the offense is malum prohibitum, but the rule is otherwise under a statute charging an obscene publica-

13 State v. Clarke, 31 Minn. 207, 17 N. W. 344.

14 Ivy v. State, 61 Ala. 58.

15 Yancy v. State, 63 Ala. 141.

1 As to form of indictment or information for obscene or indecent publication in any of its activities and phases, see Forms Nos. 1729-1750.

2 See, supra, §§ 989 and 993, footnote 8.

3 ALA.—Smith v. State, 63 Ala. 55. FLA.—Reyes v. State, 34 Fla. 181, 15 So. 875. ILL.—McNair v. People, 89 Ill. 441. MO.—State v. Fare, 39 Mo. App. 110. N. H.—State v. Peirce, 43 N. H. 273. FED.—United States v. Slenker, 32 Fed. 691; United States v. Clark, 37 Fed. 106; United States v. Brazeau, 78 Fed. 464.

4 See, infra, §§ 998, 999.

5 See, supra, § 992.

6 Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; R. v. Saunders, L. R. 1 Q. B. Div. 15, 15 Moak's Eng. Repr. 151, 3 Am. Cr. Rep. 436.

7 State v. McKee, 73 Conn. 18, 84 Am. St. Rep. 124, 49 L. R. A. 542, 46 Atl. 409.

tion, as pointed out above;[8] and under such a statute it will not be necessary either to allege or prove that the accused had knowledge that the matter complained of was obscene or indecent.[9]

§ 995. —— NEGATIVE AVERMENTS. The general rule of criminal pleading governing negative averments applies also in charging obscenity, in any of its phases, and the pleader will not be required to negative any proviso or exception in the statute unless such proviso or exception is a part of the definition and description of the offense. Thus, it has been said that on a charge of mailing or depositing in the mails non-mailable matter, it is not necessary to charge that the accused had a knowledge of the non-mailable character of the matter in question,[1] although this doctrine seems to be questioned in a later case.[2] Under a statute making it a misdemeanor for any person wilfully and wantonly to send or convey to any female, against her will and consent, any insulting, indecent, lascivious, disgusting, offensive, or annoying letter or communication, without lawful purpose in sending or conveying the same, an indictment or information charging that accused "unlawfully, wilfully and wantonly sent," an indecent letter to a female, is not sufficient to show an offense under the statute, for the reason that it does not allege that he did so "without lawful purpose" in sending the same,[3] because the allegation that it was "unlawfully sent" is not equivalent to the statutory phrase "without lawful purpose,"—it being necessary to specifically negative this latter clause of the statute.[4]

§ 996. TIME OF OFFENSE. An indictment or information charging obscenity, in any of its phases, must allege, and

8 See footnote 3, this section.

9 See, infra, § 1001.

1 United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571.

2 United States v. Slenker, 32 Fed. 691.

3 State v. Smith, 46 N. J. L. 491, 4 Am. Cr. Rep. 275. See Zabriskie v. State, 43 N. J. L. (14 Vr.) 640, 39 Am. Rep. 610.

4 State v. Smith, 46 N. J. L. 491, 4 Am. Cr. Rep. 275.

the prosecution must prove on the trial, the time when the offense was committed; and that time must be shown on the face of the presentation and by the proof to have been prior to the filing of the indictment or information, and during the period within which a prosecution can be had for the offense. Thus, on a charge of the mailing of an obscene, lewd, and lascivious paper or publication of an indecent character, the date of such paper or publication must be given.[1] This allegation as to time is necessary, not only to show that the act complained of occurred within the period in which it may be prosecuted, but also for the further protection of the accused by being sufficiently definite and certain to enable him in any further prosecution for the same offense to make the plea of autrefois acquit or autrefois convict.[2]

§ 997. Place of offense. An indictment or information charging obscenity, in any of its phases, must aver that the act complained of was committed within the jurisdiction of the court in order to confer upon the latter jurisdiction to try the offense; but the particular locality within the jurisdiction of the court need not be alleged, unless it enters into and constitutes a part of the offense,—e. g., where the statute prohibits the use of obscene or indecent language in or near the dwelling-house of another,[1]—in which case the locality must be charged

1 United States v. Harmon, 34 Fed. 872.

2 Id.

1 Quinn v. State, 65 Miss. 479, 5 So. 548.

Time and place may enter into the illegality of the act complained of; that is, an act not an offense at one time and place might be an offense at another time and place. —People v. Johnson, 86 Mich. 175, 24 Am. St. Rep. 116, 13 L. R. A. 163, 48 N. W. 870.

Thus, it has been said that it constitutes a breach of the peace for a minister in the pulpit, in the course of his sermon, to say: "Some men will stand around the depot, stores, the post office, and street corners, and watch the women pass, and size them up, the foot, ankle, and form, and they would be willing to give five dollars for the fork" (Delk v. Com., 166 Ky. 39, L. R. A. 1916B, 1117, 178 S. W. 1129), although the same remark, by the same person, at

in the indictment or information, and on the trial the averment must be proved as laid.[2]

§ 998. PUBLICATION—AS TO NECESSITY OF ALLEGING. An indictment or information charging the use of obscene language should charge that it was uttered in a public place, because the use of such language is a crime only because of its effect upon the public; and where an obscene writing or composition, or the publication of an obscene or indecent book, paper, picture, or print, and the like, is the basis of the charge, the indictment or information must allege that the same was published;[1] but it is not necessary to allege the extent of the publication of spoken or written words, communication to one person being a sufficient publication.[2] It has been said that it is not sufficient allegation of publication to charge that the obscene matter was posted on a tree; it must be further alleged that some one read it,[3] although there is authority seemingly to the contrary.[4]

Publication in a foreign language, the indictment or information should follow the rules of pleading in the case of criminal libel and slander, as pointed out in the chapter on that offense.[5]

§ 999. —— PARTICULARS OF PUBLICATION. The particular manner and matter of publication should be alleged

another place might not have been thought indecent. See Holcombe v. State, 5 Ga. App. 47, 62 S. E. 647, where a minister conducting a revival service for men only asked the women to withdraw, and made a vulgar remark about one who remained, was convicted of the use of obscene and vulgar language; the time, place, and the circumstance on making the remark entering to and influencing the judgment of the court.

2 Young v. State, 78 Tenn. (10 Lea) 165.

1 State v. Kountz, 12 Mo. App. 511; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; State v. Syphrett, 27 S. C. 29, 13 Am. St. Rep. 616, 2 S. E. 624; Smith v. State, 32 Tex. 594; R. v. Carlile, 1 Cox C. C. 229.

2 State v. Barnes, 32 Me. 530 (a prosecution for libel, but the matter of publication in both crimes is practically the same).

3 Giles v. State, 6 Ga. 272.

4 See Smith v. State, 24 Tex. App. 1, 5 S. W. 510.

5 See, supra, § 923.

so as to individuate the offense and apprise the accused of the exact matter he will be called upon to defend. The publication may be charged to have been by posting,[1] but in such case it seems that it is not necessary to further allege the manner of the publication or the circumstances thereof,[2] although there is authority to the effect that it must be alleged to have been read by some one;[3] but where the publication and distribution of obscene matter are charged, it has been held that the method of distribution should be alleged.[4]

§ 1000. INDUCEMENT AND COLLOQUIUM. The office and functions of an inducement and colloquium, on a charge of obscene language or obscene publication, are the same as in the crime of criminal libel and slander, and have already been sufficiently treated.[1] An indictment or information charging obscenity, in any of its phases, must be such as to make out a prima facie case of guilt against the accused. It must distinctly appear from the indictment or information that the words spoken or published are of an obscene or indecent character;[2] and where the words charged to have been used are not obscene or indecent per se, the indictment or information must show by extrinsic averments their obscene or indecent meaning as used, that they were used in that sense, and that they were so understood by the persons who heard or read them.[3]

1 Smith v. State, 24 Tex. App. 1, 5 S. W. 510.

2 Giles v. State, 6 Ga. 272; Smith v. State, 24 Tex. App. 1, 5 S. W. 510.

Engraving on back of church bench obscene matter charged, indictment or information need not enter into the particulars and circumstances of the publication.—Smith v. State, 24 Tex. App. 1, 5 S. W. 510.

3 Giles v. State, 6 Ga. 272.

4 State v. Smith, 17 R. I. 371, 22 Atl. 282.

1 See, supra, § 907.

2 Abendroth v. State, 34 Tex. Cr. Rep. 325, 30 S. W. 787.

3 State v. Cone, 16 Ind. App. 350, 45 N. E. 345.

"Coupling the words together shows that they are to be understood in the same sense," says Lord Bacon.—4 Bac. Abridg. 26. See Com. v. De Jardin, 126 Mass. 46, 30 Am. Rep. 652, 3 Am. Cr. Rep.

§ 1001. INTENT AND KNOWLEDGE. An indictment or information charging obscenity, in any of its phases, may properly, and in some cases, it seems, must allege, that the act complained of was done with a corrupt intent,[1] although there are cases to the contrary.[2] Thus, intent should be alleged in a charge of indecent exposure made against the accused;[3] but this charge of corrupt intent is not required to be made in specific terms.[4]

Good intention or motive[5] of accused in the act complained of does not affect the criminality where the act

290, and Lewis v. Fisher, 80 Md. 139, 45 Am. St. Rep. 327, 26 L. R. A. 278, 80 Atl. 608.

1 Barker v. Com., 19 Pa. St. 412; Smith v. State, 24 Tex. App. 1, 5 S. W. 510; Abendroth v. State, 34 Tex. Cr. Rep. 325, 30 S. W. 787.

Absence of corrupt intent is discussed in R. v. Bradlaugh, L. R. 1 Q. B. Div. 569, 21 Moak's Eng. Repr. 269, but the authority of that case is weakened by the fact that it was reversed on another point,—failure to set out the obscene matter complained of,—in Bradlaugh v. R., L. R. 3 Q. B. Div. 607, 28 Moak's Eng. Repr. 482.

2 Thomas v. State, 92 Ala. 85, 9 So. 398; State v. Smith, 17 R. I. 371, 22 Atl. 282.

3 **As to indecent exposure**, see, supra, § 991.

4 **Delivering to chief of police** copies of a publication alleged to be obscene and indecent, for the purpose of obtaining a prosecution to enable accused to vindicate the character of the publication from the accusation of obscenity and indecency, held to sufficiently charge and show an intent to give away obscene and indecent literature.—Montross v. State, 72 Ga. 261, 53 Am. Rep. 840.

"Devising and intending the morals of the people to debauch and corrupt" charged in an indictment or information, followed by the allegation that accused did the act "unlawfully, scandalously, and wantonly," when taken in connection with the particular acts set out, sufficiently alleges intent.—Com. v. Haynes, 68 Mass. (2 Gray) 72, 61 Am. Dec. 437.

The court say: "The indictment would have been more full, and more in conformity with the precedents, if it had contained a second allegation of intent, succeeding the narration of the acts done by the defendant; this, however, would have been but a repetition of what was already alleged. That the material criminal intent may be in a case like the present, thus found in the prefatory part of the indictment, seems to be assumed by Lord Ellenborough, C. J., in his opinion in the case of R. v. Philipps, 6 East 464, 473, 8 Rev. Rep. 511, 102 Eng. Repr. 1365. The case of Miller v. People, 5 Barb. (N. Y.) 203, is to the same effect."

5 **Good motive** of accused as affecting criminal charge involving obscene, indecent or profane lan-

is positively prohibited. Thus, on a charge of using obscene and indecent language in the pulpit, constituting a breach of the peace, intention on the part of the accused to rebuke the sin of impurity, constitutes no defense to the accusation;[6] and good intention or motive is immaterial in a prosecution charging a violation of a statute prohibiting the publishing, circulating, and the like, of obscene and indecent books, papers, pictures or prints,[7] or in a prosecution charging the mailing, and so forth, of obscene and indecent matter.[8] But the above rule does not apply in the case of medical and scientific works bonified for the furtherance of scientific knowledge, or the promotion of the study, treatment and cure of diseases; although such works are provided with illustrations and text matter which would otherwise be considered obscene and within the statutory prohibition and the above rule.[9]

Knowledge on part of accused respecting the obscene and indecent character of the matter complained of and charged as violating the statute, should ordinarily be alleged, it has been held in one line of cases,[10] although

guage or literature. See note, L. R. A. 1916B, 1121.

6 **Intent to rebuke the sin of impurity,** and with no intent to disturb or embarrass any one, will not relieve a minister from the criminality of obscene and indecent language used in the pulpit. —Delk v. Com., 166 Ky. 39, L. R. A. 1916B, 1117, 178 S. W. 1129.

7 State v. McKee, 73 Conn. 18, 84 Am. St. Rep. 124, 49 L. R. A. 542, 46 Atl. 409; People v. Mueller, 96 N. Y. 408, 48 Am. Rep. 635, 4 Am. Cr. Rep. 453; State v. Smith, 17 R. I. 371, 22 Atl. 282.

8 United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571; United States v. Chesman, 19 Fed. 497; United States v. Slenker, 32 Fed. 691; United States v. Clarke, 38 Fed. 500; United States v. Harmon, 45 Fed. 414; United States v. Smith, 45 Fed. 476; Burton v. United States, 73 C. C. A. 243, 142 Fed. 57; Knowles v. United States, 170 Fed. 409.

9 Abendroth v. State, 34 Tex. Cr. Rep. 325, 30 S. W. 787.

10 See Barker v. Com., 19 Pa. St. 412; Abendroth v. State, 34 Tex. Cr. Rep. 325, 30 S. W. 787; State v. Holedger, 15 Wash. 443, 46 Pac. 652; United States v. Bebout, 28 Fed. 522; United States v. Slenker, 32 Fed. 691.

After verdict of conviction and judgment, omission of allegation of knowledge does not render indictment or information insufficient.—Rosen v. United States, 161

the authorities are not uniform in their holdings as to this requirement.[11] Thus, on a charge that accused deposited to be mailed, or sent through the mails, obscene and indecent, or other unmailable matter, knowledge on the part of the accused that the matter complained of was obscene, indecent, and nonmailable should be directly charged,[12] although an early case holds otherwise.[13] On a charge of publishing, circulating, selling,[14] depositing to be mailed, or sending through the mails, an obscene and indecent book, paper, letter, picture or print, it is not necessary to aver specifically that accused knew that the matter complained of was obscene or indecent.[15]

U. S. 29, 40 L. Ed. 606, 16 Sup. Ct. Rep. 434, 480; Price v. United States, 165 U. S. 311, 41 L. Ed. 727, 17 Sup. Ct. Rep. 366; United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 Myer's Fed. Dec. 692.

11 See United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 Myer's Fed. Dec. 692.

12 United States v. Slenker, 32 Fed. 691.

13 United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 Myer's Fed. Dec. 692, holding that it is sufficient if the indictment or information alleges that the accused knowingly deposited the obscene book in the mails, without alleging that he knew it to be non-mailable matter. See Demolli v. United States, 75 C. C. A. 365, 144 Fed. 303, 6 L. R. A. (N. S.) 424.

See, also, supra, § 991, and infra, § 1006.

14 **Knowledge paper being sold obscene** or indecent not necessary to be alleged on part of accused.—Com. v. Havens, 6 Pa. Co. Ct. Rep. 545.

15 Com. v. Havens, 6 Pa. Co. Ct. Rep. 545; State v. Holedger, 15 Wash. 443, 46 Pac. 652; State v. Ulsemer, 24 Wash. 657, 64 Pac. 800.

"Knowingly" in the charge accused "unlawfully, feloniously, wilfully, knowingly, wickedly, and designedly distributed a certain indecent picture," sufficiently charges knowledge on the part of the accused of the indecency of the picture. "This principle of construction has been determined by this court in State v. Holedger, 15 Wash. 443, 46 Pac. 652, and State v. De Paoli, 24 Wash. 71, 63 Pac. 1102."—State v. Ulsemer, 24 Wash. 657, 64 Pac. 800.

Editor's knowledge that publication was obscene is presumed by the court on charge against one editing, printing and selling such publication.—State v. Holedger, 15 Wash. 443, 46 Pac. 652.

That accused knew the publication was obscene need not be stated, where he is charged with having "knowingly" published the same. — State v. Holedger, 15 Wash. 443, 46 Pac. 652.

§ 1002. DESCRIPTION, SETTING OUT AND FILING—IN GENERAL. Where the indictment or information charges obscene exhibition, either of the person,[1] or of a show,[2] there is no tenor, and a full description of the place and circumstances will be sufficient.[3] In the case of an obscene show or exhibition it has been held that an indictment or information charging (1) the keeping of such show or exhibition, or a booth, or place, or room therefor; (2) showing for gain an indecent exhibition; and (3) alleging that it was in a public place, will be sufficient without a detailed description of the obscenity or indecency exhibited,[4] although there is authority to the effect that the circumstances in which the obscenity or indecency consists must be particularly stated to enable the court to judge whether an offense within the statute or at common law has been committed.[5]

§ 1003. —— OBSCENE LANGUAGE. In those cases in which the indictment or information charges accused with the use of obscene or indecent language, the alleged utterances must be set out with substantial accuracy, the better practice being to set out the words complained of in hæc verba, or at least that portion of them relied upon for conviction.[1] Where the language is too obscene and indecent to be inserted in the indictment or information, that is, would be offensive to the court and improper to be placed upon the record thereof, that fact may be alleged in justification for its omission;[2] but in such a case

1 See, supra, § 991.

2 See, supra, § 992.

3 See, infra, §§ 1003-1005.

4 R. v. Saunders, L. R. 1 Q. B. Div. 15, 15 **Moak's Eng. Repr.** 151.

5 Knowles v. State, 3 Day (Conn.) 103.

1 Com. v. McCance, 164 Mass. 162, 29 **L. R. A.** 61, 41 N. E. 133; Hummel v. State, 10 Ohio S. & C. Pl. Dec. 492, 8 Ohio N. N. 48.

In North Carolina, an indictment charging singing of obscene song, and setting out one stanza, was held good.—State v. Toole, 106 N. C. 736, 11 S. E. 168.

Words must be set out to enable the court to judge whether their utterance constituted the crime charged.—Steuer v. State, 59 Wis. 472, 18 N. W. 433.

2 D. C.—Czarra v. Medical Suprs.,

the language complained of must be particularly described with such reasonable definiteness and certainty as to identify it, in which case it will be sufficient.[3] There is another class of cases which hold that an indictment or information drawn in the language of the statute[4] is sufficient without setting out the particular language complained of.[5]

24 App. 258. ILL.—McNair v. People, 89 Ill. 441; Strohm v. People, 60 Ill App. 128. IND.—State v. Burrell, 86 Ind. 313. KY. — Kinniard v. Com., 134 Ky. 582, 121 S. W. 489. MASS. — Com. v. Holmes, 17 Mass. 336; Com. v. Tarbox, 55 Mass. (1 Cush.) 66. MICH. — People v. Girardin, 1 Mich. 90. MO.—State v. Appling, 25 Mo. 315, 69 Am. Dec. 469. N. Y. — People v. Hallenbeck, 2 Abb. N. Cas. 66, 52 How. Pr. 502; People v. Danihy, 63 Hun 579, 10 N. Y. Cr. Rep. 102, 18 N. Y. Supp. 467. OHIO—Hummel v. State, 10 Ohio S. & C. Pl. Dec. 429, 8 Ohio N. P. 48. PA.—Barker v. Com., 19 Pa. St. 412; Com. v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632. R. I.—State v. Smith, 17 R. I. 371, 22 Atl. 282. TENN. — State v. Steele, 52 Tenn. (3 Heisk.) 135. VT.—State v. Brown, 27 Vt. 619. FED.—United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 Myer's Fed. Dec. 692; United States v. Kaltmeyer, 16 Fed. 760; United States v. Gaylord, 17 Fed. 438.

Gross violation of good morals and public decency being the gist of the offense in a charge of the utterance of shamelessly obscene language in reference to certain acts, it is of no consequence whether such language imported that he had done or would do the specified acts. The offense, so far as public decency is concerned, is identically the same in either case, and the words need not be laid exactly as spoken by the accused. "To hold that the words must be laid exactly as spoken, or that they must be proved as laid, would, perhaps, in most cases insure impunity to the offender; because almost every one not abandoned to all sense of decency would instinctively turn away his ear from hearing such revolting indecency." — Bell v. State, 31 Tenn. (1 Swan) 42.

3 D. C.—Czarra v. Medical Suprs., 24 App. 258. IND.—State v. Burrell, 86 Ind. 313. KY.—Kinnaird v. Com., 134 Ky. 582, 1121 S. W. 489. MO.—State v. Appling, 25 Mo. App. 315. N. Y.—People v. Hallenbeck, 2 Abb. N. C. 66, 52 How. Pr. 502. PA. — Barker v. Com., 19 Pa. St. 412. TENN.—State v. Steele, 50 Tenn. (3 Heisk.) 135. FED. — Rosen v. United States, 161 U. S. 37, 40 L. Ed. 608, 16 Sup. Ct. Rep. 434.

4 As to averment in language of statute, see, supra, § 989.

5 ALA.—Yancy v. State, 63 Ala. 141; Weaver v. State, 79 Ala. 279. N. C.—State v. Haddock, 109 N. C. 873, 13 S. E. 714. PA.—Barker v. Com., 19 Pa. St. 412. TENN.—Bell v. State, 31 Tenn. (1 Swan) 42.

§ 1004. —— OBSCENE PICTURE, PRINT OR PHOTOGRAPH. As to whether an indictment or information charging the violation of a statute, or a part of a statute, relating to, regulating and prohibiting obscene pictures, prints or photographs, should set out the picture, print or photograph complained of, the decisions are not harmonious,—due in part at least to variance in the provisions of the statutes under which made,—some of the decisions holding that the picture, print or photograph should be set out in, or attached as an exhibit to, the indictment or information,[1] while others hold,—and this seems to be the better and the prevailing doctrine,—that all that is required is to fully describe the picture, print or photograph, and with sufficient certainty to identify it,[2] and to enable the

[1] Abendroth v. State, 34 Tex. Cr. Rep. 325, 30 S. W. 787.

As to English view as to necessity for setting out the objectionable matter complained of, no difference how obscene, nauseating and objectionable, see Bradlaugh v. R., L. R. 3 Q. B. Div. 607, 28 Moak's Eng. Repr. 482, 3 Am. Cr. Rep. 470, reversing R. v. Bradlaugh, L. R. 2 Q. B. Div. 569, 21 Moak's Eng. Repr. 269, 3 Am. Cr. Rep. 464.

Under Tex. Pen. Code, art. 365, 1895, the indictment should set out the tenor or description of the print, picture or writing, and it must appear from an inspection thereof that it is obscene or indecent and that the mode and manner of publication were manifestly designed to corrupt the morals of youth.—Abendroth v. State, 34 Tex. Cr. Rep. 325.

Objection obscene matter not set out in indictment or information must be raised by demurrer. —R. v. Dugdale, Dears. & B. C. C. 64.

[2] FLA.—Reyes v. State, 34 Fla. 181, 15 So. 875. ILL.—McNair v. People, 89 Ill. 441. MASS.—Com. v. Holmes, 17 Mass. 336; Com. v. Wright, 139 Mass. 382, 5 Am. Cr. Rep. 571, 1 N. E. 411. OHIO—State v. Zurhorst, 75 Ohio St. 232, 9 Ann. Cas. 45, 79 N. E. 238. PA.—Com. v. Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632. TENN.—State v. Pennington, 73 Tenn. (5 Lea) 506. FED.—Grimm v. United States, 156 U. S. 604, 39 L. Ed. 550, 15 Sup. Ct. Rep. 470; Rosen v. United States, 161 U. S. 29, 40 L. Ed. 606, 16 Sup. Ct. Rep. 481; United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 Myer's Fed. Dec. 692.

Not necessary to copy or minutely describe the picture or print, but it is necessary to give a general description thereof and to aver the evil tendency; sufficient information should be given to fairly inform the accused as to what is charged against him, and the subjects of the obscenity should be stated.—Com. v.

accused to prepare his defense;[3] it not being necessary to describe in what the obscenity or indecency consists.[4] But if the description is not sufficient to identify and individuate the particular thing complained of, the indictment or information will be bad on demurrer.[5]

§ 1005. —— OBSCENE PUBLICATIONS, WRITINGS AND SIGNS. The English courts hold rigidly to the rule requiring the obscene writing or publication to be set out in hæc verba in an indictment or information charging the offense of writing, publishing, circulating, selling, mailing, and the like, any obscene or indecent matter, however objectionable and revolting the same may be.[1] According to the weight of authority in this country the objectionable matter complained of should be set out,[2] except in those cases

Holmes, 17 Mass. 336; People v. Hallenbeck, 2 Abb. N. C. (N. Y.) 66, 52 How. Pr. (N. Y.) 502.

Compare: Com. v. Wright, 55 Mass. (1 Cush.) 46; Com. v. Tarbox, 55 Mass. (1 Cush.) 66.

Obscene or indecent picture charged to have been exhibited, it is sufficient for the indictment or information to describe such picture without setting it out.—Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632. See Com. v. Holmes, 17 Mass. 336.

3 See, infra, § 1005, footnotes 12 and 13.

4 Fuller v. People, 92 Ill. 182; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; State v. Pennington, 73 Tenn. (5 Lea) 506.

5 United States v. Harmon, 34 Fed. 872.

1 See Bradlaugh v. R., L. R. 3 Q. B. Div. 607, 28 Moak's Eng. Repr. 482, 3 Am. Cr. Rep. 470, reversing R. v. Bradlaugh, L. R. 2 Q. B. Div. 569, 21 Moak's Eng. Repr. 269, 3 Am. Cr. Rep. 464.

Constant practice in all prosecutions by indictment or information for crimes or misdemeanors, in writing or speaking, the particular words supposed to be criminal, ought to be specified, in such indictment or information.—Dr. Sacheverell's Case, 15 How St. Tr. 466; R. v. Goldstein, 3 Brod. & B. 201, 7 Eng. C. L. 685; Zenobio v. Axtell, 6 T. R. 162, 101 Eng. Repr. 489.

Compare: R. v. Christopher Layer, 16 How. St. Tr. 93, 317.

Objection that obscene matter not set out in indictment or information must be raised by demurrer.—R. v. Dugdale, Dears. & B. C. C. 64.

2 ILL.—McNair v. People, 89 Ill. 441. MASS.—Com. v. Tarbox, 55 Mass. (1 Cush.) 66; Com. v. Dejardin, 126 Mass. 46, 30 Am. Rep. 652, 3 Am. Cr. Rep. 290. MO.—State v. Hayward, 83 Mo. 299. N. Y.—People v. Danihy, 63 Hun 597, 10 N. Y. Cr. Rep. 192, 18 N. Y. Supp. 467. TEX.—State v. Hansen, 23 Tex.

where the matter is (1) lost or destroyed,[3] (2) is in possession of the accused,[4] (3) where for other reasons it is out of the power of the prosecution,[5] (4) is so gross and obscene that it would pollute the record of the court,[6] or

232. ENG.—Bradlaugh v. R., L. R. 3 Q. B. Div. 607, 28 **Moak's Eng. Repr.** 482, 3 **Am. Cr. Rep.** 470, reversing R. v. Bradlaugh, L. R. 2 Q. B. Div. 569, 21 **Moak's Eng. Repr.** 269, 3 **Am. Cr. Rep.** 464.

Setting out obscene and indecent composition in hæc verba is sufficient, and it is not necessary to allege the manner and means of the making of the same or the circumstances in connection with the publication thereof.—Smith v. State, 24 Tex. App. 1, 5 S. W. 516.

3 Kinnaird v. Com., 134 Ky. 582, 121 S. W. 489.

4 Kinnaird v. Com., 134 Ky. 582, 121 S. W. 489.

5 McNair v. People, 89 Ill. 441; Strohm v. People, 60 Ill. App. 128; affirmed, 160 Ill. 582, 43 N. E. 622; Armitage v. State, 13 Ind. 441; Hess v. State, 73 Ind. 537; Munson v. State, 79 Ind. 541; State v. Parker, 1 D. Chip. (Vt.) 298, 6 **Am. Dec.** 735.

6 FLA.—Reyes v. State, 34 Fla. 181, 15 So. 875. GA.—Stevenson v. State, 90 Ga. 456, 16 S. E. 95. ILL. — McNair v. People, 89 Ill. 441; Strohm v. People, 60 Ill. App. 128; affirmed, 160 Ill. 582, 43 N. E. 622. IND.—Thomas v. State, 103 Ind. 419, 2 N. E. 808. KY.—Kinnaird v. Com., 134 Ky. 582, 121 S. W. 489. MASS. — Com. v. Holmes, 17 Mass. 336; Com. v. Tarbox, 55 Mass. (1 Cush.) 66; Com. v. Dejardin, 126 Mass. 46, 30 **Am. Rep.** 652, 3 **Am. Cr. Rep.** 290; Com. v. McCance, 164 Mass. 162, 29 **L. R. A.** 61, 41 N. E. 133. MICH. — People v. Girardin, 1 Mich. 90. MO.—State v. Appling, 25 Mo. 315; State v. Hayward, 83 Mo. 299; State v. Van Wye, 136 Mo. 227, 58 **Am. St. Rep.** 627, 37 S. W. 938. N. Y.—People v. Kaufman, 14 App. Div. 305, 12 N. Y. Cr. Rep. 263, 43 N. Y. Supp. 1046. PA.—Com. v. Sharpless, 2 Serg. & R. 91, 7 **Am. Dec.** 632. R. I.—State v. Smith, 17 R. I. 371, 22 Atl. 282. TENN.—State v. Pennington, 73 Tenn. (5 Lea) 506. VT.—State v. Brown, 27 Vt. 619. FED.—United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 **Myer's Fed. Dec.** 692.

Bill of particulars can always be procured by the accused on application to the court, in which must be set out a copy of the publication, or a copy of the alleged obscene parts of it.—United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 **Myer's Fed. Dec.** 692. See, also, footnote 12, this section.

Charging an obscene book sent through the mails, it is not necessary to set out in hæc verba the alleged obscene book, or the alleged obscene passage in it, if the indictment states that such book is so indecent that it would be offensive to the court and improper to be placed on its records. — United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 **Myer's Fed. Dec.** 692.

Deposit for mailing, or mailing, obscene and indecent matter, indictment or information describ-

(5) is so voluminous as to unnecessarily encumber the record of the court without deriving any practical ad-

ing the article complained of, stating that the contents thereof are highly offensive to the court and wholly unfit and improper to be perpetrated in the records of the court has been held to be sufficient. — Rosen v. United States, 161 U. S. 29, 40 **L. Ed.** 606, 16 Sup. Ct. Rep. 434, 480; Price v. United States, 165 U. S. 311, 41 **L. Ed.** 727, 17 Sup. Ct. Rep. 366; Dunlop v. United States, 165 U. S. 486, 41 **L. Ed.** 799, 17 Sup. Ct. Rep. 375; United States v. Foote, 13 Blatchf. 418, Fed. Cas. No. 15128; Bates v. United States, 10 Biss. 70, 10 Fed. 92; United States v. Gaylord, 17 Fed. 438; United States v. Clarke, 38 Fed. 500, 40 Fed. 325; In re Wahll, 42 Fed. 822; United States v. Harris, 122 Fed. 551.

"Did have in his possession unlawfully, at a certain time and place, two hundred and twenty-one copies of a certain article of an indecent and immoral nature, to wit, a certain printed pamphlet of an indecent and immoral nature, entitled 'Circular Number One—A Biographical Sketch of a Few Short Skate Politicians,' for the purpose of giving away, exhibiting and publishing the said pamphlet, which said pamphlet is so indecent and immoral in its nature that the same would be offensive to the court and improper to be placed upon the records thereof," is sufficient, without setting forth a copy of the pamphlet. — State v. Zurhorst, 75 Ohio St. 232, 116 **Am. St. Rep.** 724, 9 **Ann. Cas.** 45, 79 N. E. 238.

Disposition of obscene matter charged, indictment held to be sufficient without setting out a copy of the alleged obscene matter.—State v. Zurhorst, 75 Ohio St. 232, 116 **Am. St. Rep.** 724, 9 **Ann. Cas.** 45, 79 N. E. 238.

Obscene book or picture can not be required to be displayed upon the records of the court.—Com. v. Holmes, 17 Mass. 336. See Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 **Am. Dec.** 632.

Papers, pictures and prints alleged to be obscene, lewd and lascivious, it is sufficient without incorporating them into the indictment or giving a full description of them.—Grimm v. United States, 156 U. S. 604, 39 **L. Ed.** 550, 15 Sup. Ct. Rep. 470. See, also, United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 **Myer's Fed. Dec.** 692.

Printing, having in possession, and giving away an obscene and indecent pamphlet charged, indictment must set out the supposed obscene matter, unless the publication is in the hands of the accused or out of the power of the prosecutor, or the matter is too gross and obscene to be spread on the records of the court; either of which facts, if existing, should be averred as an excuse for failing to set out the obscene matter. Whether matter published is obscene or not is a question of law and not of fact, and that question is for the court, and not for the jury, to determine.—McNair v. People, 89 Ill. 441; Com. v. Wright, 55 Mass. (1 Cush.) 46; Com. v. Tarbox, 55 Mass. (1 Cush.) 66.

vantage therefrom;[7] in either of which instances the particular facts may be averred as an excuse and justification for failure to set out the matter.[8] Where the matter is not set forth, a justifiable reason being assigned for the omission, the indictment or information must particularly describe the objectionable matter,[9] or give a valid reason for omitting to do so,[10] and the description of such objectionable matter must be such as to identify and individuate it so as to (1) identify the publication in which it appeared,[11] (2) enable the accused to prepare his defense and present his evidence,[12] and (3) enable the accused, in any future prosecution for the same offense, to

7 Strohm v. People, 60 Ill. App. 128; affirmed, 160 Ill. 582, 43 N. E. 622; State v. Van Wye, 136 Mo. 227, 58 **Am. St. Rep.** 627, 37 S. W. 938; Bates v. United States, 10 Biss. 70, 10 Fed. 92; United States v. Kaltmeyer, 16 Fed. 760.

Book or newspaper being cumbrous by nature, need not be set out in its entirety. — Strohm v. People, 60 Ill. App. 128; State v. Van Wye, 136 Mo. 227, 58 **Am. St. Rep.** 627, 37 S. W. 938.

8 McNair v. People, 89 Ill. 441; Com. v. Tarbox, 55 Mass. (1 Cush.) 66; State v. Smith, 17 R. I. 371, 22 Atl. 282; State v. Brown, 27 Vt. 619.

9 Grimm v. United States, 156 U. S. 604, 39 **L. Ed.** 550, 15 Sup. Ct. Rep. 470; Rosen v. United States, 161 U. S. 29, 40 **L. Ed.** 606, 16 Sup. Ct. Rep. 434, 480; United States v. Foote, 13 Blatchf. 418, Fed. Cas. No. 15128; United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 **Myer's Fed. Dec.** 692; Timmons v. United States, 30 C. C. A. 74, 85 Fed. 204; United States v. Harris, 122 Fed. 551.

10 **Under statute providing that** "whoever imports, prints, publishes, sells or distributes any book, pamphlet, ballad, printed paper, or other thing containing obscene, indecent, or impure language, or any obscene, indecent or impure prints, pictures, figures or descriptions manifestly tending to corrupt the morals of youth, etc.," an indictment or information should aver that the accused "imported, printed, published, sold, or distributed, a book, pamphlet, ballad, printed paper, or other thing" describing it, "containing obscene or indecent language, or obscene or indecent prints, pictures, figures or descriptions," describing them, or giving an excuse for not particularly describing them. — Com. v. Dejardin, 126 Mass. 46, 30 **Am. Rep.** 654, 3 **Am. Cr. Rep.** 290.

11 Com. v. Wright, 139 Mass. 382, 5 **Am. Cr. Rep.** 571, 1 N. E. 411; People v. Kaufman, 14 App. Div. 305, 12 N. Y. Cr. Rep. 263, 43 N. Y. Supp. 1046; United States v. Harmon, 34 Fed. 872.

12 United States v. Harmon, 34 Fed. 872.

make the plea of autrefois acquit or autrefois convict.[13] Where a book or newspaper is charged to be obscene, indecent and impure, and the whole of such book or newspaper is not so, the indictment or information must describe or refer to the parts which are complained of so specifically that they can be readily identified (1) by the accused for the purpose of making his defense or of pleading any judgment in bar to a subsequent prosecution for the same offense,[14] and (2) be easily identified by the evidence;[15] and if not thus described and identified with reasonable certainty, the indictment or information

Matter described with reasonable certainty, the accused may apply to the court for a bill of particulars in order that he may properly prepare his defense; but going to trial without such a demand will be deemed to have waived the right to object that the indictment is insufficient. — Price v. United States, 165 U. S. 311, 41 L. Ed. 727, 17 Sup. Ct. Rep. 366; United States v. Foote, 13 Blatchf. 418, Fed. Cas. No. 15128; United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 Myer's Fed. Dec. 692; United States v. Chase, 27 Fed. 807; Tubbs v. United States, 44 C. C. A. 357, 105 Fed. 59.

13 United States v. Harmon, 34 Fed. 872.

14 See authorities in footnotes 12 and 13, this section; Com. v. McCance, 164 Mass. 162, 29 L. R. A. 61, 41 N. E. 133.

15 **Obscene book** described by its title only, without setting out any of the words charged as obscene, was held to be good and sufficient on a motion to quash the indictment or in arrest of judgment, because the omission of the words charged as obscene is not open to objection by a demurrer or otherwise (R. v. Bradlaugh, L. R. 2 Q. B. Div. 569, 21 Moak's Eng. Repr. 269, 3 Am. Cr. Rep. 464); but on a subsequent hearing this was overruled and it was held that to describe a book by its title only was not sufficient for the reason that the words thereof alleged to be obscene must be set out, and if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error.—Bradlaugh v. R., L. R. 3 Q. B. Div. 607, 28 Moak's Eng. Repr. 482, 3 Am. Cr. Rep. 470, reversing the decision above. But this last decision, not being by a court of last resort, the question is, in a measure at least, still an open one, on the theory that it has not been finally determined by the English courts.

Omission of words complained of, when they form the substance of the offense, can not be cured by verdict. — Lord Ellenborough, in Cook v. Cox, 3 Maul. & S. 110.

will be insufficient on objection duly and properly taken thereto.[16]

§ 1006. Mailing obscene or indecent matter. Where the charge is the offense of mailing or sending obscene and indecent matter through the mails, the indictment or information must allege that the accused deposited the objectionable matter to be mailed, or that he procured it to be deposited;[1] and under some statutes it must be fur-

16 Com. v. McCance, 164 Mass. 162, 29 L. R. A. 61, 41 N. E. 133; State v. Smith, 17 R. I. 371, 22 Atl. 282. See Com. v. Holmes, 17 Mass. 336; People v. Girardin, 1 Mich. 90; In re Arentsen, 26 W. N. C. (Pa.) 359; State v. Griffin, 43 Tex. 538.

1 United States v. Bott, 11 Blatchf. 346, Fed. Cas. No. 14626; United States v. Bebout, 28 Fed. 522; United States v. Grimm, 45 Fed. 558. See Rosen v. United States, 161 U. S. 45, 40 L. Ed. 611, 16 Sup. Ct. Rep. 481.

Answer to decoy letter sent by government detective under an assumed name, enclosing postage and inviting correspondence, which answer gives information regarding medicines for the prevention of conception, there can be no conviction, because the government solicited the commission of the offense.—United States v. Adams, 59 Fed. 674, following United States v. Whittier, 5 Dill. 35, 41, Fed. Cas. No. 16688, and distinguishing United States v. Grimm, 50 Fed. 529.

Causing obscene matter written by him to be printed in a newspaper, intending thereby to bring it to the attention of the readers of the paper, the accused well knowing at the time that the established and regular mode of transmitting the paper to its readers is by the use of the mail, he thereby knowingly causes the objectionable matter to be deposited in the mail, within the meaning of § 3893, United States Rev. Stats. (5 Fed. Stats. Ann., 1st ed., p. 839), when in such regular course the paper, with the objectionable matter printed therein, is deposited in the postoffice for mailing and delivery. — Demolli v. United States, 75 C. C. A. 365, 144 Fed. 363, 6 L. R. A. (N. S.) 424.

Conviction of accused of depositing newspapers containing obscene matter in the mail should not be arrested on the ground that the indictment did not set forth the names of any of the persons to whom the newspapers were addressed, but stated that they were unknown to the grand jury, whereas the evidence produced at the trial showed that the grand jury had been informed of the names of at least two of these persons, since judgment can be arrested only for matter apparent on the face of the record, and the evidence is not part of the record for this purpose. — Demolli v. United States of America, 75 C. C. A. 365, 144 Fed. 363, 6 L. R. A. (N. S.) 424.

ther alleged that the accused did the act complained of "without lawful purpose in sending the same."[2] It is not necessary to charge that the matter was of "an in-

Describing as a "book" a pamphlet containing twenty-four pages, consisting of a sheet and one-half, secured together by stitching, with a cover of four pages and having a title-page, proper in indictment under 19 U. S. Stat. at L. 90, forbidding depositing in the mail of any obscene or indecent publication.—United States v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571, 12 Myer's Fed. Dec. 692.

Not essential to the commission of the offense of knowingly depositing in the mails non-mailable matter contained in a newspaper in violation of U. S. Rev. Stats., § 3893 (5 Fed. Stats. Ann., 1st ed., p. 839), that the entire contents of the newspaper be objectionable in character, or that the offender's responsibility for its being put in the mail extend to its entire contents, or that it be deposited in the mail by the offender himself or by another acting under his express direction, since he is equally responsible if it is deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge that such will be its natural and probable effect.—Demolli v. United States, 75 C. C. A. 365, 144 Fed. 363, 6 L. R. A. (N. S.) 424.

Mailing obscene letter. — Under U. S. Rev. Stats., § 3893, prior to the amendment of 1889 (25 Stats. at L., ch. 139), mailing a sealed letter containing obscene writing was not an offense within the terms of the statute. — United States v. Chase, 135 U. S. 255, 34 L. Ed. 117, 10 Sup. Ct. Rep. 756; United States v. Loftis, 8 Sawy. 194, 12 Fed. 671; United States v. Comerford, 25 Fed. 902, 7 Crim. L. Mag. 465. But see United States v. Hanover, 17 Fed. 444; United States v. Britton, 17 Fed. 731; United States v. Thomas, 27 Fed. 682; since such amendment, by the insertion of the word "letter," the mailing of a sealed letter containing obscene matter is an indictable offense.—Andrews v. United States, 162 U. S. 420, 46 L. Ed. 1023, 16 Sup. Ct. Rep. 798; United States v. Huggett, 40 Fed. 636; In re Wahll, 42 Fed. 822; United States v. Martin, 50 Fed. 918; United States v. Andrews, 58 Fed. 861, disapproving United States v. Wilson, 58 Fed. 768; Timmons v. United States, 85 Fed. 204.

Compare: United States v. Durant, 46 Fed. 753; United States v. Wilson, 58 Fed. 768; United States v. Warner, 59 Fed. 355; United States v. Jarvis, 59 Fed. 357; United States v. Ling, 61 Fed. 1001.

[2] State v. Smith, 46 N. J. L. 491, 4 Am. Cr. Rep. 275.

Invariable rule of pleading statutory crimes is that the indictment or information must contain every fact mentioned in the statute as constituting the crime.—Zabriskie v. State, 43 N. J. L. (14 Vr.) 460, 39 Am. Rep. 610; State v. Smith, 46 N. J. L. 491, 4 Am. Cr. Rep. 275.

decent character"[3] where it is alleged that it was "obscene, lewd and lascivious";[4] neither is it necessary to allege prepayment of the postage,[5] or that the matter was actually delivered,[6] or even that the matter was addressed to the person to whom it was delivered, because the gist of the offense consists in the depositing or causing to be deposited, to be conveyed or delivered by the mail.[7] Although it has been said, on the other hand, and with much reason, that the substance of the offense is the employment of, or attempted employment of, the mails for the transmission of obscene and indecent matter; that the purpose or intent of the accused in the act of depositing, an adaptation, apparent at least, in the thing deposited, is necessary to effect the intent of the accused; that without an address the thing deposited is impotent to effect the intent of the accused and to reach the hands of another person, and for these reasons it is necessary that the matter should be addressed to some one to whom it is to be conveyed and delivered, and that the indictment or information must so charge,[8] and must allege further that such person was an actual person.[9] The decisions are not harmonious upon the question of the necessity of alleging in the indictment or information that the accused had knowledge of the obscene or indecent character, and of the unmailable nature, of the matter

[3] **Mailing pamphlet for the treatment of spermatorrhea and impotency charged, held to be indecent and prohibited by U. S. Rev. Stat., § 3893.**—United States v. Chesman, 19 Fed. 497.

[4] Timmons v. United States, 85 Fed. 204.

[5] United States v. Jones, 74 Fed. 545.

[6] United States v. Grimm, 45 Fed. 558.

[7] United States v. Harris, 122 Fed. 551.

[8] United States v. Grimm, 45 Fed. 558; United States v. Brazeau, 78 Fed. 464.

Address of matter sent through the mails should be set out in the indictment.—United States v. Chesman, 19 Fed. 497; United States v. Grimm, 45 Fed. 558; United States v. Brazeau, 78 Fed. 464.

[9] United States v. Kaltmeyer, 16 Fed. 760; United States v. Chesman, 19 Fed. 497.

complained of; but the cases on this point have been already sufficiently discussed in the section devoted to "Intent and Knowledge."[10] Where an obscene book is charged to have been deposited in the mails, addressed to a particular person, the indictment or information need not negative[11] that the person to whom such package was addressed was one of those persons, or belonged to a class of persons, to whom such book might lawfully be sent by mail.[12]

§ 1007. Joinder—Of defendants. In the case where the charge is that of uttering obscene language by two or more persons the act of each is a separate and individual offense for which each person so charged is individually liable for his own act but not liable for the act of the others accused; for this reason it has been said that each accused must be prosecuted separately and that they can not be joined in the same indictment,[1] although there are authorities to the contrary.[2] Thus, it has been said that where two persons sing a libelous or obscene song, the act of singing is a joint act and the parties may be jointly indicted therefor.[3]

§ 1008. —— Of offenses. It has been said that an indictment or information charging obscenity, in any of

10 See, supra, § 1001.

11 As to negativing exceptions, see, supra, § 995.

12 United States v. Clarke, 38 Fed. 500.

1 Cox v. State, 76 Ala. 66; State v. Lancaster, 36 Ark. 55; McJunkins v. State, 10 Ind. 140.

Obscene language, it would seem, ex vi terminorum, is an offense which can not be committed by two or more persons conjointly; being made up of speech — perverted speech — which is necessarily a personal and individual act.—Cox v. State, 76 Ala. 66.

Objection to joinder must be timely made, it being too late after the jury has been sworn and a portion of the evidence has been heard. — McJunkins v. State, 10 Ind. 140.

2 State v. Marlier, 46 Mo. App. 233; State v. Roulstone, 35 Tenn. (3 Sneed.) 107; R. v. Benfield, 2 Burr. 980, 97 Eng. Repr. 664.

3 R. v. Benfield, 2 Burr. 980, 97 Eng. Repr. 664.

Charging one with singing and others with abetting therein, was held good in State v. Marlier, 46 Mo. App. 233.

its phases, should not join two or more offenses consisting of violations of different clauses of the same statute,[1] although a contrary doctrine seems to have been approved in the dictum in one case.[2] Where the charge is that of depositing for mail, or sending through the mails, obscene and indecent matter, the indictment or information should be limited to one depositing of the matter, or one sending of the matter, through the mails, and this depositing or sending may include more than one copy of the objectionable matter; although it has been doubted whether the accused could be convicted, on such a charge, of the sending of more than one of the objectionable articles.[3]

§ 1009. —— DUPLICITY. The general rules applying to indictments for other statutory offenses regulating as to duplicity apply also on a charge of obscenity. Where the statute under which the indictment or information is drawn prohibits a series of acts, any one or all of which constitute the offense, the indictment or information may charge accused with the commission of all of those acts in one count, without being open to the objection of duplicity. Thus, where the statute prohibits and punishes any one who shall "import, print, publish, sell, rent, give away, distribute or show" any obscene book, newspaper, picture or print, or photograph, an indictment or information charging accused did compose, edit, print, sell, etc., a certain obscene newspaper, charges but a single offense under such statute.[1] Obscene matter charged to have been deposited or sent through the mails, the indictment or information may use the copulative instead of the disjunctive conjunction without laying it open to the charge of duplicity. Thus, it may be charged that the ac-

1 State v. Lancaster, 36 Ark. 55.

2 State v. Roulstone, 35 Tenn. (3 Sneed.) 107.

3 United States v. Harmon, 38 Fed. 827.

1 State v. Holedger, 15 Wash. 443, 46 Pac. 652.

To the objection that the indictment charged more than one offense the court says: "We think

cused "deposited and caused to be deposited in the mail" the obscene matter complained of,[2] or it may be charged that the matter was obscene, lewd, and lascivious[3] without laying the indictment or information open to the charge of duplicity.

it is clearly without foundation. In the case of State v. Carr, 6 Ore. 133, under a statute substantially like ours, it was held that the indictment was sufficient."

2 United States v. Janes, 74 Fed. 545.

3 Swearingen v. United States, 161 U. S. 446, 40 L. Ed. 765, 16 Sup. Ct. Rep. 562.

CHAPTER LXIII.

INDICTMENT—SPECIFIC CRIMES.

Obstructing Justice.

§ 1010. Requisites and sufficiency of indictment—In general.
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§ 1010. REQUISITES AND SUFFICIENCY OF INDICTMENT[1]—IN GENERAL. An indictment or information charging obstructing justice, in any of its phases, is governed by the same general rules requiring that the particular facts and circumstances which go to make up the offense shall be set out with such distinction and certainty as to leave nothing open to speculation or conjecture.[2] In those cases in which the statute under which the prosecution is had contains words descriptive of the offense sought to be charged, the indictment or information must expressly charge the facts that constitute such offense,[3] and the omission of any of the essential facts going to make up the statutory elements of the offense charged will be

1 As to forms of indictment charging obstruction of justice, in any of its phases, see Forms Nos. 1758-1777.

Attempt to defeat purpose of judgment as a contempt of court.—State v. Pittsburg (City of), 8 Kan. 710, 133 Am. St. Rep. 227, 25 L. R. A. (N. S.) 226, 104 Pac. 847.

2 People v. Hamilton, 71 Mich. 340, 38 N. W. 921; Lamberton v. State, 11 Ohio 282; State v. Maloney, 12 R. I. 251; State v. Burt, 25 Vt. 373.

3 State v. Beasom, 40 N. H. 367.

fatal.[4] However, it has been said that where the indictment or information fails to set out the offense as defined by the statute because of a failure to charge one of the essential elements of the offense as defined therein, but it does set out enough to make out the common-law offense of an assault, or to make out an offense under the statute respecting breaches of the peace, it will be sufficient to sustain a prosecution for either of these latter offenses.[5]

Conclusion of an indictment or information charging obstructing justice, in any of its phases, need not be "to the obstruction and hindrance of public justice," where the facts set out show an obstruction and hindrance to public justice in the legal sense and meaning of those words.[6]

§ 1011. —— LANGUAGE OF STATUTE. Where the statute denouncing obstructing justice, assaulting, obstructing or resisting an officer in the discharge of his duties in executing a writ or process, and the like, under which the prosecution is had, specifically describes the offense sought to be charged, an indictment or information in the language of the statute,[1] or in words substantially equivalent to the language of the statute,[2] will be sufficient; but where the statute is more general than is allowable in an indictment, the language being merely descriptive of the offense, the indictment or information must be more specific than the statute, and must allege in addi-

4 See Jones v. State, 60 Ala. 99; State v. Beasom, 40 N. H. 367.

5 State v. Phipps, 34 Mo. App. 400; State v. Dunn, 109 N. C. 839, 13 S. E. 881; State v. Burt, 25 Vt. 373.

6 Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665.

1 State v. Perkins, 43 La. Ann. 186, 8 So. 439; State v. Ashworth, 43 La. Ann. 204, 8 So. 625; State v. Fifield, 18 N. H. 34; State v. Roberts, 52 N. H. 492.

2 United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490.

Even the statutory words need not be strictly pursued, but others conveying the same meaning may be used.—State v. Gilbert, 21 Ind. 474; State v. Morrison, 46 Kan. 679, 27 Pac. 133.

tion the particular facts constituting the alleged offense,[3] and this must be done by direct and positive averment.[4] Thus, it has been said that charging, in the language of the statute, that the accused resisted the officer in the execution of the process is sufficient without setting out the particular mode of resistance or obstruction, the latter being properly merely matter of evidence.[5] An indictment or information in the language of the Ohio statute,[6] charging the accused with knowingly and wilfully obstructing and abusing a peace officer, is defective if it fails to set out the facts constituting the alleged offense;[7] but an indictment in the language of the California statute,[8] charging that accused "did resist, delay and obstruct" an officer in the performance of his duty, being in the language of the statute, is sufficient without setting out the particular acts done by him.[9] Where an indictment in the language of the statute does not lay the offense with sufficient particularity, the accused can obtain the necessary particulars by application for a bill of particulars.[10]

§ 1012. —— CONSUMMATION OF OFFENSE. In the absence of statutory provision to the contrary an indictment or information charging accused with the obstruction of justice, in any of its phases, need not allege, or set out facts to show, that accused's efforts were sufficient to accomplish his object,—e. g., to prevent the officer from serving a writ or other process, or from performing other official duty.[1] Thus, on a charge of conspiracy to resist

3 See State v. Perkins, 43 La. Ann. 186, 8 So. 439; State v. Fifield, 18 N. H. 34; Aylmore v. State, 11 Ohio Dec. Rep. 900, 30 Cinc. L. Bul. 370; State v. Maloney, 12 R. I. 251; United States v. Wardell, 49 Fed. 914; United States v. Armstrong, 59 Fed. 568.

4 State v. Beasom, 40 N. H. 367.

5 See, infra, §§ 1028, 1029.

6 Ohio Rev. Stats., § 698.

7 Aylmore v. State, 11 Ohio Dec. Repr. 900, 30 Cinc. L. Bul. 370.

8 Kerr's Cal. Cyc. Pen. Code, § 148.

9 People v. Hunt, 120 Cal. 281, 52 Pac. 658.

10 State v. Dunn, 109 N. C. 839, 13 S. E. 881; State v. Pickett, 118 N. C. 1231, 24 S. E. 350.

1 State v. Gilbert, 21 Ind. 474.

an officer,[2] actual violence need not be averred, it being sufficient to allege threats and acts in their nature calculated or intended to intimidate or terrify a reasonably prudent officer.[3]

§ 1013. —— TIME OF OFFENSE. Time not being of the essence of the offense of obstructing justice, or resisting an officer, it need not be alleged;[1] but in all those cases in which it is of the essence of the offense, the time must be alleged with substantial certainty.[2] Thus, an indictment charging contemptuous language to a magistrate in the exercise of his office should not only set forth the words spoken but should allege the day of the month on which the offense occurred.[3] Where an indictment or information charging the resistance of an officer alleges that the writ or warrant or process was issued on a designated day and that on another designated day the officer proceeded to execute the same, and the accused "then and there" resisted the officer, such allegation is sufficiently certain as to the time of the offense.[4] In all cases in which time is necessary to be alleged, as being of the essence of the offense, or as a necessary ingredient in the description thereof, it must be proved as alleged.[5]

§ 1014. —— KNOWLEDGE OF ACCUSED. Wherever knowledge on the part of the accused is an essential element,— e. g., as knowledge that the person assaulted[1] or obstructed[2] was an officer,—the fact of knowledge must be affirmatively alleged in the indictment or information; such knowledge will not be implied from a mere statement of the facts and charge of the act itself.[3] Thus,

2 As to resistance of officer, see, infra, §§ 1028, 1029.

3 United States v. Smith, 1 Dill. 212, Fed. Cas. No. 16333.

1 State v. Freeman, 8 Iowa 428, 74 Am. Dec. 317.

2 State v. Freeman, 8 Iowa 428, 74 Am. Dec. 317.

3 United States v. Beale, 4 Cr. 313, Fed. Cas. No. 14549.

4 State v. Estis, 70 Mo. 427.

5 Miller v. State, 33 Miss. 356, 69 Am. Dec. 351.

1 See, infra, § 1021.

2 See, infra, §§ 1026, 1027.

3 Pettibone v. United States, 148

wherever the statute under which the prosecution is had provides that any one "knowingly," or any equivalent term, does the act prohibited, then it is necessary that the indictment or information should allege, in a traversible form, that the party accused knew, at the time he was charged with hindering, etc., an officer, that such person was one of the officers described in the statute that it was a crime to hinder,[4] but the fact of knowledge is not required to be alleged in so many words;[5] and it is thought that in those cases in which otherwise a prima facie case, on the face of the indictment or information, will not

U. S. 197, 37 L. Ed. 419, 13 Sup. Ct. Rep. 542; United States v. Keen, 5 Mas. 453, Fed. Cas. 15511.

4 IND. — State v. Deniston, 6 Blackf. 277. MO.—State v. Phipps, 34 Mo. App. 400. OHIO—Faris v. State, 3 Ohio St. 159. R. I.—State v. Maloney, 12 R. I. 251. TEX.—Horan v. State, 7 Tex. App. 183; Bristow v. State, 36 Tex. Cr. Rep. 379, 37 S. W. 326; Patton v. State, (Tex. Cr.) 49 S. W. 389. VT.—State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Carpenter, 54 Vt. 551; State v. Ferry, 61 Vt. 624, 18 Atl. 451.

Alleges officer was in due and lawful execution of duties of office of constable, and that the accused, "while the said Sanderson was in due and lawful execution of his said duties, unlawfully, knowingly, and designedly, did hinder and oppose," etc., is sufficient to show knowledge. — Com. v. Kirby, 56 Mass. (2 Cush.) 577.

Charging accused with knowingly and willfully resisting an officer authorized by law in attempting to execute a legal writ, it is not necessary to aver that the officer, at the time, informed the accused that he acted under the authority of a warrant. In making an apprehension the officer must inform the accused that he acts under the authority of the warrant and, if required, must produce and show it. But it is not necessary that the indictment should set forth at length the acts of the officer, or show that in making the apprehension he complied, in all respects, with the requisites of the statute. In serving the writ he will be presumed to have discharged his duty; and if the accused relies on the fact that he omitted to declare the authority under which he acted, it was proper matter of defense.—State v. Freeman, 8 Iowa 428, 74 Am. Dec. 317.

Objection, how raised.—An indictment being fatally defective which does not aver that the accused knew the person resisted to be an officer, the defect is one of substance and can not be cured by plea; and, while it may be taken advantage of by demurrer, it may also be urged in arrest of judgment.—State v. Maloney, 12 R. I. 251; State v. Carpenter, 54 Vt. 551.

5 State v. Brown, 6 Wash. 609, 34 Pac. 133.

be made against the accused, the allegation of knowledge will be inserted by the careful pleader. In those cases in which the statute creating and defining the offense does not contain the word "knowingly," or any equivalent term or word of similar import, and the indictment will set forth a prima facie case against the accused, it is not necessary to allege that the accused knowingly did the act complained of, or that he had knowledge the person assaulted, obstructed or resisted was an officer acting in his official capacity.[6] Knowledge on the part of the accused, where required to be alleged, must be alleged in the terms of the statute; and where the statute provides that any one who "knowingly and wilfully" does an act prohibited, and punished, an indictment or information charging that accused did "unlawfully and wilfully" commit one of the acts prohibited by the statute, it will not be sufficient, for the reason that "unlawfully" is not synonymous with "knowingly," and knowledge is an essential element which must be alleged in the terms of the statute.[7]

§ 1015. ——INTENT OF ACCUSED. As in the case of all other statutory crimes, intent of the accused in the act complained of need not be alleged in an indictment or information charging the offense of obstructing justice, in any of its phases, unless intent is an essential element under the statute defining and punishing the offense.[1]

[6] ALA.—Putnam v. State, 49 Ark. 449, 5 S. W. 715. IND.—State v. Tuell, 6 Blackf. 344. ILL.—McQuoid v. People, 8 Ill. 76; Cantrill v. People, 8 Ill. 356; Bowers v. People, 17 Ill. 373. LA.—State v. Perkins, 43 La. Ann. 186, 8 So. 439. ME.—State v. Henderson, 15 Mo. 486; State v. Dickerson, 24 Mo. 365; State v. Estis, 70 Mo. 427. N. H.—State v. Fifield, 18 N. H. 34; State v. Beasom, 40 N. H. 367; State v. Flagg, 50 N. H. 321. N. C.—State v. Dunn, 109 N. C. 839, 13 So. 881. S. C.—State v. Hailey, 2 Strob. L. 73. VT.—State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Hooker, 17 Vt. 658. WASH.—State v. Brown, 6 Wash. 609, 34 Pac. 133. FED.—United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

[7] State v. Perry, 109 Iowa 353, 80 N. W. 401.

[1] State v. Lovett, 3 Vt. 110.

§ 1016. —— OFFICER ACTING IN OFFICIAL CAPACITY. An indictment or information charging assaulting,[1] hindering or obstructing,[2] or resisting,[3] an officer, must distinctly aver that the person assaulted, etc., was an officer, and that he was at the time acting in his general official capacity,[4] or was duly deputized,[5] and acting in a particular capacity;[6] but a separate allegation is not required to set out either of these facts,[7] an officer being sufficiently described as "a duly constituted public officer of" a named county or town.[8] Thus, an allegation that accused "with force and arms, in and upon one Howard Stevens, of Wolcott aforesaid, then and there being a deputy sheriff within said county, under the authority of this state, an assault did make," etc., sufficiently alleges that Stevens was a deputy sheriff.[9] Charging accused with using contemptuous language to a magistrate in the exercise of his office, should not only set forth the words spoken, and give the day and month,[10] but should also allege that the magistrate was at the time in the discharge of his judicial function.[11]

§ 1017. —— DEFECTIVE AVERMENTS AND SURPLUSAGE. It is a general rule of criminal pleading that surplusage may be disregarded where this can be done without affecting the validity of the indictment. Thus, on a charge of resisting an officer in the lawful execution of his office in

1 See, infra, § 1021.

2 See, infra, §§ 1026, 1027.

3 See, infra, §§ 1028, 1029.

4 McQuoid v. People, 8 Ill. 76.

5 As to deputized officer, see, infra, § 1024.

6 ILL.—Bowers v. People, 17 Ill. 373. IND.—State v. Gilbert, 21 Ind. 474. MICH.—People v. Hubbard, 141 Mich. 96, 104 N. W. 386. OHIO — Lamberton v. State, 11 Ohio 282. N. H.—State v. Beasom, 40 N. H. 367. TEX.—Hill v. State, 43 Tex. 329. VT.—State v. Hooker, 17 Vt. 658.

7 State v. Flagg, 50 N. H. 321; State v. Hooker, 17 Vt. 658; United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490.

8 State v. Pickett, 118 N. C. 1231, 24 S. E. 350.

9 State v. Ferry, 61 Vt. 624, 18 Atl. 451.

10 See, supra, § 1013.

11 United States v. Beale, 4 Cr. 313, Fed. Cas. No. 14549.

attempting to apprehend the accused for "then and there being drunk and disturbing the peace," the words "being drunk" may be rejected as surplusage;[1] and charging an assault upon an officer with a "dangerous weapon," and knowingly and wilfully obstructing and hindering him in the discharge of his official duty, the manner of the assault not being an element of the offense, the allegation that the assault was made with a "dangerous weapon" may be rejected as surplusage;[2] and finally, in an indictment or information charging an obstruction of justice, in any of its phases, which sets out facts showing an obstruction and hindrance to public justice, in the legal sense of that word,[3] the fact that it concludes "against the statute," etc., may be regarded as surplusage.[4]

Defective averments, in that they are inconsistent with the facts set out, or are repugnant to other parts of the indictment or information, or are in themselves absurd or insensible, where such defective averments can be wholly omitted and what remains will constitute a valid indictment or information, may be treated as surplusage;[5] likewise all unnecessary words may be stricken out as surplusage where the indictment or information, after their elimination, sufficiently charges the crimes alleged.[6]

§ 1018. —— VARIANCE IN NAME OF OFFICER OR OFFICE. On a charge of resisting an officer while in the discharge of his official duty,[1] under a statute providing that an erroneous allegation of the name of the person injured, or attempted to be injured, is not material, there is no fatal variance where the name of the officer resisted by the accused is alleged to be Patrick Ryan and the proof

1 People v. Rounds, 67 Mich. 482, 35 N. W. 77.

2 Com. v. Delehan, 148 Mass. 254, 19 N. E. 221.

3 See, supra, § 1010.

4 State v. Burt, 25 Vt. 373.

5 State v. Freeman, 8 Iowa 428, 74 Am. Dec. 317; State v. Morrison, 46 Kan. 679, 27 Pac. 133; State v. Welch, 37 Wis. 196.

6 State v. Webster, 39 N. H. 96.

1 See, infra, §§ 1028, 1029.

showed his name to be Patrick Ryder;[2] and the same is true regarding the allegation as to the official title, where the indictment or information sufficiently sets out that the alleged officer was authorized to perform the duty in which he was resisted.[3]

§ 1019. ASSAULTING,[1] HINDERING OR OBSTRUCTING, OR RESISTING[2] AN OFFICER—IN GENERAL. An assault upon and resistance of an officer in the execution of any authority or power vested in him by reason of his office is indictable at common law.[3] A person accused can not defy an officer seeking to execute a valid warrant[4] for his apprehension, and determine for himself whether he will submit to be apprehended, neither can he elect before what magistrate he will be tried; it is his duty to quietly submit to apprehension and present his defense afterward.[5] One who knows that a misdemeanor has been committed and opposes the apprehension of the wrongdoer therefor, or obstructs an officer of the law in the execution of his legal duty in relation thereto, or advises and aids the accused to make his escape and carry away the subject and evidence of his crime, thereby becomes guilty, as principal, of the crime previously committed.[6]

§ 1020. —— PARTICULAR ALLEGATIONS—IN GENERAL. We have already seen that the question whether knowledge

2 State v. Flynn, 42 Iowa 164.

3 State v. Pickett, 118 N. C. 1231, 24 S. E. 350.

1 As to form of indictment for assaulting officer, see Form No. 1758.

2 As to form of indictment for resisting an officer in the discharge of his duties, see Forms Nos. 1759-1771.

3 State v. Downer, 8 Vt. 424.

4 See, infra, § 1032.

5 King v. State, 89 Ala. 43, 18 Am. St. Rep. 89, 8 So. 120.

Tortiously obtaining possession of the warrant, keeping the officer at bay over night, and until accused could obtain the advice of counsel, and the next morning proposing to go with the officer and be tried by a justice other than the one named in the warrant, provided his attorney advised him the warrant was valid, constitutes the resistance of an officer in the performance of his duty under such warrant.—King v. State, 89 Ala. 43, 18 Am. St. Rep. 89, 8 So. 120.

6 United States v. Sykes, 58 Fed. 1000.

on the part of the accused that the person assaulted, obstructed, or resisted was an officer,[1] and the intent with which accused acted,[2] are essential elements in the commission of the particular offense charged, and to be alleged in the indictment or information, depends upon the wording of the particular statute under which the prosecution is had. The general rule is that where the statute uses the word "knowingly," or any word or phrase of equivalent import, the indictment or information must charge knowledge on the part of the accused that the person assaulted, obstructed, or resisted, was an officer;[3] otherwise such an allegation is not required.[4] Thus, it has been said that an indictment or information under the Oregon statute,[5] charging an assault with a deadly weapon and wounding an officer of the penitentiary, having the charge and custody of the prisoners, including the accused, must charge that the accused knew the person assaulted to be an officer of the penitentiary.[6]

§ 1021. ———— As to assaulting an officer. A charge against accused of assaulting an officer is a charge of an aggravated assault,[1] and the word "assault," being made an offense by statute, is used in its ordinary meaning.[2] In making the charge against the accused the indictment or information need not follow the language of the statute, but may use words of equivalent import.[3] Charging an assault upon a person assisting an officer in the execution of a warrant, it is not necessary to allege that the officer requested the person assaulted to assist

1 See, supra, § 1014.

2 See, supra, § 1015.

3 State v. Perkins, 43 La. Ann. 186, 8 So. 439.

4 State v. Maloney, 12 R. I. 251; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Burt, 25 Vt. 373.

5 Oregon Crim. Code, § 677.

6 State v. Smith, 11 Ore. 205, 8 Pac. 343. See Com. v. Kirby, 56 Mass. (2 Cush.) 581; Horan v. State, 7 Tex. App. 183; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482.

1 See, supra, § 435.

2 See, supra, § 432.

3 State v. Gilbert, 21 Ind. 474.

him.[4] Where the indictment or information charging accused with having assaulted an officer is not good as a charge for an aggravated assault, because it does not allege that it was known or declared to the accused that the person assaulted was an officer discharging an official duty, it may be good as an indictment for a simple assault, notwithstanding the fact that it is alleged that the person assaulted "was then and there an officer in the lawful discharge of his duties."[5]

§ 1022. ——— As TO OFFICER, HIS AUTHORITY AND DUTIES. An indictment or information charging interference with an officer in the performance of his duties must identify the officer in such a manner as to show that he had power and authority to execute the writ or process in question, or otherwise had authority to perform the particular duty accused is charged to have interfered with;[1] but it is not necessary that the authority of the officer should be alleged in direct words, it being sufficient if it is duly manifested as the result of all the allegations of the indictment or information.[2] Thus, an officer assaulted may be sufficiently designated as "then and there being a collector of taxes of said town," without alleging that he was duly authorized to serve the warrant in the service of which he is alleged to have been obstructed.[3] It is generally regarded as sufficient to designate the officer by his official title[4] and allege that he was acting in his

4 State v. Emery, 65 Vt. 464, 27 Atl. 167.

As to deputized officers, see, infra, § 1024.

5 Johnson v. State, 26 Tex. 117.

1 GA.—Vince v. State, 113 Ga. 1168, 39 S. E. 313. ILL.—Cantrill v. People, 8 Ill. 356. MASS.—Com. v. Doherty, 103 Mass. 443. N. H. — State v. Sherburne, 59 N. H. 99. N. Y.—People v. Hochstim, 36 Misc. 562, 73 N. Y. Supp. 626; reversed on another point, 75 App. Div. 25, 17 N. Y. Cr. Rep. 117, 78 N. Y. Supp. 638, 986. OHIO—Faris v. State, 3 Ohio St. 159. S. C. — State v. Hailey, 2 Strob. L. 73. TEX. — Brown v. State, 42 Tex. Cr. Rep. 472, 60 S. W. 548. VT.—State v. Hooker, 17 Vt. 658.

2 State v. Roberts, 52 N. H. 492; State v. Cassady, 52 N. H. 500.

3 State v. Roberts, 52 N. H. 492. See State v. Capp, 15 N. H. 212.

4 **Misnomer as to officer or office**

official capacity at the time when the offense alleged was committed,[5] although it may be otherwise made to sufficiently appear that the offense occurred to him in his official and not his private capacity.[6]

§ 1023. ——— As to officer's territorial jurisdiction. In those cases in which the officer alleged to have been assaulted, obstructed, or resisted is one whose authority is limited to a prescribed territory, the indictment or information should show that the offense complained of was committed within the territorial jurisdiction of such officer.[1]

§ 1024. ——— As to deputization.[1] An assault upon, or obstruction of, or resistance of, an officer's assistants or deputies is within a statute prohibiting and punishing such acts to an officer in the execution of a process or writ, or in the discharge of his other legal duties; and an allegation that an officer was hindered, impeded, or obstructed by an assault upon an assistant is a sufficient allegation of the offense against such officer.[2] In the case of an assault upon persons assisting an officer, it is unnecessary to allege that the officer had requested or or-

not a fatal variance. See, supra, § 1018.

5 **Apprehension must be alleged to have been lawful,** or that the officer was authorized to make it, otherwise the indictment or information will be bad.—Com. v. Doherty, 103 Mass. 443.

6 McQuoid v. People, 8 Ill. 76; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Burt, 25 Vt. 373.

1 People v. Craig, 59 Cal. 370; State v. Scammon, 22 N. H. 44.

Failure to charge that process was resisted within township of which the officer was a constable was held not to affect the indictment, because the constable is not restricted to the limits of his own township in executing civil process.—Oliver v. State, 17 Ark. 508.

1 **As to form of indictment** charging obstructing, etc., a deputy, see Forms Nos. 1761, 1762, 1765.

2 "This is an allegation of impeding him in a direct manner, in fact, as direct and forcible as could well be conceived."—State v. Emery, 65 Vt. 464, 27 Atl. 167.

Person deputized by justice of the peace to serve process, said not to be such an officer as is contemplated by the statute defining and punishing obstructing or resisting an officer.—State v. McOmber, 6 Vt. 215.

dered such person to assist him, or that it was necessary for the officer to have assistance, as accused had no right to assault them, though their aid was unnecessary, and they were mere volunteers.[3]

Deputization, general or special,[4] must be made to appear by adequate averments in the indictment or information, and be established by proper proof on the trial; but there need be no allegation regarding the authority to deputize,[5] or regarding the nature of the deputization, whether general or special.[6] Thus, an allegation that the officer assaulted, and so forth, was a deputy sheriff, is a sufficient allegation of his official character.[7]

§ 1025. ——— AS TO KNOWLEDGE OF CAPACITY IN WHICH OFFICER ACTED. Knowledge by accused as to the official character of the person assaulted, obstructed, or resisted, as an element in the offense of obstructing justice, has been already sufficiently treated;[1] it remains but to add in this place that, where knowledge of the accused is required to be alleged, the indictment or information should clearly set out, not only that the accused knew the person to be a public officer, but also that he knew that such person was acting in the discharge of his legal duties as such officer.

§ 1026. ——— AS TO PARTICULAR EXERCISE OF DUTY OBSTRUCTED. The authorities are not in harmony as to whether it is necessary to allege the particular official act or acts obstructed or resisted by the accused, some of the cases holding that such averments are unnecessary,[1] and

3 State v. Emery, 65 Vt. 464, 27 Atl. 167.

4 Person deputized by justice of the peace to serve a warrant, and the like, is a state officer within a statute prohibiting and punishing interfering with or obstructing an officer in the performance of his duties. — State v. Seery, 95 Iowa 652, 64 N. W. 631.

5 Andrews v. State, 78 Ala. 483.

6 Com. v. Armstrong, 4 Pa. Co. Ct. Rep. 5.

7 Andrews v. State, 78 Ala. 483; State v. Ferry, 61 Vt. 624, 18 Atl. 451.

1 See, supra, § 1014.

1 United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490.

others seemingly holding them to be necessary inasmuch as they hold that in those cases in which the statute defining the offense is not full and explicit in this regard, an indictment charging the offense in the language of the statute will be insufficient.[2] The general rule may be said to be that, in the absence of statutory provisions denouncing the obstruction of a particular duty, it is not necessary for the indictment or information to allege the particular duty the officer was discharging at the time, unless that particular duty is in some way necessary to determine the nature of the offense charged or the grade of the punishment to be inflicted;[3] but it must be charged that the officer was in the proper exercise of his duties as such officer.[4] Charging obstructing an executive officer in the exercise of his lawful right to examine the books of a city officer for a proper purpose, charges an indictable offense.[5] Charging attempt corruptly to influence officers of the courts of a state in the discharge of their duties, by addressing a communication to the judges of a court to influence their decision in a case pending therein, an indictment or information is not defective because it does not charge that the court was in session when the communication was sent or received, nor that the attempt to influence the court was ineffectual,[6] nor because it does not state that the communication does not concern the merits of the case.[7]

2 People v. Hamilton, 71 Mich. 340, 38 N. W. 921; State v. Maloney, 12 R. I. 251; United States v. Wardell, 49 Fed. 914.

3 State v. Boies, 34 Me. 235; United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490; United States v. Keen, 5 Mas. 453, Fed. Cas. No. 15511.

4 United States v. Beale, 4 Cr. 313, Fed. Cas. No. 15565.

5 Tryon v. Pingree, 112 Mich. 338, 67 Am. St. Rep. 398, 37 L. R. A. 222, 70 N. W. 905.

6 See, supra, § 1012.

7 State v. Johnson, 77 Ohio St. 461, 21 L. R. A. (N. S.) 905, 83 N. E. 702.

Disparaging relator in suit brought by state, in communication addressed to judges to influence their decision in a case pending before them, is a corrupt endeavor to influence the officers

§ 1027. ——— AS TO DESCRIPTION OF OBSTRUCTION. In those cases in which the offense of obstructing justice is by an assault upon an officer[1] in the discharge of his duties, the act of assault must be alleged,[2] and the careful pleader will make a like specific allegation of the manner in which the offense was committed in the case of any other kind of obstruction or resistance,[3] although the authorities are not harmonious as to the necessity that the mode or manner of the offense charged shall be set out, some of the cases holding that an indictment or information will be sufficient where it is in the language of the statute,[4] and others that it is sufficient where it shows there was actual obstruction, opposition, or resistance;[5] but the better doctrine, and the weight of authority, is to the effect that the particular facts and circumstances should be set out,[6] or at least that the allegations should

of such court in the discharge of their duties, within the meaning of a statute providing that whoever corruptly endeavors to influence any officer in any court of the state in the discharge of his duty shall be punished by fine or imprisonment.—State v. Johnson, 77 Ohio St. 461, 21 L. R. A. (N. S.) 905, 83 N. E. 702.

1 As to assault upon officer, see, supra, § 1021.

2 See Appling v. State, 95 Ark. 185, 28 L. R. A. (N. S.) 548, 128 S. W. 866; Gibson v. State, 118 Ga. 29, 44 S. E. 811; State v. Gilbert, 21 Ind. 474.

3 MASS. — Com. v. Kirby, 56 Mass. (2 Cush.) 577. MICH. — People v. Smith, 131 Mich. 170, 90 N. W. 666. OHIO—Lamberton v. State, 11 Ohio 282; Faris v. State, 3 Ohio St. 159. VT.—State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Burt, 25 Vt. 373.

4 State v. Fifield, 18 N. H. 34; Bonneville v. State, 53 Wis. 680, 11 N. W. 427; United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490; United States v. Hudson, 1 Hask. 527, Fed. Cas. No. 15410.

5 ARK.—State v. Oliver, 17 Ark. 508. ILL.—McQuoid v. People, 8 Ill. 76. N. H.—State v. Copp, 15 N. H. 212; State v. Fifield, 18 N. H. 34. N. C.—State v. Dunn, 109 N. C. 839, 13 S. E. 881. OHIO—Faris v. State, 3 Ohio St. 159. FED. — United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490.

"Did knowingly, wilfully, and unlawfully obstruct, resist and oppose" an officer, sufficiently states the manner and method of resistance.—United States v. Hudson, 1 Hughes 397, 2 Am. Law Rev. 782, Fed. Cas. No. 15415.

6 GA.—Gibson v. State, 118 Ga. 29, 44 S. E. 811. OHIO—Lamberton v. State, 11 Ohio 282; State v. Johnson, 11 Ohio 286. S. C.—State v. Hailey, 2 Strob. L. 73.

be sufficiently full and specific to show the commission of the offense, without the aid of presumption or conjecture.[7] Within the better rule it has been said to be sufficient to charge accused with standing upon the threshold of a house and refusing to permit an officer to enter to execute a search warrant, without alleging any further overt act.[8]

§ 1028. ——— RESISTANCE OF OFFICER—IN GENERAL. The question as to whether the means used, or the manner of obstructing an officer in the performance of his duties must be set out in the indictment or information, has already been discussed,[1] and what is there said regarding obstructing an officer applies equally to the charge of resisting an officer. Some of the cases hold that the indictment or information must charge, by proper averment, the particular mode by which the officer was resisted,[2] while other cases hold the contrary view;[3] some of the

TEX.—Horan v. State, 7 Tex. App. 183.

7 State v. Hailey, 2 Strob. L. (S. C.) 73; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Ferry, 61 Vt. 626, 18 Atl. 451.

8 Appling v. State, 95 Ark. 185, 28 L. R. A. (N. S.) 548, 128 S. W. 866.

Addressing communication to the judges of a court to influence their decision in a case pending therein being charged, indictment states an offense under a statute prohibiting attempts corruptly to influence officers of the courts of a state in the discharge of their duties, notwithstanding the act charged may be punishable as a contempt of court.—State v. Johnson, 77 Ohio St. 461, 21 L. R. A. (N. S.) 905, 83 N. E. 702.

Stranger to writ of attachment under which personal property is seized and delivered to a custodian, who claims to own the property, and makes demand for it upon the custodian prior to serving papers in a writ of replevin begun by him, is not guilty of obstructing the execution of process, whatever his motives may have been, even though he employs no deceit, and the property is voluntarily delivered to him in response to his demand.—State v. Tannyhill, 90 Kan. 598, 47 L. R. A. (N. S.) 1146, 135 Pac. 674.

1 See, supra, § 1027.

2 MICH.—People v. Hamilton, 71 Mich. 340, 38 N. W. 921. OHIO—Faris v. State, 3 Ohio St. 159. TEX.—Horan v. State, 7 Tex. App. 183. VT.—State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Burt, 25 Vt. 373; State v. Ferry, 61 Vt. 624, 18 Atl. 451.

3 McQuoid v. People, 8 Ill. 76;

cases hold that charging resistance in the language of the statute is sufficient,[4] because the particular mode of resistance is properly merely a matter of evidence.[5] Where the statute provides that if any person shall "forcibly resist, prevent or impede," etc., an indictment or information charging that accused "did, with force and arms, violently and unlawfully resist, prevent and impede," etc., sufficiently complies with the requirements of the statute.[6]

Affidavit upon which information based, charging resisting an officer, must allege either directly, or by fair implication, that the accused forcibly interfered with the officer in the execution of a legal process, and it must not be confused or uncertain as to the connection the accused may have had therewith, otherwise the information founded thereon will be insufficient.[7]

Conclusion of indictment or information charging resisting an officer in the execution of his duties, showing on its face a resistance to an officer in the due performance of his duties as such, need not be "to the obstruction and hindrance of public justice."[8]

State v. Copp, 15 N. H. 212; State v. Fifield, 18 N. H. 34; United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490.

"It has never been held that the specific acts of resistance should be stated." — State v. Copp, 15 N. H. 212.

4 Oliver v. State, 17 Ark. 508; People v. Hunt, 120 Cal. 281, 52 Pac. 658.

Allegation that accused did "resist, delay, and obstruct" an officer in the performance of his duty is sufficient, such quoted words being used in the statute. The particular acts of resistance, delay and obstruction need not be set out.—People v. Hunt, 120 Cal. 281, 52 Pac. 658.

"Simply to charge in the language of the statute that the accused obstructed the officer is extremely vague and uncertain."—State v. Maloney, 12 R. I. 251.

5 **Charging in the language of** the statute that the accused resisted the officer in the execution of the process is sufficient. The particular mode of resistance or obstruction is properly a matter of evidence.—Oliver v. State, 17 Ark. 508.

6 United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490.

7 Brunson v. State, 97 Ind. 95.

8 Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665.

§ 1029. ——— ——— ——— SUFFICIENCY OF ALLEGATION. An indictment or information charging resisting an officer in the execution of his duties must be drawn with special reference to the terms of the statute under which the prosecution is had, and must cover every essential element in such statute.[1] The charge made in the language of the statute is usually sufficient,[2] although it has been said that unless the statute defining the offense is full and explicit,[3] the indictment must set forth the acts of resistance complained of,[4] in some jurisdictions, though the contrary is held in others.[5] The indictment or information must allege that the officer was attempting to execute a legal process,[6] or set it out, or describe it in such a manner that the court can see that the writ was in fact legal;[7] or allege that the officer was attempting to perform some other official duty,[8] otherwise it will be insufficient;[9] but

1 ARK.—Oliver v. State, 17 Ark. 508. MASS.—Com. v. Hubbard, 41 Mass. (24 Pick.) 98. MICH.—People v. Haley, 48 Mich. 495, 12 N. W. 671. N. H.—State v. Fifield, 18 N. H. 34. FED.—United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409; United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490.

2 People v. Hunt, 120 Cal. 281, 52 Pac. 658; United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490.

See, supra, § 1028, footnote 4.

Need not use language of statute in those jurisdictions where the statute expressly provides that the words of the statute need not be used in criminal pleading.—State v. Gilbert, 21 Ind. 474.

3 State v. Maloney, 12 R. I. 251.

4 People v. Hamilton, 71 Mich. 340, 38 N. W. 921; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Burt, 25 Vt. 373; State v. Emery, 65 Vt. 464, 27 Atl. 167.

5 See, supra, § 1027.

6 **As to necessity for legality of process**, see, infra, § 1034.

7 State v. Knopf, 50 Wash. 229, 21 L. R. A. (N. S.) 66, 96 Pac. 1076.

8 **As to interference with ministerial duties of officer**, see, supra, § 1026.

9 Hill v. State, 43 Tex. 329.

Engaged in "due and legal execution of his office," is not a sufficient averment in Louisiana where the offense defined by statute is for resisting an officer "while serving or attempting to serve or execute the process, writ or order of any court." "An indictment under a statute ought, with certainty and precision, to charge defendant with having committed the act under the circumstances mentioned in the statute."—State v. Johnson, 42 La.

it need not set forth the particular exercise of office in which the officer was engaged, or the particular act and circumstance of the obstruction.[10]

Resisting officer in execution of civil process, being charged, the indictment or information must show the nature of the process,[11] so far that the court may see whether it was legal and whether the officer had authority to serve it, and should also set out the mode of resistance, as well as the manner in which the process was attempted to be executed;[12] and it must also be alleged that the persons resisting the officer knew of the character in which he acted.[13]

Ann. 559, 7 So. 588. See, also, state v. Beasom, 40 N. H. 367.

"In the execution of his said office" was held to be defective because it did not set forth what official duty the officer was performing, although the quoted words were substantially the words of the statute. — State v. Maloney, 12 R. I. 251.

—**But a contrary doctrine** has been held in North Carolina. — State v. Dunn, 109 N. C. 839, 13 S. E. 881; State v. Pickett, 118 N. C. 1231, 24 S. E. 350.

While in the "discharge of his duties as such sheriff," by assaulting him with a pistol, held to be sufficient to authorize conviction under statute punishing offense of resisting sheriff while he is serving or attempting to serve process. —People v. Nash, 1 Ida. 206.

10 United States v. Bachelder, 2 Gall. 15, Fed. Cas. No. 14490.

11 **Setting out process in hæc verba** is not necessary; neither is it necessary to aver that it is in full force, when that fact appears from the description of it.—United States v. Hudson, 1 Hughes 397, 2 Am. Law Rev. 782, Fed. Cas. No. 15415.

Personal property having been sold, but title not completed by delivery to and possession by the purchaser, an attachment against the party in possession may be levied thereon, and any resistance by an agent of the purchaser of such property with the officer in the execution of such writ of attachment, will be unlawful.—Com. v. McHugh, 157 Mass. 457, 32 N. E. 650.

12 **Mode in which process was attempted to be executed** should be specifically set forth. See People v. Hamilton, 71 Mich. 340, 38 N. W. 921; Faris v. State, 3 Ohio St. 159; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Burt, 25 Vt. 373.

— **Sufficiently sets forth the** manner in which officer was attempting to execute the process, which alleges that he was "attempting to apprehend the body of one Julia Whitcomb."—State v. Ferry, 61 Vt. 624, 18 Atl. 451.

13 State v. Downer, 8 Vt. 424, 30 Am. Dec. 482.

Resisting officer executing criminal process, being charged, the officer seeking to apprehend the accused for wilfully and unlawfully disturbing the peace,[14] the indictment or information need not set out the acts done by the accused which constitute the offense of disturbing the peace;[15] and where accused is charged with resisting an officer while conveying to jail a person apprehended on a charge of crime, it is not necessary to give the name of such prisoner.[16] A charge that accused resisted an officer in executing a warrant for his apprehension, which was merely that he stated to the officer that he would not submit to be apprehended, and would die first, without setting out any overt act of actual physical resistance, is insufficient.[17]

§ 1030. —— PROCESS—IN GENERAL. In those cases in which an officer assaulted, obstructed, or resisted had authority to act in the particular instance without a process, the indictment or information is not required to aver that the officer had no process;[1] and where the act complained of occurred after the officer had executed

Officer seizing property not of defendant in the action, under an attachment, can not be lawfully resisted by the real owner, if the officer at the time had reasonable cause to believe the property to be that of the defendant in the attachment suit, and under such belief attempted to seize the property in good faith.—State v. Downer, 8 Vt. 424, 30 Am. Dec. 482.

Apprehension on warrant for resisting officer in the execution of writ or process, evidence of his acts and declarations at the time of his arrest are not admissible on his trial for resisting the officer in the execution of the civil process. Such matters relate to a separate and distinct offense.—Witherspoon v. State, 42 Tex. Cr. Rep. 532, 96 Am. St. Rep. 812, 61 S. W. 396.

14 **Passenger guilty of misconduct** for which the statute makes it the duty of a peace officer to take him into custody at the request of the conductor, is bound to submit to apprehension, whether he has done anything which justifies it or not.—Com. v. Marcum, 135 Ky. 1, 24 L. R. A. (N. S.) 1194, 122 S. W. 215.

15 People v. Hunt, 120 Cal. 281, 52 Pac. 658.

16 State v. Garrett, 80 Iowa 589, 46 N. W. 748.

17 State v. Scott, 123 La. 1085, 24 L. R. A. (N. S.) 199, 49 So. 715.

1 **Needlessly alleging**, in an indictment or information, that the apprehension then and there made

the process,—e. g., after the apprehension of a prisoner and while he was being conducted to jail or other prison,—it is not necessary to aver as to the process under which the officer had acted.[2] In all other cases it is essential that the indictment or information shall show that there was a writ or process[3] on which the officer was acting at the time of the offense complained of.[4] This process should be set out and described with more or less minuteness as the particular case requires,[5] so that (1) the court may be able to see whether the officer was acting under a valid process[6] and whether the alleged acts of the accused, if established as laid, were unlawful, and (2) inform the accused of the particular offense with which he is charged and which he must meet on the trial.[7]

by the sheriff was without a warrant, for a misdemeanor, it must further appear that the misdemeanor was one for which an arrest could be made without a warrant. — McKinney v. State, (Tex. Cr.) 22 S. W. 146.

2 Com. v. Lee, 107 Mass. 207; People v. Muldoon, 2 Park. Cr. Rep. (N. Y.) 13; State v. Russell, (Iowa) 76 N. W. 653.

3 Jones v. State, 60 Ala. 99.

Indictment charging accused "did knowingly and wilfully oppose or resist Greene McMullen, a constable of said county, in attempting to command the peace," was held, on demurrer, insufficient, because the statutory offense was for knowingly and wilfully opposing or resisting an officer of the state "in serving, executing, or attempting to serve or execute the legal writ or process," nothing appearing in the indictment to show that there was a writ or process.—Jones v. State, 60 Ala. 99.

4 State v. Henderson, 15 Mo. 486; State v. Hailey, 2 Strob. L. (S. C.) 73; McGrew v. State, 17 Tex. App. 618.

North Carolina rule seems to be different. See State v. Dunn, 109 N. C. 839, 13 S. E. 881.

5 ILL.—McQuoid v. People, 8 Ill. 76; Cantrill v. People, 8 Ill. 356; Bowers v. People, 17 Ill. 373. IND.—State v. Tuell, 6 Blackf. 344. MO.—State v. Henderson, 15 Mo. 486; State v. Dickerson, 24 Mo. 365; State v. Estis, 70 Mo. 427. N. H.—State v. Fifield, 18 N. H. 34; State v. Beasom, 40 N. H. 367; State v. Flagg, 50 N. H. 321. N. C.—State v. Dunn, 109 N. C. 839, 13 S. E. 881. S. C.—State v. Hailey, 2 Strob. L. 73. VT.—State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Hooker, 17 Vt. 658. WASH.—State v. Brown, 6 Wash. 609, 34 Pac. 133. FED.—United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

6 State v. Henderson, 15 Mo. 486; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Burt, 25 Vt. 373.

7 State v. Moore, 125 Iowa 749,

In some jurisdictions it is not essential,[8] while in other jurisdictions it is necessary,[9] that the process should be set out in hæc verba. It is unnecessary that it should be alleged by whom the writ or process was delivered to the officer.[10]

§ 1031. ——— AS TO PRELIMINARIES TO ISSUANCE. The preliminary proceedings furnishing the foundations for a writ or other process is required to be set out for the purpose of showing that such writ or process was legally issued and valid, in some jurisdictions;[1] in other jurisdictions, however, a different doctrine prevails, the rule being to characterize the process, leaving its regularity and validity to be determined later on by the court,[2] it

101 N. W. 732; State v. Roberts, 52 N. H. 492; United States v. Hudson, 1 Hask. 527, Fed. Cas. No. 15412.

8 McQuoid v. People, 8 Ill. 76; State v. Roberts, 52 N. H. 492; United States v. Hudson, 1 Hask. 527, Fed. Cas. No. 15412.

9 Process must be set forth, if not in hæc verba, at least in substance.—Lamberton v. State, 11 Ohio 282; Faris v. State, 3 Ohio St. 159. And see McQuoid v. People, 8 Ill. 76; Bowers v. People, 17 Ill. 373; State v. Dunn, 109 N. C. 839, 13 S. E. 881; State v. Pickett, 118 N. C. 1231, 24 S. E. 350.

In State v. Maloney, 12 R. I. 251, the court said that they were "not prepared to go so far as some of the cases, which hold that, if the officer was engaged in the serving of a writ or warrant, it is not enough to have the writ designated, but it must be set forth in totidem verbis."

Indictment charging that Fielding Madox was a constable, duly qualified, etc.; that there was put into his hands for collection a certain execution from the office of Simeon M. Hubbard, probate justice of the peace in and for said county, etc.; and then proceeded to charge the accused in the usual form with obstructing the constable in the execution of said process, was held insufficient, on the ground that "the process charged to be in the hands of the constable is not set out, nor is it alleged to be a lawful process, or so described as to show it to be so. The probate court is one of limited jurisdiction. It must, therefore, show that in issuing the execution, it kept within the sphere of its authority. This is not shown."—Cantrill v. People, 8 Ill. 356.

10 State v. Estis, 70 Mo. 427.

1 State v. Beasom, 40 N. H. 367; State v. Barrett, 42 N. H. 466; Campbell v. Neely, 2 Wend. (N.Y.) 559; R. v. Lilly, 7 Mod. 63, 87 Eng. Repr. 1097.

2 MO.—State v. Dickerson, 24 Mo. 365. N. H.—State v. Fifield, 18 N. H. 34; State v. Cassady,

being regarded to be sufficient where the process is valid on its face.[3] Thus, it has been held that an indictment charging the resistance of a sheriff in the levying of a writ of execution, it is not necessary to set out the recovery of the judgment,[4] or the amount of the judgment upon which the execution was issued.[5]

§ 1032. ——— ISSUANCE AND LEGALITY OF. Where a person is charged with obstructing or resisting an officer in the execution of a writ or other process, the indictment or information must show, by proper averment, such writ or process was duly issued,[1] was legal,[2] (1) as

52 N. H. 500. S. D.—State v. Cassidy, 4 S. D. 58, 54 N. W. 928. TENN.—Farris v. State, 82 Tenn. (14 Lea) 295. FED.—United States v. Tinklepaugh, 3 Blatchf. 425, Fed. Cas. No. 16526.

3 State v. Cassidy, 4 S. D. 58, 54 N. W. 928.

4 State v. Dickerson, 24 Mo. 365.

5 Farris v. State, 82 Tenn. (14 Lea) 295.

1 ILL.—Cantrill v. People, 8 Ill. 356. IND.—State v. Tuell, 6 Blackf. 344. N. H.—State v. Beasom, 40 N. H. 367; State v. Flagg, 50 N. H. 321. S. C.—State v. Hailey, 2 Strob. L. 73. TEX. — Toliver v. State, 32 Tex. Cr. Rep. 444, 24 S. W. 286. VT.—State v. Downer, 8 Vt. 424, 30 Am. Dec. 482. WASH.—State v. Brown, 6 Wash. 609, 34 Pac. 133. FED.—United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

"Duly issued," allegation that writ or process was, is insufficient; the facts constituting the due issue must be set forth.—United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

2 ILL.—McQuoid v. People, 8 Ill. 76; Cantrill v. People, 8 Ill. 356; Bowers v. People, 17 Ill. 373. IND. — State v. Tuell, 6 Blackf. 344. KY.—Fleetwood v. Com., 80 Ky. 1, 4 Am. Cr. Rep. 37. LA.—State v. Perkins, 43 La. Ann. 186, 8 So. 439. N. H.—State v. Beasom, 40 N. H. 367; State v. Flagg, 50 N. H. 321. S. C.—State v. Davis, 53 S. C. 150, 69 Am. St. Rep. 845, 31 S. E. 62. TENN.—State v. Maynard, 62 Tenn. (3 Baxt.) 348. TEX.—Toliver v. State, 32 Tex. Cr. Rep. 444, 24 S. W. 286. VT.—State v. Carpenter, 54 Vt. 551, 4 Am. Cr. Rep. 559. WASH.—State v. Brown, 6 Wash. 609, 34 Pac. 133. FED.—United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

Count setting out writ of replevin, but which does not state that the writ was duly issued out of the court of common pleas, or that the bond required by law to be given by the plaintiff, "before the service thereof," had been given, does not so describe the process that the court can see that it was legal.—State v. Beasom, 40 N. H. 367.

"In the due and lawful execution of his office," averred in the indictment or information, is in-

to form,[3] and (2) it must be made to appear that the

sufficient as an allegation of the legality of the writ or process.—State v. Beasom, 40 N. H. 367.

"Lawful process" not specifically averred in the indictment or information, it must be so described that it shall appear to be such.—State v. Beasom, 40 N. H. 367; State v. Flagg, 50 N. H. 321; State v. Maynard, 62 Tenn. (3 Baxt.) 348.

"Lawful process or order," being especially provided in the statute, an allegation in the indictment or information that the sheriff was in the due and lawful execution of his office, can not be regarded as a substantial statement that the process was legal.—State v. Beasom, 40 N. H. 367.

Legality of process not required to be specifically averred by the statute, an indictment is sufficient which designates it as a writ, warrant or order for the apprehension of a named person, issued by a designated justice of the peace, "in and for the parish of," naming it.—State v. Perkins, 43 La. Ann. 186, 8 So. 439.

Louisiana statutes, indictment or information under, need not aver in terms that the process was legal. — State v. Perkins, 43 La. Ann. 186, 8 So. 439.

Search-warrant charged to have been obstructed or resisted in its execution, the indictment or information must show the warrant to be legal; it must therefore show that the warrant appeared upon its face to be founded upon a sufficient affidavit.—State v. Tuell, 6 Blackf. (Ind.) 344. See, also, McQuoid v. People, 8 Ill. 76.

Statement of facts constituting the legality of a process is better pleading than to plead the conclusion of law.—State v. Brown, 6 Wash. 609, 34 Pac. 133.

Unlawful apprehension may be resisted the same as a threatened injury to life or limb. — State v. Davis, 53 S. C. 150, 69 Am. St. Rep. 845, 31 S. E. 62.

—Resisting in an unwarrantable or illegal manner, an attempt to apprehend, the person may be responsible for his acts, but he can not be convicted of assault with intent to murder. — Toliver v. State, 32 Tex. Cr. Rep. 444, 24 S. W. 286. See Fleetwood v. Com., 80 Ky. 1, 4 Am. Cr. Rep. 37; State v. Carpenter, 54 Vt. 551, 4 Am. Cr. Rep. 559.

"Was attempting to serve a legal process," alleged in an indictment or information, insufficiently describes the legality and validity of the process.—Bowers v. People, 17 Ill. 373.

[3] Cantrill v. People, 8 Ill. 356; United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

Process not valid on its face, but simply voidable in a civil proceeding, evidence of its invalidity is not admissible in a prosecution for resisting an officer in its execution. — Witherspoon v. State, 42 Tex. Cr. Rep. 532, 96 Am. St. Rep. 812, 61 S. W. 396.

Process regular and legal upon its face, officer can not be governed by motives and designs of the complainant in a criminal process, even though he knows complainant's objects are illegal. —State v. Weed, 21 N. H. 262, 53 Am. Dec. 188.

Writ of execution issued in a

writ or process was issued for a legal purpose[4] and that the writ itself was legal and valid as emanating from a court or officer duly empowered by law to issue such writ or process.[5] What particular averments are necessary to show this authority to issue the writ or process, alleged to have been obstructed or resisted, depends upon the character of the tribunal or officer from whom it came. In those cases where the court or officer who granted the writ or issued the process, had, by law, only a limited or special authority or jurisdiction, dependent for such jurisdiction upon particular facts, every fact necessary to the existence of such authority must either (1) be averred in the indictment or information,[6] or (2) appear on the face of the process set out therein.[7] Thus, on an indictment or information charging resistance of an officer attempting to execute a writ of apprehension in a

civil suit, admissible in evidence in a prosecution for resisting an officer in its execution, notwithstanding objections to its validity in regard to merely formal matters, which objections might be good on a motion to quash a civil suit. — Witherspoon v. State, 42 Tex. Cr. Rep. 532, 96 Am. St. Rep. 812, 61 S. W. 396.

4 Cantrill v. People, 8 Ill. 356; Bowers v. People, 17 Ill. 373; People v. McLean, 68 Mich. 480, 36 N. W. 231; United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

5 Cantrill v. People, 8 Ill. 356; United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

Resisting officer attempting to serve summons being charged, the indictment or information alleging "which summons was a lawful process," it was held that the averment that the process was "a lawful one" was an averment of jurisdiction in the officer issuing it; and that it was not necessary to set out in the indictment or information the process or order, the execution of which was opposed or resisted, for the purpose of proving jurisdiction.—McQuoid v. People, 8 Ill. 76.

Writ in civil suit issued by a court of competent jurisdiction, fair on its face, it is no defense for resisting an officer in the execution of such writ that it is merely informal and voidable and might be quashed in a civil proceeding.—Witherspoon v. State, 42 Tex. Cr. Rep. 532, 96 Am. St. Rep. 812, 61 S. W. 396.

6 People v. McLean, 68 Mich. 480, 36 N. W. 231; United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

7 Cantrill v. People, 8 Ill. 356; United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

criminal case, or serve process in a civil action, issuing from a justice's court, it must be alleged (1) that the action was pending, or that the offense occurred within the jurisdiction of such court,[8] and (2) that such justice had jurisdiction of the subject-matter of the action, or of the person of the parties to be apprehended, and had jurisdiction to issue the warrant or process.[9] The same is

[8] People v. Craig, 59 Cal. 370.

"The said county of ———," the omission of the name of the county being a mere clerical misprision, may be considered in connection with the caption, notwithstanding the caption is no part of the indictment, and be sufficient. —People v. Thompson, 7 Cal. App. 616, 59 Pac. 386.

[9] People v. Craig, 59 Cal. 370; Cantrill v. People, 8 Ill. 356; People v. McLean, 68 Mich. 480, 36 N. W. 231.

Error in Christian name of justice does not vitiate the indictment.—State v. Dickerson, 24 Mo. 365.

"Knowingly and wilfully resisted one Dobson, deputy sheriff, in serving, or attempting to serve, a legal process, to wit, a civil warrant on said" accused being charged, the court said: "It is averred that the process was issued by a justice of the peace, the word 'warrant' being the usual language in which process issued by a justice of the peace is described . . . we think the averment reasonably certain and that the indictment was erroneously quashed."—State v. Maynard, 62 Tenn. (3 Baxt.) 348.

"Lawfully issued by A, a justice of the peace, in and for," a designated county, held to be sufficient, without setting out that A was a justice at the time of the issuance. —Murphy v. State, 55 Ala. 252.

Magistrate's warrant of commitment must show on its face authority of the magistrate to commit; where it shows the magistrate had no jurisdiction over the person or the offense, it is insufficient. — Gurney v. Tufts, 73 Me. 130, 58 Am. Dec. 777.

Statute not requiring a specific averment that process which the officer was resisted in execution, was a legal process, an indictment or information which specifies the process as a "writ, warrant or order of apprehension issued by Opey Johnson, a justice of the peace, in and for the said parish of," naming it, is sufficient under the statute.—State v. Perkins, 43 La. Ann. 186, 8 So. 439.

Resistance of officer serving writ of apprehension charged against accused, an indictment or information alleging accused was charged "with a crime against the laws of the state," and that the process "was duly and regularly issued from a justice of the peace court," of a designated precinct, the averments as to the legality of the warrant of apprehension were sufficient. — State v. Brown, 6 Wash. 609, 34 Pac. 133.

Unnecessary to aver jurisdiction of justice who issued writ of execution charged to have been re-

true regarding officers of inferior jurisdiction. Thus, a commissioner empowered to issue a warrant under a statute must be a commissioner designated in such statute, and an indictment or information charging resisting such warrant, alleging that it was issued by a commissioner of the circuit court of the United States is not sufficient;[10] want of an averment of the facts showing that the commissioner was authorized to issue the warrant can not be aided by reference to the records of the court.[11]

Validity or legal effect of a warrant or other process is a question of law for the court, and not one of fact for the jury.[12] Process may be void as to the parties originating and issuing it, but voidable, only, as to the officer attempting to or serving it.[13] A magistrate issuing process, having jurisdiction of the subject-matter or of the parties, and the process being regular on its face and not disclosing want of jurisdiction to issue the same, will be sufficient, so far as the officer is concerned;[14] but it has been said that the service of a writ fair on its face may be resisted in those cases in which the officer has knowledge that it is invalid because the judgment on which it was founded was void or had been superseded,[15] and a spent writ or process may be legally resisted. Thus, where the offense of resisting process was charged to have been committed on the 1st day of March of a named year, while the process set out in the indictment or information was returnable on the 10th day of January of

sisted, where the execution itself is set out in the indictment or information, and is regular on its face, showing it to be for an amount within the justice's jurisdiction.—Farris v. State, 82 Tenn. (14 Lea) 295.

10 United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

11 Id.

12 Witherspoon v. State, 42 Tex. Cr. Rep. 532, 96 Am. St. Rep. 812, 61 S. W. 396.

13 State v. Weed, 21 N. H. 262, 53 Am. Dec. 188.

14 State v. McNally, 34 Me. 210, 56 Am. Dec. 650.

15 State v. Knopf, 50 Wash. 229, 21 L. R. A. (N. S.) 66, 96 Pac. 1076.

the same year, before the justice of the peace who had issued it, it was held that the indictment was fatally defective, the alleged resistance being charged to have been committed after the process had spent its force.[16]

§ 1033. ——— DESCRIPTION OF PROCESS. An indictment or information charging the obstruction or resistance of the execution of a legal writ or process by an officer should describe the writ sufficiently (1) to identify it and (2) to advise the accused of the accusation against him and which he will have to meet on the trial, and where it does this it will usually be sufficient,[1] although there are cases to the effect that the indictment or information must set out the process and allege it to be a legal process.[2] Where under the statute the process may be described generally, it is not necessary to state the date of issuance[3] or against whom it was issued.[4] Thus, it has been said to be sufficient to describe the writ obstructed or resisted as a possessory warrant for the recovery of possession of a cow, issued by a named magistrate.[5]

§ 1034. ——— AUTHORITY OF OFFICER TO EXECUTE. It is essential to a prosecution charging that accused obstructed or resisted an officer in the execution of a writ or process, that the officer should have been duly authorized to execute the same. If the writ or process be illegal

16 McGehee v. State, 26 Ala. 154.

1 ARK. — Slicker v. State, 13 Ark. 397. ILL.—McQuoid v. People, 8 Ill. 76; Bowers v. People, 17 Ill. 373. IND.—Kernan v. State, 11 Ind. 471. IOWA—State v. Freeman, 8 Iowa 428, 74 Am. Dec. 317. N. H.—State v. Copp, 15 N. H. 212; State v. Roberts, 52 N. H. 492; State v. Cassady, 52 N. H. 500.

Regularity presumed. — Kernan v. State, 11 Ind. 471.

2 ARK.—Oliver v. State, 17 Ark. 508. ILL.—Cantrill v. People, 8 Ill. 356. MO.—State v. Henderson, 15 Mo. 486. OHIO—Faris v. State, 3 Ohio St. 159. S. C.—State v. Hailey, 2 Strob. L. 73. TENN.—Farris v. State, 82 Tenn. (14 Lea) 295.

See, also, discussion and authorities, § 1032, supra.

3 Howard v. State, 121 Ala. 21, 25 So. 1000.

4 Id.

5 Gibson v. State, 118 Ga. 29, 44 S. E. 811.

or void, or the time within which it was to be executed or served has expired, the officer is without authority to execute or serve it.[1] Hence, an indictment or information charging accused with obstructing or resisting an officer in executing a writ or process must allege that the officer had authority, either general or special,[2] to execute it.[3] But it has been said that a general allegation that the officer was authorized to execute the writ or serve the process is sufficient,[4] because where the officer is expressly deputized to serve a particular process, the indictment or information need not set forth that fact.[5] Yet it has been said that where a private person is specially deputized to execute a writ, an allegation in the indictment or information that such person "was then and there a peace officer, to-wit, a deputy sheriff of said county," is too vague and uncertain, and for that reason not sufficiently descriptive of the special character and authority under which such person acted; that his authority and the capacity in which he was acting at the time should be specifically set forth with reasonable certainty.[6] Where the officer obstructed or resisted is one whose office is provided for and his authority and duties prescribed by a general statute of which the court must take judicial notice, it may not be regarded as necessary to allege the officer's authority to execute the writ or serve the process, where such writ or process is set out in the indictment or information, and is such an one as by the statute he is authorized to execute or serve, on the ground that every public officer is presumed to do his duty and to act within his authority.[7]

1 See, supra, § 1032.

2 As to deputization of officer, general or special, see, supra, § 1024.

3 State v. Downer, 8 Vt. 424, 30 Am. Dec. 482.

Compare: Blake v. United States, 18 C. C. A. 117, 33 U. S. App. 376, 71 Fed. 286.

4 Com. v. Armstrong, 4 Pa. Co. Ct. Rep. 5.

5 Id.

6 Rountree v. State, 1 Pinn. (Wis.) 59.

7 See Den v. Den, 6 Cal. 81;

Yet it has been said that under a statute providing that "if any person against whom a legal warrant of apprehension is directed in any criminal case resist its execution when attempted by any person duly authorized to execute the same, he shall be fined," etc., an indictment or information charging accused with resisting the execution of such a warrant must allege that the legal warrant was a warrant for the apprehension of accused, and that such warrant was directed to such officer in a criminal case.[8] It seems that the question as to proper allegations in an indictment or information charging this offense is ruled largely by the particular provisions of the statute under which the prosecution is had.

§ 1035. ——— POSSESSION OF WARRANT OR PROCESS BY OFFICER. The officer must have possession of the writ or process before he can execute or serve it; but it seems to be the general rule, although there are cases to the contrary,[1] that the indictment or information charging obstructing or resisting an officer is not required to specifically charge that the writ or process was in such officer's possession;[2] an allegation that such officer was in the act of serving it at the time of the act complained of clearly implies that it was in his hands at that time;[3] and that fact may otherwise appear from the allegations of the indictment or information.[4]

§ 1036. ——— INDORSEMENT AND RETURN OF. An indorsement of the writ alleged to have been obstructed or resisted being necessary to authorize the officer to execute it, an indictment or information charging obstruction or resistance of such writ must allege that the writ

Jones v. Garza, 11 Tex. 186; Ely v. Cram, 17 Wis. 541.

8 McGrew v. State, 17 Tex. App. 613.

1 See Maverty v. State, 78 Tenn. (10 Lea) 729; McGrew v. State, 17 Tex. App. 613.

2 State v. Bushey, 96 Me. 151, 51 Atl. 872; State v. Estis, 70 Mo. 427.

3 State v. Fifield, 18 N. H. 34.

4 State v. Hooker, 17 Vt. 658.

was indorsed, and this allegation is sufficiently made by the averment that the indorsement was a part of the writ, or by setting out the writ with the indorsement thereon.[1] The return of the writ need not be alleged, for the offense of obstructing or resisting its execution is necessarily committed before the return day thereof, and it does not appear to be necessary to wait for the return day before the indictment can be found;[2] and it is thought that the right of the state to prosecute in such a case would not be affected by the fact that the writ were lost or destroyed without a return thereof being made.[3]

§ 1037. Refusal to assist officer. A duly constituted officer has authority to command third persons to assist him in the execution of a warrant or service of a process whenever in the exigencies of the circumstances it is necessary, or whenever such officer thinks it is necessary, that he should have such help and assistance; and to refuse to assist when commanded or requested by the officer is to obstruct and resist the due administration of public justice. An indictment or information charging accused with the offense of refusing to assist an officer when duly commanded, must set out (1) the authority of the officer to command such assistance,[1] to enable the court to see that such officer was proceeding lawfully,[2] (2) knowledge on the part of the accused of the official character of the person commanding his services,[3] and (3) aver the command of the officer to accused to assist him and the latter's refusal.[4]

1 State v. Fifield, 18 N. H. 34.

2 Id.

3 See Oliver v. State, 17 Ark. 508; State v. Moore, 39 Conn. 244; Com. v. Tobin, 108 Mass. 426; Com. v. Coughlin, 123 Mass. 436.

1 State v. Shaw, 25 N. C. (3 Ired. L.) 20.

See, supra, § 1034.

2 State v. Shaw, 25 N. C. (3 Ired. L.) 20.

3 State v. Deniston, 6 Blackf. (Ind.) 277.

See, supra, § 1014.

4 State v. Nail, 19 Ark. 563; Comfort v. Com., 5 Whart. (Pa.) 437; R. v. Sherlock, L. R. 1 C. C. 20, 19 Cox C. C. 170.

§ 1038. Refusal to obey subpœna as witness. Where a person has been duly served with subpœna, or other process, commanding him to attend and give testimony in a named case, and neglects or refuses to comply therewith he may be attached[1] and is liable to be punished either for a contempt of court or by indictment; if by the latter method, the indictment or information must allege (1) that there was a cause pending in a designated court in which accused was served with process commanding him to appear and testify,[2] (2) describe or set out the subpœna or other process accused neglected or refused to obey,[3] and (3) allege the manner in which the subpœna or other process was served upon the accused,[4] so that the court may determine whether the accused was duly served, and was under a duty to attend and give testimony.[5]

§ 1039. Interfering with, or tampering with, witness —In general. The criminal offense of interfering with, or tampering with, a witness, consists in any act, or any attempt,[1] to dissuade or deter a person who is expected to be a witness,—particularly in a criminal cause,—from

1 3 Russ. on Crimes, 9th ed., 575.

2 State v. Clancy, 56 Vt. 598.

3 See Batie v. State, 18 Ala. 119; Drake v. State, 60 Ala. 62.

4 Id.

5 State v. Clancy, 56 Vt. 598.

1 ME.—State v. Ames, 64 Me. 386. MICH.—Montgomery v. Palmer, 100 Mich. 436, 59 N. W. 148 (though not yet subpœnaed, see, infra, § 1042). VT.—State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; State v. Carpenter, 20 Vt. 9. W. VA.—State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66. ENG.—R. v. Lawley, 2 Str. 904, 93 Eng. Repr. 980.

Payment of money to third person to be used in inducing witness not to attend trial, without evidence of payment of the money by such third person to, or offering it to, the witness, held not to be indictable.—State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66.

"When the crime which one is solicited to commit has for its object an interference with public justice, for instance, the procuring of a witness to absent himself from court so as to avoid testifying when he has been summoned to testify, there can be no doubt that at common law such a solicitation was a misdemeanor in itself."—State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66, citing: ALA.—Martin v. State, 28 Ala. 71. DEL.—

attending a trial and giving his testimony,[2] or inducing, or attempting to induce, him to color his testimony or give false testimony, and may be committed in several different ways,[3]—e. g., by endeavoring to persuade, or persuading, the person not to appear or attend at the trial,[4] even though such person has not yet been served with a subpœna or other process commanding his attendance;[5] by inducing a witness, particularly in a criminal cause, to become intoxicated for the express purpose of preventing his attendance and testifying;[6] or to secrete himself;[7] or to leave the state; or absent himself from the county,[9] and the like. Such interference is not only a contempt of court,[10] it is always a high-handed offense,[11] but is not classed as infamous, and may be prose-

State v. Early, 3 Harr. 562. ILL.—Walsh v. People, 65 Ill. 58. MASS.—Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665. N. Y.—People v. Washburne, 10 Johns. 160. TEX.—Jackson v. State, 43 Tex. 421. VT.—State v. Caldwell, 2 Tyl. 212; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; State v. Carpenter, 20 Vt. 9.

2 State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; Bushell v. Barrett, Ry. & M. 434, 21 Eng. C. L. 483.

3 State v. Curdy, (Del.) 75 Atl. 868; State v. Holt, 84 Me. 509, 24 Atl. 951; Garland v. State, 112 Md. 83, 75 Atl. 631; Perrow v. State, 67 Miss. 365, 7 So. 349.

4 Spencer v. Scott, 47 La. Ann. 1209, 15 So. 706; State v. Ames, 64 Me. 386; State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66.

5 State v. Horner, 1 Marv. (Del.) 504, 26 Atl. 73, 41 Atl. 139; Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665; Montgomery v. Palmer, 100 Mich. 436, 59 N. W. 148; Perrow v. State, 67 Miss. 365, 7 So. 349; In re Brule, 71 Fed. 943.

See, infra, § 1042.

6 State v. Holt, 84 Me. 509, 24 Atl. 951.

7 Tedford v. People, 219 Ill. 23, 73 N. E. 60.

8 Id.; In re Brule, 71 Fed. 943.

9 Com. v. Berry, 141 Ky. 477, Ann. Cas. 1912C, 516, 33 L. R. A. (N. S.) 976, 133 S. W. 212; People v. Chase, 16 Barb. (N. Y.) 495.

10 Montgomery v. Palmer, 100 Mich. 436, 59 N. W. 148; Com. v. Higgins, 5 Kulp (Pa.) 269; In Matter of Savin, 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. Rep. 699; In re Brule, 71 Fed. 943.

Bribing witness, at his residence, and at some distance from the court-house, in the town where the court was sitting, to hide himself, remain away from court, and thereby prevent his testifying in a pending cause, is a contempt of court under U. S. Rev. Stats., § 725, 4 Fed. Stats. Ann., 1st ed., § 435. (See Judicial Code, § 157, 5 Fed. Stats. Ann., 2d ed., § 671.) —In re Brule, 71 Fed. 943.

11 Com. v. Higgins, 5 Kulp (Pa.)

cuted either by indictment or information,[12] being a misdemeanor at common law.[13] Proceeding against the offender in contempt, and his punishment in that proceeding, will not relieve him of the liability to prosecution and punishment criminally, and vice versa.[14]

§ 1040. —— FORM AND SUFFICIENCY OF INDICTMENT.[1] An indictment or information charging the offense of obstructing public justice by interfering with, or tampering with, or attempting to interfere or tamper with, a witness, or with a person expected to be a witness, in a cause pending in a court of justice, by bribing, dissuading, or otherwise preventing him from appearing and testifying, or causing him to give colored or false testimony in such cause, should state definitely the time and place of the alleged offense,[2] in order (1) to confer jurisdiction to try the cause, and (2) to enable the court to see that the alleged offense took place within the period of time for which a prosecution for the offense must be had; and must also charge the facts with reasonable certainty,[3] although it need not be averred that the attempt was successful,[4] or that the act was done with

269; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; In Matter of Savin, 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. Rep. 699.

12 Id.

13 ALA. — Martin v. State, 28 Ala. 71. DEL.—State v. Early, 3 Harr. 562. ILL.—People v. Walsh, 65 Ill. 58. MASS.—Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665. N. Y.—People v. Washburne, 10 Johns. 160. TEX.—Jackson v. State, 43 Tex. 421. VT.—State v. Caldwell, 2 Tyl. 212; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; State v. Carpenter, 20 Vt. 9. W. VA.—State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66.

14 Com. v. Higgins, 5 Kulp (Pa.) 269; In Matter of Savin, 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. Rep. 669; In re Brule, 71 Fed. 943.

1 As to form of indictment for interfering with, or tampering with, a witness, see Forms Nos. 1774-1777.

As to form and sufficiency of indictment or information generally, see, supra, §§ 1010-1018.

2 As to time and place, see, supra, § 1013.

3 Com. v. Felly, 4 Va. (2 Va. Cas.) 1.

4 State v. Ames, 64 Me. 386; People v. Chase, 16 Barb. (N. Y.) 495; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

the intent to impede or obstruct public justice.[5] It is not necessary to aver that a cause was pending requiring the attendance, or in which the person interfered with, or dissuaded was expected to appear as a witness,[6] although the contrary has been held;[7] or to set out the record of a pending cause,[8] or allege in whose behalf the said witness was subpœnaed;[9] but the indictment or information must set out the name of the person interfered with or dissuaded, and that the attempt was made to interfere with or dissuade him as such witness.[10] To be sufficient the indictment must bring the offense clearly within the provisions of the statute. Thus, it has been said that an indictment or information alleging accused conspired with another to induce a witness in a pending prosecution before a justice of the peace to leave the state, does not charge a crime, when it appears from the complaint set out in the indictment that the justice was without jurisdiction to try the party charged before him, because he was not charged with any crime under the statutes.[11]

§ 1041. ——— ALLEGATION AS TO MEANS USED. An indictment or information charging accused with interfering or tampering with, or attempting to interfere or tamper with, a witness, need not particularize the method of interference, or attempted interference, it being sufficient to make a general statement of the facts without

As to consummation of offense, see, supra, § 1012.

5 State v. Biebusch, 32 Mo. 276.

As to intent of accused, see, supra, § 1015.

6 Brown v. State, 13 Tex. App. 358; Armstrong v. Van de Vanter, 21 Wash. 682, 12 Am. Cr. Rep. 327, 59 Pac. 510.

7 State v. Holt, 84 Me. 509, 24 Atl. 951.

8 State v. Carpenter, 20 Vt. 9.

9 Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665; Brown v. State, 13 Tex. App. 358; State v. Bringgold, 40 Wash. 12, 82 Pac. 132. See State v. Roe, 19 Ida. 416, 113 Pac. 461.

10 Brown v. State, 13 Tex. App. 358.

11 Armstrong v. Van de Vanter, 21 Wash. 682, 12 Am. Cr. Rep. 327, 59 Pac. 510.

giving the gist of the charge which must be proved on the trial to support the indictment.[1]

§ 1042. ——— ALLEGATION AS TO WITNESS HAVING BEEN SUBPŒNAED, ETC. It need not be alleged that the person interfered with, or tampered with, had been sworn, recognized, subpœnaed, or served with other process, requiring his attendance as a witness in a judicial proceeding then pending,[1] or to allege that process had been issued for him to appear and testify as a witness,[2] although there is authority to the contrary, holding that both the issuance and authority to issue a subpœna, or other process, should be alleged;[3] neither need it be alleged in whose behalf the person was, or was to be, subpœnaed as a witness, or was expected to give testi-

[1] State v. Bartlett, 30 Me. 132; State v. Ames, 64 Me. 386; Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665; People v. Chase, 16 Barb. (N. Y.) 495; R. v. Bidwell, 1 Den. C. C. 222.

[1] DEL. — State v. Horner, 1 Marv. 504, 26 Atl. 73, 41 Atl. 139. KAN.—State v. Sills, 85 Kan. 830, 118 Pac. 867. KY.—Com. v. Bailey, 26 Ky. L. Rep. 583, 87 S. W. 299; Com. v. Berry, 141 Ky. 477, Ann. Cas. 1912C, 516, 33 L. R. A. (N. S.) 976, 133 S. W. 212. LA.—State v. Desforges, 46 La. Ann. 1167, 17 So. 811. ME.—State v. Holt, 84 Me. 509, 24 Atl. 951. MASS.—Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665. MICH.—Montgomery v. Palmer, 100 Mich. 436, 59 N. W. 148. MISS.—Perrow v. State, 67 Miss. 365, 7 So. 349. MO. — State v. Biehusch, 32 Mo. 276. NEB.—Chrisman v. State, 18 Neb. 107, 6 Am. Cr. Rep. 175, 24 N. W. 437. VT.—State v. Carpenter, 20 Vt. 9. WASH.—State v. Bringgold, 40 Wash. 12, 82 Pac. 132. FED.—In re Brule, 71 Fed. 943; Heinze v. United States, 104 C. C. A. 510, 181 Fed. 322.

Attempt, though made before service of a subpœna, and though it prove unsuccessful, is nevertheless punishable.—State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

See, supra, § 1039, footnote 2.

Indictment with name of witness attempted to be corrupted indorsed thereon as a witness, on the part of the state, may be introduced in evidence when the judicial proceeding involved a trial upon an indictment charging a crime or misdemeanor.—Chrisman v. State, 18 Neb. 107, 6 Am. Cr. Rep. 175, 24 N. W. 437.

[2] State v. Holt, 84 Me. 509, 24 Atl. 951; Jackson v. State, 43 Tex. 421; Brown v. State, 13 Tex. App. 358; Scroggins v. State, 18 Tex. App. 298.

[3] Com. v. Watrous, 1 Com. Pl. Rep. (Pa.) 21.

mony.[4] Where by way of inducement it is averred that a subpœna or other process had been issued and served upon the person tampered with, or attempted to be tampered with, the fact of service need not be alleged with the same certainty as to place and time[5] as is required in setting out the substance of the charge.[6]

§ 1043. ——— ALLEGATION AS TO MATERIALITY OF WITNESS'S TESTIMONY. The question of the materiality or relevancy of the testimony to be given, or which could be given in the cause, by the person as a witness, does not enter into the offense of interfering with or tampering with, or attempting to interfere or tamper with, a witness, and for that reason there need be no averment in the indictment or information charging the offense that such testimony was, or would be, material or relevant,[1] or upon whose behalf it was, or was to be, given.[2]

§ 1044. ——— ALLEGATION OF ACCUSED'S KNOWLEDGE OF PROCEEDINGS AND WITNESS'S OBLIGATION TO ATTEND. The knowledge of the accused that there was a cause pending in court, and that the witness interfered or tampered with, or attempted to be interfered or tampered with, was under obligation to attend and give his testimony, or was expected to attend and give his testimony, has been said to be an essential element in the crime of interfering or tampering with a witness, and must be specifically charged in the indictment or information,[1] although the contrary is also held.[2] Where such knowledge is required to be alleged, an averment that the accused "being an evil-disposed person, and contriving and intending to ob-

4 Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665.

5 See, supra, § 1040.

6 Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665.

1 See Com. v. Early, 3 Harr. (Del.) 562; Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665.

2 Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665.

1 Com. v. Stout, 76 Ky. (7 B. Mon.) 247.

2 State v. Holt, 84 Me. 509, 24 Atl. 951.

struct and impede the due course of justice," "unlawfully and unjustly did endeavor to dissuade, hinder and prevent" a named witness from appearing and testifying in a designated cause, sufficiently shows that the accused knew of the existence and pendency of the cause and of the obligation of the witness to attend.[3] Where knowledge is required to be alleged, the indictment or information must further characterize the purpose with which the act was done.[4] Thus, an allegation that the accused, after and with knowledge that a third person had stolen certain property, concealed the property stolen, and concealed from the magistrate the commission of the felony, states no offense under the California statute[5] punishing concealment of evidence about to be introduced, because it fails to state the purpose of the act.[6]

§ 1045. ——— ALLEGATION AS TO INDICTMENT AND SUFFICIENCY THEREOF IN CRIMINAL CAUSE, ETC. Where the charge is that of interfering with, or tampering with, or an attempt to interfere or tamper with, a witness in a criminal cause, it is not necessary that the indictment or information shall allege that an indictment in such cause had been found,[1] or that an indictment found was sufficient, or that the accused therein was guilty;[2] it being equally an offense to thus interfere with, or tamper with, a witness subpœnaed, or expected to appear before a grand jury and give evidence upon which an indictment may be returned.[3]

3 State v. Carpenter, 20 Vt. 9.

4 Ex parte Goldman, 7 Cal. Unrep. 254, 88 Pac. 819.

5 Kerr's Cyc. Cal. Pen. Code, § 135.

6 Ex parte Goldman, 7 Cal. Unrep. 254, 88 Pac. 819.

1 See, supra, § 1040.

2 R. v. Lawley, 2 Str. 904, 93 Eng. Repr. 980.

3 Com. v. Berry, 141 Ky. 477, Ann. Cas. 1912C, 516, 33 L. R. A. (N. S.) 976, 133 S. W. 212; State v. Holt, 84 Me. 509, 24 Atl. 951; State v. Carpenter, 20 Vt. 9.

One who persuades person to leave jurisdiction of the court. having knowledge of the commission of a crime, without disclosing his knowledge to the grand jury, is guilty of obstructing justice, although such person had not been

§ 1046. ——— CONCLUSION. The offense of interfering with, or tampering with, a witness not being made punishable by statute, a conclusion "contrary to the form of the statute," etc., may be rejected as surplusage;[1] and in the absence of a statute so requiring, it is not necessary that the indictment or information shall conclude "to the obstruction and hindrance of public justice,"[2] although there seems to be no authority to the contrary.[3]

§ 1047. FALSE CERTIFICATE FURNISHED FOR CONTINUANCE —AFFIDAVIT SUPPORTING INFORMATION. The affidavit upon which an information is founded charging accused with furnishing a false certificate upon which to procure the continuance of a trial, must show probable cause arising from facts within the knowledge of the party making such affidavit,[1] although there are authorities to the contrary.[2] Thus, an affidavit which states that the offense of obstructing the due administration of justice in a designated court was committed by the furnishing of a false affidavit to secure a continuance of a cause pending in said court, which simply avers that there is probable cause to believe that the offense was committed by a person named, but which neither sets out any facts done

subpœnaed and was under no obligation to appear before the grand jury.—Com. v. Berry, 141 Ky. 477, Ann. Cas. 1912C, 516, 33 L. R. A. (N. S.) 976, 133 S. W. 212.

1 Com. v. Reynolds, 80 Mass. (14 Gray) 87, 74 Am. Dec. 665.

2 Id.; State v. Ames, 64 Me. 386; State v. Biebusch, 32 Mo. 276; Chrisman v. State, 18 Neb. 107, 6 Am. Cr. Rep. 175, 24 N. W. 434.

See, supra, § 1010.

3 See State v. Soragan, 40 Vt. 450.

1 Johnston v. United States, 30 C. C. A. 612, 87 Fed. 187. See Vannatta v. State, 31 Ind. 210; Salter v. State, 2 Okla. Cr. 469, 139 Am. St. Rep. 935, 25 L. R. A. (N. S.) 60, 102 Pac. 721; Degraff v. State, 2 Okla. Cr. 528, 103 Pac. 541; Ex parte Owen, 10 Okla. Cr. 292, 136 Pac. 200; United States v. Tureaud, 20 Fed. 621; United States v. Polite, 35 Fed. 59; United States v. Baumert, 179 Fed. 739. See, also, State v. Tompkins, 2 Abb. Pr. (N. Y.) 468; State v. Mitchell, 1 Bay (S. C.) 267; Ex parte Burford, 1 Cr. 276, Fed. Cas. No. 2148; affirmed, 7 U. S. (3 Cr.) 448, 453, 2 L. Ed. 495.

2 Territory v. Cutinola, 4 N. M. 305, 14 Pac. 809; Com. v. Murray, 4 Va. (2 Va. Cas.) 507.

Information by ex officio prose-

nor avers any knowledge of the facts by affiant, is insufficient as the basis of an information.[3]

§ 1048. —— SUFFICIENCY OF INDICTMENT. An indictment or information charging the offense of obstructing justice by furnishing a false certificate with which to procure the continuance of a pending cause, must directly and explicitly allege the pendency of the cause and charge the making of such certificate by the accused, and must further charge that the act was done with a corrupt intent.[1]

§ 1049. FALSELY ASSUMING TO BE AN OFFICER. The offense of false pretense of being an officer has already been sufficiently treated in the chapter devoted to False Pretenses.[1] Where the act is prosecuted as the offense of obstructing public justice, the indictment or information should set out and specify the particular facts in the case with the fullness and particularity heretofore pointed out as necessary,[2] and should allege knowledge on the part of the accused,[3] as well as an unlawful intent.[4]

§ 1050. PARTIES DEFENDANT. All persons guilty of acts which have the effect of hindering or obstructing public

cuting attorney need not be sworn to.—Territory v. Cutinola, 4 N. M. 305, 14 Pac. 809.

3 Johnston v. United States, 30 C. C. A. 612, 87 Fed. 187.

"Wholly insufficient to warrant the arrest and trial of the accused, and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, nor even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that 'there is probable cause to believe that the said offense was committed by P. T. Johnston.' However false the affidavit may be, it would be next to impossible to assign and prove perjury upon it.—Johnston v. United States, 30 C. C. A. 612, 87 Fed. 187.

1 Johnston v. United States, 30 C. C. A. 612, 87 Fed. 187.

As to necessity for unlawful intent, see, supra, § 1015.

1 See, supra, § 648.

2 See, supra, §§ 1010 et seq.

3 See, supra, § 1014.

4 See, supra, § 1015. See, also, Com. v. Wolcott, 64 Mass. (10 Cush.) 61; Daniel v. State, 50 Tenn. (3 Heisk.) 257; R. v. Buchanan, 8 Ad. & E. N. S. (8 Q. B.) 883, 55 Eng. C. L. 883.

justice, where the act is done knowingly[1] and with unlawful intent,[2] are liable to indictment and prosecution for the offense of obstructing public justice. Thus, an attorney and client conspiring to resist an officer are equally guilty of the offense.[3] But each individual is responsible for his own act only. Thus, the unauthorized acts of an agent in obstructing the service of process upon an actor in a theater does not render the owner of the theater liable therefor.[4] In a case where an officer, in attempting to make an arrest under a capias, requested the assistance of several persons, all of whom declined to comply with the request, and all were included in one indictment, being severally charged with obstructing justice in failing to respond to the request of the officer, it was held not to be error to quash the indictment for improper joinder of parties defendant.[5]

§ 1051. Duplicity. Obstructing public justice by assaulting an officer, or by hindering or obstructing him in the performance of his duty, or by resisting an officer in the discharge of his duty in the execution of a writ or otherwise, where provided for by statute prohibiting these acts in the disjunctive merely, as "assaulting or obstructing or resisting an officer," but one offense is created, and the offense of obstructing public justice may be charged to have consisted of all these acts set out with the copulative conjunction, without rendering the indictment or information vulnerable to the objection that it states two offenses.[1] But where it is manifest that the legislature intended to create two distinct offenses of obstructing public justice, one "by hindering or obstructing an officer," and another "by resisting an officer," the two offenses can not be united in one count, although they

1 See, supra, § 1014.

2 See, supra, § 1015.

3 United States v. Smith, 1 Dill. 212, Fed. Cas. No. 16333.

4 Paulton v. Keith, 23 R. I. 164, 91 Am. St. Rep. 624, 54 L. R. A. 670, 94 Atl. 635.

5 State v. Nail, 19 Ark. 563.

1 Slicker v. State, 13 Ark. 397.

may be charged in separate counts, where arising out of the same act and state of facts. But it has been said there can not be a conviction on both of two counts, one for assaulting an officer while in the discharge of his duties, and the other for hindering, impeding, obstructing or resisting the same officer.[2] Charging accused with assaulting an officer and by so assaulting him with impeding or obstructing or resisting him in the discharge of his official duties, is not bad for duplicity.[3] Where conviction for the assault is sought, however, both an assault upon an officer, which is in law an aggravated assault, and obstructing or resisting an officer, can not be founded upon the same acts and transaction;[4] but where the two offenses are charged, however, and it is possible to reject as surplusage either the charge as to the assault upon the officer, or the charge as to obstructing public justice, this rejection may be made and the indictment or information will be valid.[5]

Timely objection by demurrer must be taken to an indictment or information vulnerable to the objection of duplicity, otherwise such objection will be deemed to have been waived.[6]

2 State v. McOmber, 6 Vt. 215.

3 State v. Ferry, 61 Vt. 624, 18 Atl. 451.

4 State v. Johnson, 12 Ala. 840, 46 Am. Dec. 283.

5 State v. Coffey, 41 Tex. 46.

6 People v. Nash, 1 Ida. 206. See People v. Shotwell, 27 Cal. 402; Johnson v. State, 51 Fla. 48, 40 So. 679; People v. Stapleton, 2 Ida. 49, 3 Pac. 6.

CHAPTER LXIV.

INDICTMENT—SPECIFIC CRIMES.

Pandering.[1]

§ 1052. In general—Venue and variance, etc.
§ 1053. Sufficiency of indictment—Language of statute.

§ 1052. In general—Venue and variance, etc. Pandering is a purely statutory crime,—is malum prohibitum,—and is governed in the indictment or information charging the crime and the prosecution therefor by the provisions of the particular statute under which the prosecution is had, and the general rules of criminal pleading and procedure. Thus, where the statute creating the offense simply requires that the information shall set forth the offense with reasonable certainty it need not show on its face that the court examined the person presenting the complaint and required other evidence.[2] In those cases where the acts constituting the statutory offense of pandering were committed in two or more counties, the jurisdiction to try accused for the offense is in either of such counties; hence, where the indictment or information alleges the acts complained of to have occurred in one county, and the evidence on the trial shows such acts to have been committed in that county and in another county, this does not constitute a fatal variance.[3]

§ 1053. Sufficiency of indictment[1]—Language of statute. The crime of pandering being purely a stat-

1 See, also, "Pimping," infra, Chapter LXVII, and "Prostitution," infra, Chapter LXXI.

2 People v. Yon, 173 Ill. App. 649.

As to affidavit to support an information, see, supra, § 1047, and authorities cited.

3 People v. De Martini, 25 Cal. App. 9, 142 Pac. 898.

1 As to form of indictment or in-

utory offense, where the statute in defining and describing the act or acts prohibited contains all the elements of the offense, an indictment or information charging the offense to have been committed at a stated time in a designated place, framed in the language of the statute,[2] or substantially in the language of the statute,[3] is sufficient. It is not necessary that the indictment or information shall allege conjunctively all the acts enumerated and prohibited in the statute, when any one of them singly, or all taken together, constitute the offense denounced and punished;[4] neither is it necessary that it shall set out the particular facts showing the offense to have been committed, in some jurisdictions,[5] but where the charge is a general one, in the language of the statute, the accused may ask for a bill of particulars.[6] An indictment or information which charges that "by the abuse of his position of confidence" the accused "did induce" a named female to enter a house where prostitution is allowed and encouraged, sufficiently charges the offense;[7] but it need not be alleged that the person induced was "a female" person, where the name of such person as given indicates that such person was a female.[8] Where it is alleged that the offense charged was committed in a named city,[9] or county,[10] it is not

formation for pandering, see Form No. 1789.

2 People v. De Martini, 25 Cal. App. 9, 142 Pac. 898; People v. Pizzi, 170 Ill. App. 537; People v. Young, 182 Ill. App. 3; Jones v. State, 72 Tex. Cr. Rep. 496, 162 S. W. 1142; Clark v. State, 76 Tex. Cr. Rep. 348, 174 S. W. 354.

3 People v. Greenberg, 172 Ill. App. 360; People v. Armond, 172 Ill. App. 489.

4 People v. Lawlor, 21 Cal. App. 63, 131 Pac. 63.

5 People v. Young, 182 Ill. App. 3.

6 People v. Yon, 173 Ill. App. 651; People v. Young, 182 Ill. App. 3.

7 People v. Bennett, 185 Ill. App. 316.

8 People v. Pizzi, 170 Ill. App. 537; People v. Greenberg, 172 Ill. App. 360; People v. De Mas, 173 Ill. App. 130.

9 Lee v. State, 114 Ark. 310, 169 S. W. 963; People v. Bennett, 185 Ill. App. 316.

10 Jones v. State, 72 Tex. Cr. Rep. 496, 162 S. W. 1142.

The indictment after alleging that in the county of W——, state of T——, accused did, etc., says

necessary to designate any particular house or room.[11] Under a statute making it "unlawful for any person to invite, solicit, procure, allure or use any means for the purpose of alluring or procuring any female to visit and be at any particular house, room, or place for the purpose of meeting and having unlawful sexual intercourse with any male person or take part, or in any way participate in any immoral conduct with men or women," it is unnecessary to set out the name of the man or men with whom the female is expected to meet;[12] neither need the indictment or information state any particular house or room.[13]

"did then and there procure a place as inmate for L—— P—— in a house of prostitution." The words "then and there" related back and alleged that the cause was situate in W—— county.—Jones v. State, 72 Tex. Cr. Rep. 496, 162 S. W. 1142.

11 People v. De Martini, 25 Cal. App. 9, 142 Pac. 898; Sanders v. State, 60 Tex. Cr. Rep. 34, 129 S. W. 605; Clark v. State, 76 Tex. Cr. Rep. 348, 174 S. W. 354.

In prosecution for pandering the information need not show the particular house of prostitution of which the woman was induced to become an inmate.—People v. De Martini, 25 Cal. App. 9, 142 Pac. 898.

12 Sanders v. State, 60 Tex. Cr. Rep. 34, 129 S. W. 605.

13 Sanders v. State, 60 Tex. Cr. Rep. 34, 129 S. W. 605; Clark v. State, 76 Tex. Cr. Rep. 348, 174 S. W. 354.

CHAPTER LXV.

INDICTMENT—SPECIFIC CRIMES.

Pawnbrokers.

§ 1054. In general—Complaint.
§ 1055. Sufficiency of indictment—Language of statute.
§ 1056. —— Negativing exceptions.

§ 1054. In general—Complaint. The business of a pawnbroker is regulated by state statute and municipal ordinance, and any violation of either the statute or the ordinance is usually prosecuted by criminal complaint. A complaint charging a violation of a city ordinance regulating pawnbrokers is not required to state the facts with the same strictness required in an indictment.[1] Charging any of the offenses provided for and prohibited in statute or ordinance in the language of such statute or ordinance is sufficient;[2] and where the complaint is for carrying on and conducting the business of a pawnbroker without a license, the complaint need not state the times when, nor the person with whom, the accused did business as a pawnbroker without having a license so to do.[3] Where the charge is refusal of accused to exhibit his books required to be kept by him, both the keeping and the exhibiting thereof being required by statute or ordinance, the complaint need not allege directly that accused kept such books, it being sufficient if it is alleged indirectly.[4]

1 St. Joseph (City of) v. Levin, 128 Mo. 588, 49 Am. St. Rep. 577, 31 S. W. 101.

2 Com. v. Danziger, 176 Mass. 290, 57 N. E. 461.

3 St. Paul (City of) v. Lytle, 69 Minn. 1, 71 N. W. 703.

4 St. Joseph (City of) v. Levin, 128 Mo. 588, 49 Am. St. Rep. 577, 31 S. W. 101.

As to reasonableness of ordinance requiring a daily report to be made by pawnbrokers with a description of goods or things re-

§ 1055. Sufficiency of indictment—Language of statute. The formal parts of an indictment or information charging a violation of the law regulating pawnbrokers are the same as the formal parts in the charging of any other statutory offense. A charge of a violation of any of the provisions of the law in the language, or substantially in the language, of the statute, will be sufficient.[1] It is not necessary to allege the times when, nor the persons with whom the accused did business as such pawnbroker;[2] or allege that accused loaned money and received deposits of goods and other property as security for the repayment of such loans.[3] The offenses against the statute regulating pawnbrokers being malum prohibitum, it is not necessary to allege either knowledge or intent on the part of the accused, in the absence of statutory provisions which require such allegations.

§ 1056. —— Negativing exceptions. In the prosecution for a violation of the laws regulating pawnbrokers, the general rules regarding the negativing of exceptions in criminal pleadings apply. Thus, on a charge of violating the regulation requiring accused, as a pawnbroker, to keep, and furnish to the police department, a record of property purchased or received by him as a pawnbroker, as well as a description of the persons from whom the property was purchased or received, a subsequent clause in the same statute or ordinance exempting the accused, as a pawnbroker, from the necessity of keeping a record of, and making a report to the police department of, property purchased from manufacturers or wholesalers having an established place of business, or which he pur-

ceived or deposited with them, and the hour of the transaction, see Launder v. Chicago (City of), 111 Ill. 291, 53 Am. Rep. 625; Kansas City v. Garnier, 57 Kan. 412, 46 Pac. 707.

1 See Com. v. Danziger, 176 Mass. 290, 57 N. E. 461.

2 St. Paul (City of) v. Lytle, 69 Minn. 1, 71 S. W. 703.

3 Schapiro v. State, (Tex. Cr.) 169 S. W. 683.

chased in an open sale, it is not necessary that the indictment or information should negative such exception.[1]

1 Kansas City (City of) v. Garnier, 57 Kan. 412, 46 Pac. 707.

"The exception being in a subsequent clause, and not being incorporated in the definition of the offense, it was not necessary to negative it in the complaint."—Kansas City (City of) v. Garnier, 57 Kan. 412, 46 Pac. 707, citing State v. Thompson, 2 Kan. 432; State v. O'Brien, 74 Mo. 549; State v. Elam, 21 Mo. App. 290. See, supra, § 288.

CHAPTER LXVI.

INDICTMENT—SPECIFIC CRIMES.

Perjury.

§ 1057. Requisites of indictment—In general.
§ 1058. —— As to form and sufficiency—In general.
§ 1059. —— —— Allegation as to venue.
§ 1060. —— —— At common law.
§ 1061. —— —— Allegation in language of statute.
§ 1062. —— —— Following statutory form.
§ 1063. —— —— Averment showing jurisdiction of court, etc.
§ 1064. —— —— Averment as to intent.
§ 1065. —— —— Averment as to time.
§ 1066. —— —— Averment as to place.
§ 1067. —— —— Appropriate technical words.
§ 1068. —— —— Innuendo.
§ 1069. —— —— Joinder of assignments of perjury.
§ 1070. —— —— Negative averments.
§ 1071. —— —— Subornation of perjury.
§ 1072. —— —— —— Attempt to suborn.
§ 1073. —— —— Conclusion.
§ 1074. Description of proceedings in which offense committed—In general.
§ 1075. —— —— Matter under investigation and issue—Action pending.
§ 1076. —— —— Allegation as to issues and pleadings.
§ 1077. —— —— Alleging name of action.
§ 1078. —— —— Alleging names of parties—Variance.
§ 1079. —— —— Setting out record of proceedings—Common-law rule.
§ 1080. —— —— Setting out result of proceedings.
§ 1081. —— —— Voluntary affidavits or extra-judicial oaths.
§ 1082. Authority and jurisdiction to administer oath—Of court, generally.
§ 1083. —— —— At common law.

§ 1084. ——— Under American statutes.
§ 1085. ——— Voidable proceedings—Competency of testimony or witness.
§ 1086. —— Of officer—As to name of officer.
§ 1087. ——— Justices of the peace.
§ 1088. ——— Ministerial and quasi-judicial officers and bodies.
§ 1089. —— Description of tribunal or officer.
§ 1090. —— Appointment, election and qualification of judge, officer or body.
§ 1091. The oath, administration, form, making, etc.—In general.
§ 1092. —— Making affidavit or oath.
§ 1093. —— Form of oath and manner of taking.
§ 1094. —— Administration of oath and by whom.
§ 1095. Materiality of testimony or affidavit—In general.
§ 1096. —— As to manner of pleading.
§ 1097. —— Necessity of averment of facts showing materiality.
§ 1098. —— Averment as to necessity of oath.
§ 1099. —— Averment as to competency and admissibility of testimony.
§ 1100. —— Averment as to immaterial matters.
§ 1101. —— In ex parte proceedings.
§ 1102. —— In extra-judicial and quasi-judicial oaths—In general.
§ 1103. ——— Before grand jury.
§ 1104. ——— Before taxing officer.
§ 1105. ——— In insolvency and supplementary proceedings.
§ 1106. ——— In registration of voters and elections.
§ 1107. Setting forth false matter—According to substance and effect.
§ 1108. —— Testimony in foreign language.
§ 1109. —— Assigning perjury upon affidavit, etc.
§ 1110. Assignment of perjury—In general.
§ 1111. —— Averment as to accused's knowledge of falsity.
§ 1112. —— Averment of accused's intent.
§ 1113. Parties liable—Corporations.
§ 1114. —— Infants.

§ 1057. REQUISITES OF INDICTMENT[1]—IN GENERAL. Perjury was an offense at common law, and great particularity was required in its allegation. Statutes have been passed in all the states defining and punishing the offense of perjury and false swearing, and false oaths of all kinds, and the requisites and sufficiency of an indictment or information charging perjury under the statute will be governed by the provisions of the particular statute under which the prosecution is had; but statutes providing for the punishment of perjury and false swearing in a proceeding in which an oath is authorized or required by law, does not in any way change the rules regulating the mode in which an indictment for perjury is to be framed.[2] Hence, a common-law indictment charging perjury will be sufficient to support a conviction of the statutory offense in those cases where the common-law crime of perjury and the statutory crime of perjury are substantially the same;[3] but in all those cases where the offenses are not the same,—e. g., where the offense is a misdemeanor at common law and is made a felony by statute,—the rule is otherwise.[4] As in the case of all other statutory crimes, an indictment or information charging perjury must allege specifically and certainly all the facts and circumstances necessary to constitute the offense charged, and be sufficient to apprise the accused with reasonable certainty of the offense with which he is accused[5]

1 **As to forms of indictment** or information charging perjury in any of its phases, see Forms Nos. 1790-1840.

2 People v. Collier, 1 Mich. 137, 48 Am. Dec. 699.

Must be according to common law, is held in some jurisdictions. —Com. v. Lodge, 43 Va. (2 Gratt.) 579.

3 State v. Eaid, 55 Wash. 302, 33 L. R. A. (N. S.) 946, 104 Pac. 275.

4 See State v. Morse, 1 G. Greene (Iowa) 503; Allen v. State, 42 Tex. 12.

5 ARK.—Thomas v. State, 54 Ark. 584, 16 S. W. 568; Harp v. State, 59 Ark. 113, 26 S. W. 714. FLA. — Humphreys v. State, 17 Fla. 381. ILL.—Morrell v. People, 32 Ill. 499. MD.—State v. Bixler, 62 Md. 354. ME.—State v. Mace, 76 Me. 64, 5 Am. Cr. Rep. 588. MISS.—Copeland v. State, 23 Miss. (1 Cush.) 257. VT.—State v. McCone, 59 Vt. 117, 7 Atl. 406; State v.

and to enable the court to pass an intelligent judgment;[6] must charge a judicial proceeding in which the alleged false evidence was given or affidavit made,[7] or a proceeding in due course of law;[8] aver or otherwise show that the court or officer administering the oath had authority and jurisdiction to do so,[9] as well as the administration[10] and manner of taking the same;[11] set forth the false matter,[12] aver its materiality,[13] and assign perjury thereon.[14]

Rowell, 72 Vt. 405, 82 Am. St. Rep. 918, 15 Am. Cr. Rep. 567, 47 Atl. 111. WASH.—State v. See, 4 Wash. 344, 30 Pac. 327, 746; Armstrong v. Van De Vanter, 21 Wash. 682, 59 Pac. 510; State v. Roberts, 22 Wash. 1, 60 Pac. 65. W. VA.—Stofer v. State, 3 W. Va. 689. FED.—Markham v. United States, 160 U. S. 319, 40 L. Ed. 441, 16 Sup. Ct. Rep. 288; United States v. Walsh, 22 Fed. 644; United States v. Pettus, 84 Fed. 791.

6 "By falsely swearing to material matter in a writing signed by him," being charged against accused, without (1) mention of the character or purpose of the writing, (2) without stating the matter falsely sworn to, and (3) not containing any averment that would enable the court to determine that the oath was one authorized by law, the indictment was held to be insufficient, even after a verdict of guilty; the court remarking: "It does not contain sufficient matter to enable the court to render an intelligible judgment."—State v. Mace, 76 Me. 64, 5 Am. Cr. Rep. 588.

7 See, infra, §§ 1074 et seq.

8 West v. State, 8 Tex. App. 119.

9 See, infra, §§ 1082-1090.

10 See, infra, § 1093.

11 See, infra, § 1092.

12 See, infra, §§ 1107-1109.

13 See, infra, §§ 1095 et seq.

14 See, infra, §§ 1110-1112. See: ALA.—Burnett v. State, 89 Ala. 165, 7 So. 414. ARK.—State v. Green, 24 Ark. 591. CAL.—People v. Brilliant, 58 Cal. 214; People v. Kelly, 59 Cal. 372; People v. Ah Bean, 77 Cal. 12, 18 Pac. 815. ILL.—Kimmel v. People, 92 Ill. 457. IND.—Stefani v. State, 124 Ind. 3, 24 N. E. 254; State v. Hopper, 133 Ind. 460, 32 N. E. 877. IOWA—State v. Schill, 27 Iowa 263; State v. Booth, 88 N. W. 344. KAN.—State v. Gregory, 46 Kan. 290, 26 Pac. 747. KY.—Ross v. Com., 14 Ky. L. Rep. 590, 20 S. W. 1043; Com. v. Lashley, 25 Ky. L. Rep. 58, 74 S. W. 658; Goslin v. Com., 28 Ky. L. Rep. 683, 90 S. W. 223; Com. v. Combs, 30 Ky. L. Rep. 1300, 101 S. W. 312. MASS.—Com. v. Alden, 14 Mass. 388; Com. v. Warden, 52 Mass. (11 Metc.) 406; Com. v. Bouvier, 164 Mass. 398, 41 N. E. 561. MINN.—State v. Madigan, 57 Minn. 425, 59 N. W. 490. MISS.—State v. Jolly, 73 Miss. 42, 18 So. 541. MO.—State v. Huckby, 87 Mo. 414; State v. Walker, 190 Mo. 367, 91 S. W. 899; State v. Gordon, 196 Mo. 185, 95 S. W. 420. N. Y.—Tuttle v. People, 36 N. Y. 431, 2 Transc. App. 306; People v. Phelps, 5 Wend. 9. N. C.—State v. Gates, 107 N. C. 832, 12 S. E. 319;

Charging accused was called and sworn as a witness, implies that he was "lawfully required to depose as to the truth in a proceeding in a court of justice," within the provisions of the statute.[15] Charging taking an oath before a judge and giving the false evidence before the jurors, is proper.[16] False affidavit for a continuance being charged, the indictment or information must aver that the cause was pending in the court; that application for a continuance had been made; that the affidavit was material on the hearing of such application, and show in what its falsity consisted.[17] It is not necessary to allege whether the accused was subpœnaed as a witness or attended voluntarily,[18] nor allege whether the false evidence was oral or written, or allege facts showing materiality;[19] need not aver where the oath was administered,[20] nor name the clerk who administered the same;[21] and where accused is charged with falsely swearing another delivered to a banker a package containing county orders, the orders need not be described.[22] Charging accused with falsely swearing to an affidavit in attachment proceedings that he was the attorney for the plaintiff, it is not necessary to allege that he was an attorney

State v. Thompson, 113 N. C. 638, 18 S. E. 211. OKLA.—Fisher v. United States, 1 Okla. 252, 31 Pac. 195; Stanley v. United States, 1 Okla. 336, 33 Pac. 1025; Morford v. Territory, 10 Okla. 714, 54 L. R. A. 513, 63 Pac. 958. ORE.—State v. Ah Lee, 18 Ore. 540, 23 Pac. 424. PA.—Com. v. Jerome, 29 Leg. Int. 165. TENN.—State v. Stillman, 47 Tenn. (7 Coldw.) 341. TEX.—Bradberry v. State, 7 Tex. App. 375; Brown v. State, 9 Tex. App. 171; Cox v. State, 13 Tex. App. 479; Carver v. State, 33 Tex. Cr. Rep. 557, 28 S. W. 472. VT.—State v. Webber, 78 Vt. 463, 62 Atl. 1018. FED.—United States v. Walsh, 22 Fed. 644; United States v. Cuddy, 39 Fed. 696; Noah v. United States, 62 C. C. A. 618, 128 Fed. 270.

15 Com. v. Wright, 166 Mass. 174, 44 N. E. 129.

16 State v. Wetherow, 7 N. C. (3 Murph.) 153.

17 Morrell v. People, 32 Ill. 499.

18 Com. v. Knight, 12 Mass. 274, 7 Am. Dec. 72.

19 Barnes v. State, 8 Ohio Cir. Dec. 153, 15 Ohio Cir. Ct. Rep. 14.

See, however, infra, §§ 1095-1106.

20 Com. v. Alden, 14 Mass. 388.

21 Smith v. People, 32 Cal. 251, 75 Pac. 914.

22 Kimmel v. People, 92 Ill. 457.

at law;[23] and charging false swearing to a written instrument, the instrument need not be set out.[24] But on a charge of falsely swearing to an affidavit, it must be alleged the affidavit was made by the person accused.[25] Charging perjury in falsely listing amount of money in bank, it must be alleged that the money in question was payable on demand, under a statute defining as "money" deposits which owner could withdraw on demand.[26] Charging perjury at preliminary examination of accused for the alleged offense of indecent exposure of person, neither the facts constituting the exposure nor the guilt of the accused need be alleged.[27] Perjury charged in an application for a continuance of a criminal cause, it is not necessary to set out the former indictment;[28] and where such charge is in reference to testimony respecting a game of cards, it is not necessary to set out the name of the game.[29] An indictment or information reciting the material facts accused is alleged to have testified falsely to, and then finally averring that accused committed perjury by swearing to "the falsehoods above set forth," is sufficient.[30]

§ 1058. —— AS TO FORM AND SUFFICIENCY—IN GENERAL. We have already noted that the rules regulating the mode in which indictments are to be framed on a charge of perjury are not changed by statutes defining and punishing perjury,[1] even though the statute embraces cases

23 State v. Madigan, 57 Minn. 425, 59 N. W. 490.

24 United States v. Walsh, 22 Fed. 644. This decision was under U. S. Rev. Stats., § 5396, 5 Fed. Stats. Ann. (1st Ed.) 705. See U. S. Criminal Code, § 125, 3 Kerr's Whart. Crim. Law, p. 2477.

25 Copeland v. State, 23 Miss. (1 Cush.) 257.

26 Parker v. State, 44 Tex. Cr. Rep. 147, 69 S. W. 75.

27 State v. Perry, 117 Iowa 463, 91 N. W. 765.

28 Ross v. State, 40 Tex. Cr. Rep. 349.

29 Bailey v. State, 41 Tex. Cr. Rep. 157, 53 S. W. 117.

30 Com. v. Wright, 166 Mass. 174, 44 N. E. 129.

1 See, supra, § 1057, footnote 2. Iowa statute providing that "in an indictment for perjury . . . it is sufficient to set forth . . . in what

which were not before embraced by the law;[2] and where the indictment or information is not framed in compliance with these requirements, it may be assailed for the first time on appeal, on the ground that it does not state facts sufficient to constitute a cause of action.[3] By special provisions, under some statutes, an indictment or information is sufficient if the essential constituents of the offense are alleged in plain and intelligible language, without following the common-law precedent;[4] but in all jurisdictions it is necessary that (1) the offense be averred directly, positively and with certainty, not inferentially or by way of argument;[5] (2) the style of the court before which the perjury is alleged to have been committed must be correctly set out;[6] (3) the accused must be properly distinguished and identified;[7] (4) the location of the offense must be fixed;[8] (5) properly identify and cor-

court or before whom the oath alleged to be false was taken and that the court or person before whom it was taken had authority to administer the same" should be given a liberal interpretation as a remedial statute, relieving the prosecution from undue technical requirements.—State v. Harter, 131 Iowa 199, 9 Ann. Cas. 764, 108 N. W. 232.

2 People v. Collier, 1 Mich. 137, 48 Am. Dec. 699.

3 State v. Coyne, 214 Mo. 344, 21 L. R. A. (N. S.) 993, 114 S. W. 8.

Variance between indictment and proof in surname of deceased, in a homicide case, may be raised for the first time on appeal, and is reversible error.—Clark v. State, 100 Miss. 751, Ann. Cas. 1914A, 463, 38 L. R. A. (N. S.) 187, 57 So. 209.

4 State v. Harter, 131 Iowa 199, 9 Ann. Cas. 764, 108 N. W. 232; Bradberry v. State, 7 Tex. App. 375; West v. State, 8 Tex. App. 119; Brown v. State, 9 Tex. App. 171.

5 United States v. Morgan, 1 Morr. (Iowa) 341; Tuttle v. People, 36 N. Y. 431; State v. Powell, 28 Tex. 626.

6 State v. Street, 5 N. C. (1 Murph.) 156, 3 Am. Dec. 682.

7 Designation and identification of accused in an indictment for perjury alleged to have been committed before a grand jury by charging that it was material to inquire of "one Aaron H. Miller" concerning the subject under investigation, the fact that he was afterwards referred to in the indictment as "said Aaron H. Miller" does not render the indictment objectionable for a failure to show that the Aaron H. Miller referred to was the accused.—People v. Miller, 264 Ill. 148, Ann. Cas. 1915B, 1240, 106 N. E. 191.

8 People v. Miller, 264 Ill. 148,

rectly describe the proceedings;[9] (6) allege legality and sufficiency of proceedings,[10] and (7) allege necessity and materiality of the testimony.[11] Although it has been said that an indictment or information is sufficient which sets out that certain issues were duly joined between the parties in a case named, that the cause came on to be tried in due form of law, and that certain testimony therein, particularly specified, given by the accused on the trial, was knowingly and wilfully false,[12] yet it is thought that it is not sufficient to aver generally the falsity of the testimony,[13] because in failing to aver that the alleged false testimony or oath was as to material facts or matters[14] the indictment or information will be fatally defective.[15] And it has been said that charging perjury "by

Ann. Cas. 1915B, 1240, 106 N. E. 191.

See, infra, § 1059.

9 See, infra, §§ 1074 et seq.

Perjury charged to have been committed in preliminary examination of one warrant against two persons, is not sustained by proof showing a preliminary examination of two warrants, one against each of two persons. The variance was held fatal, although such persons are identical with those referred to in the joint case.—Wilson v. State, 115 Ga. 206, 90 Am. St. Rep. 104, 41 S. E. 696.

10 **Charging a lister with perjury,** in that he violated his official oath, is bad unless it contain an allegation of the election of the requisite number of listers and that they qualified and acted as such, under a statute by which towns are required to elect a certain number of listers constituting a board, a majority of which is essential to legal action.—State v. Peters, 57 Vt. 86, 5 Am. Cr. Rep. 591.

Perjury assigned upon testimony given in a mayor's court on the trial for a violation of a municipal ordinance, the existence of the ordinance should be alleged and proved.—Freeman v. State, 19 Fla. 552, 4 Am. Cr. Rep. 470, 473.

11 See, infra, §§ 1095 et seq.

12 State v. Miller, 26 R. I. 282, 3 Ann. Cas. 943, 58 Atl. 882.

Charging accused falsely swore that a certain party was not at a designated church on a named Sunday, when in fact the accused was not at such church on such Sunday, and did not know whether or not he was there, is sufficient, the last pronoun evidently relating to the third party and not to the accused.—Com. v. Miles, 140 Ky. 577, 140 Am. St. Rep. 401, 131 S. W. 385.

13 State v. Mumford, 12 N. C. (1 Dev. L.) 519, 17 Am. Dec. 573.

See, infra, § 1110.

14 **As to necessity of alleging materiality,** see, infra, §§ 1095-1106.

15 State v. Mace, 76 Me. 64, 5

falsely swearing to material matter in a writing signed by him" against accused, is insufficient, even after verdict,[16] by reason of its failure to set out facts showing that the oath was authorized or required by law,[17] because the allegation of materiality, without setting out facts showing such materiality, merely states a conclusion of law, and if the court can see from the pleading that the testimony was not material, or that the oath was not authorized or required by law, the indictment or information will be set aside, notwithstanding the materiality of the testimony or oath is alleged.[18] It is not necessary that it should be made to appear whether the witness was subpœnaed, or whether he attended voluntarily, or that the false testimony was given in answer to a specific interrogatory.[19]

§ 1059. ——— ALLEGATION AS TO VENUE. An indictment or information charging perjury should allege that the act complained of occurred in the county in which the prosecution is had,[1] except in those cases in which the false testimony, or false oath, was in a trial or proceeding authorized by a federal statute, in which case the prosecution must be conducted in a federal court, even though the offense was committed in a state court, or in an extra-judicial proceeding within the state:[2] e. g., false

Am. Cr. Rep. 588; Moore v. State, 91 Miss. 250, 124 Am. St. Rep. 652, 44 So. 817; United States v. Rhodes, 212 Fed. 518.

16 State v. Mace, 76 Me. 64, 5 Am. Cr. Rep. 588.

17 Id.

18 United States v. Rhodes, 212 Fed. 518.

19 Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72.

1 State v. Hopper, 133 Ind. 460, 32 N. E. 877; State v. Bunker, 38 Kan. 737, 17 Pac. 65; Guston v. People, 61 Barb. (N. Y.) 35, sub nom. Geston v. People, 4 Lans. (N. Y.) 487.

2 ARK.—State v. Kirkpatrick, 32 Ark. 117. CAL.—People v. Kelly, 38 Cal. 145, 99 Am. Dec. 360. GA.—Ross v. State, 55 Ga. 192. IND.—State v. Adams, 4 Blackf. 146. N. H.—State v. Pike, 15 N. H. 83. FED.—In re Loney, 134 Cal. 372, 33 L. Ed. 949, 10 Sup. Ct. Rep. 584; United States v. Cornell, 2 Mass. 60, Fed. Cas. No. 14,867; Ex parte Bridges (Brown v. United States), 2 Woods 428, Fed. Cas. No. 1,862.

affidavit as to residence in an application to obtain a land grant, because state courts have no jurisdiction to punish crimes against the United States as such;[3] perjury before a United States commissioner;[4] a false oath in testifying before a notary public upon a contest of election for a seat in the house of representatives;[5] false swearing in a naturalization proceeding,[6] although the contrary has been held, as to the latter case, in so far as the perjury is an offense against the state.[7] Where the term of a state court, by provision of law and consent of the federal officials, is held in a room of a United States custom-house, situated within the limits of the county and town, but under exclusive federal control, the state court has jurisdiction to punish perjury committed in a trial before the court at a term thus held.[8] Perjury charged to have been committed in the village of Sandy Hill, it being alleged that the court at which it was committed was held at the town of Kingsbury, in which the village of Sandy Hill was situated, this was held to sufficiently charge the commission of the crime in the county of Washington, and that the courts will take judicial notice of the fact that the village of Sandy Hill is situated in the town of Kingsbury.[9] Where it was alleged that the oath was

[3] People v. Kelly, 38 Cal. 145, 99 Am. Dec. 360; State v. Adams, 4 Blackf. (Ind.) 146; State v. Pike, 15 N. H. 83; United States v. Cornell, 2 Mass. 91, Fed. Cas. No. 14,868; Ex parte Bridges (Brown v. United States), 2 Woods 428, Fed. Cas. No. 1,862. See People v. Fonda, 62 Mich. 401, 29 N. W. 26 (embezzlement by clerk of national bank); Com. v. Dale, 3 Pa. Co. Ct. Rep. 30 (offense against national currency act).

[4] Ross v. State, 55 Ga. 192, 21 Am. Rep. 278; State v. Pike, 15 N. H. 83; In re Fair, 100 Fed. 149.

[5] In re Loney, 134 U. S. 372, 33 L. Ed. 949, 10 Sup. Ct. Rep. 384.

[6] People v. Sweetman, 3 Park. Cr. Rep. (N. Y.) 358.

[7] State v. Whitmore, 50 N. H. 245, 9 Am. Rep. 196; Rump v. Com., 30 Pa. St. 475; United States v. Severino, 125 Fed. 951.

[8] Exum v. State, 90 Tenn. 501, 25 Am. St. Rep. 700, 15 L. R. A. 381, 17 S. W. 107.

[9] Wood v. People, 1 Hun (N. Y.) 381, 3 Thomp. & C. (N. Y.) 506, reversed on another point, 59 N. Y. 117.

administered in a designated circuit in a named county, in a given state, it sufficiently appears therefrom that such oath was taken in said county and state.[10] Perjury before a grand jury, alleging that the testimony was material in investigating whether any game had been played with cards for money in the city of Sullivan, township of Sullivan, county of Moultrie, within a designated period; that accused was called as a witness, and, having taken a lawful oath, falsely deposed that he had not been present when any game had been played with cards for money in the city of Sullivan within the designated period, it was held that the indictment was sufficient as to the location of the city of Sullivan in alleging the location of the offense.[11]

§ 1060. ——— At common law. An indictment at common law charging perjury required great particularity in its allegations;[1] but the particularity and technicality of the common law, in charging perjury, have been done away with by statute in most, if not all, the jurisdictions.[2] Where the common-law crime of perjury and statutory perjury are substantially the same, a common-law form of indictment charging perjury will support a conviction for the statutory offense;[3] but where the crimes are different,[4] or where the statute uses technical terms in describing and defining the offense, the rule is otherwise.[5] A common-law indictment for perjury charging that accused "did voluntarily and of his own

10 State v. Walls, 54 Ind. 407.

11 People v. Miller, 264 Ill. 148, Ann. Cas. 1915B, 1240, 106 N. E. 191.

1 N. C.—State v. Gallimon, 24 N. C. (2 Ired. L.) 372. TENN.—State v. Stillman, 47 Tenn. (7 Coldw.) 341; Lawson v. State, 71 Tenn (3 Lea) 309. VA.—Com. v. Lodge, 43 Va. (2 Gratt.) 579. ENG.—R. v. Carter, 6 Mod. 168, 87 Eng. Repr. 924; R. v. Dowlin, 5 T. R. 311, 101 Eng. Repr. 174.

2 See, supra, § 1057.

3 State v. Eaid, 55 Wash. 302, 33 L. R. A. (N. S.) 946, 104 Pac. 275.

See, supra, § 1057, footnote 3.

4 Wile v. State, 60 Miss. 260.

See, supra, § 1057, footnote 4.

5 Allen v. State, 42 Tex. 12.

free will and accord, propose to purge himself upon oath of the said contempt," negativing, by express averments, the truth of the oath, and concluding that accused "did knowingly, falsely, wickedly, maliciously, and corruptly commit wilful and corrupt perjury," etc., is good.[6]

§ 1061. ——— ALLEGATION IN LANGUAGE OF STATUTE. Where the statute defining the crime of perjury also prescribes the form and essential allegations of an indictment or information therefor, it will usually be sufficient to follow the language of the statute.[1] But in West Virginia, and perhaps elsewhere, it is held not to be sufficient to charge in the exact words of the statute; that all the facts and circumstances, such as time,—where time is of the essence,—place, manner, and occasion of the offense, should be set out with such particularity and certainty as to give accused reasonable notice of the charge against him.[2]

§ 1062. ——— FOLLOWING STATUTORY FORM. The statutes in some jurisdictions not only define and punish perjury, but also prescribe the form in which the indictment or information shall be drawn. These statutory forms may be safely followed in all those cases in which the form prescribed (1) sets forth clearly and specifically

6 Respublica v. Newell, 3 Yeates (Pa.) 407, 2 Am. Dec. 381.

1 ALA.—Brown v. State, 47 Ala. 47; Williams v. State, 68 Ala. 551; Peterson v. State, 74 Ala. 34; Walker v. State, 96 Ala. 53, 11 So. 401. CAL.—People v. Parsons, 6 Cal. 487; People v. Ross, 103 Cal. 427, 37 Pac. 379. IND.—State v. Walls, 54 Ind. 407; Masterson v. State, 144 Ind. 240, 43 N. E. 138. IOWA—State v. Porter, 105 Iowa 677, 75 N. W. 519. LA.—State v. Matlock, 48 La. Ann. 663, 19 So. 669. MD.—State v. Bixler, 62 Md. 354. MINN.—State v. Thomas, 19 Minn. 484. N. Y.—People v. Williams, 92 Hun 354, 36 N. Y. Supp. 511, affirmed 149 N. Y. 1, 11 N. Y. Cr. Rep. 557, 43 N. E. 407. N. C.—State v. Thompson, 113 N. C. 638, 18 S. E. 211. OHIO—Crusen v. State, 11 Ohio St. 258. OKLA.—Stanley v. United States, 1 Okla. 336, 33 Pac. 1025. ORE.—State v. Ah Lee, 18 Ore. 540, 23 Pac. 424. TEX.—State v. Peters, 42 Tex. 7.

2 Stofer v. State, 3 W. Va. 692.

all the elements of the offense charged; (2) apprises the accused, with reasonable certainty, of the exact charge against him and which he must meet on the trial, and (3) enables the court to see from the face of the indictment or information whether the acts charged constitute the crime alleged;[1] but in all those cases where an indictment or information, in the statutory form, fails to accomplish either of these things, it will be insufficient.[2] The legislature may abbreviate, simplify, and in many other respects modify and change, the form of indictments or informations; but it can not make valid and sufficient an indictment or information in which the accusation is not set forth with sufficient fullness to enable the accused to know, with reasonable certainty, what the matter of fact is which he is required to meet, and enable the court to see, without going out of the record, that a crime has been committed.[3]

1 ALA.—Hicks v. State, 86 Ala. 30, 5 So. 425; Barnett v. State, 89 Ala. 165, 7 So. 414; Walker v. State, 96 Ala. 53, 11 So. 401; Smith v. State, 103 Ala. 57, 11 So. 866; Johnson v. State, 3 Ala. App. 98, 57 So. 389. KY.—Com. v. Combs, 30 Ky. L. Rep. 1300, 101 S. W. 312. MISS.—State v. Jolly, 73 Miss. 42, 18 So. 541. MO.—State v. Huckby, 87 Mo. 414. N. C.—State v. Gates, 107 N. C. 832, 12 S. E. 319; State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Thompson, 113 N. C. 638, 18 S. E. 211. ORE.—State v. Spencer, 6 Ore. 152; State v. Ah Lee, 18 Ore. 540, 23 Pac. 424. TENN.—State v. Stillman, 47 Tenn. (7 Coldw.) 341. VT.—State v. Webber, 78 Vt. 463, 62 Atl. 1018. FED.—United States v. Cuddy, 39 Fed. 696; United States v. Clark, 46 Fed. 640.

"Repeatedly held in this state that the form of indictment given in the statute was sufficient."—State v. Gugielmo, 46 Ore. 253, 7 Ann. Cas. 976, 69 L. R. A. 466, 79 Pac. 579, citing State v. Dodson, 4 Ore. 64; State v. Spencer, 6 Ore. 152; State v. Brown, 7 Ore. 186; State v. Lee Yan Yan, 10 Ore. 365; State v. Ah Lee, 18 Ore. 540, 23 Pac. 242.

Doctrine followed in Cutter v. Territory, 8 Okla. 110, 56 Pac. 863, and United States v. Clark, 46 Fed. 640.

Substantially in code form, sufficient.—Johnson v. State, 3 Ala. App. 98, 57 So. 389.

2 State v. Mace, 76 Me. 64, 5 Am. Cr. Rep. 588.

3 Id. State v. Learned, 47 Me. 426.

§ 1063. ——— AVERMENT SHOWING JURISDICTION OF COURT, ETC. In those cases in which the court, board, officer, and the like, has no jurisdiction of the cause, offense, or the person of the defendant, perjury can not be predicated upon the alleged false testimony given, or false oath made, by a witness;[1] although it is otherwise in those cases in which the proceedings are merely erroneous or voidable, the court having jurisdiction.[2] Hence, every indictment or information charging perjury must aver (1) before what court, body, or authority the alleged offense was committed,[3] and (2) allege that the court, magistrate, officer, or other tribunal, had jurisdiction of the cause, controversy, or subject-matter, and of the parties;[4] but this allegation may be made either by direct averment or by a statement of facts from which jurisdiction can be inferred,[5]—as by an allegation that the per-

1 Morford v. Territory, 10 Okla. 741, 54 L. R. A. 513, 63 Pac. 958.

2 See, infra, § 1085.

3 Kerr v. People, 42 Ill. 307; State v. Harlis, 33 La. Ann. 1172; Guston v. People, 61 Barb. (N. Y.) 35, sub nom. Geston v. People, 4 Lans. (N. Y.) 487; State v. Street, 5 N. C. (1 Murph.) 156, 3 Am. Dec. 682; State v. Oppenheimer, 41 Tex. 82; United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16,692.

4 ILL.—Maynard v. People, 135 Ill. 416, 25 N. E. 740. IOWA—State v. Cunningham, 66 Iowa 94, 6 Am. Cr. Rep. 551, 23 N. W. 280. ME.—State v. Plummer, 50 Me. 217. OKLA.—Rich v. United States, 1 Okla. 354, 33 Pac. 804. TENN.—Steinston v. State, 14 Tenn. (6 Yerg.) 531. TEX.—State v. Oppenheimer, 41 Tex. 82; Anderson v. State, 18 Tex. App. 17. VA.—Com. v. Pickering, 49 Va. (8 Gratt.) 628, 56 Am. Dec. 153.

Poor debtor's oath, assigned as perjury, it is not necessary to aver that the oath was administered within the limits of the prison.—Com. v. Alden, 14 Mass. 388.

Town lister charged with perjury, in that he had violated his official oath, is defective without allegation of the election of the requisite number of listers, and that they qualified and acted as such, under a statute requiring towns to elect annually three, four or five listers, who constitute a board, a majority of which is essential to legal action; one acting alone has no jurisdiction; his acts would be void.—State v. Peters, 57 Vt. 86, 5 Am. Cr. Rep. 591.

5 ILL.—Maynard v. People, 135 Ill. 416, 25 N. E. 740. IOWA—State v. Cunningham, 66 Iowa 94, 6 Am. Cr. Rep. 551, 23 N. W. 280. LA.—State v. Grover, 38 La. Ann. 567; State v. Thibodaux, 49 La.

jury was committed in the trial of an issue duly joined, without an express allegation that the cause of action was within the jurisdiction of the court,[6] although the contrary has been held.[7] Where the indictment or information contains a general averment of the jurisdiction of the court, officer, or other tribunal, over the cause or proceeding in which the perjury is alleged to have been committed, it need not set forth the facts by virtue of which that jurisdiction attaches;[8] and where the cause in which the perjury was committed is alleged to have been a criminal action, it is not necessary to aver that the court was held for criminal business,[9] or that the trial was had before a trial justice, and "was commenced on information under oath."[10]

Illustrations as to jurisdiction—A board. Perjury alleged to have been committed before a board, the indictment or information is fatally defective which does not set forth the jurisdiction of the board with certainty;[11] but where perjury at an election is charged, it is not a valid objection to the indictment or information that it

Ann. 15, 21 So. 127. TEX.—Anderson v. State, 18 Tex. App. 17.

Allegation clerk of the court had authority to administer, it is a sufficient averment that the court had jurisdiction of the cause in which the perjury was charged to have been committed, under a statute which merely requires that the indictment shall set forth the court or person before whom the oath was taken, and that the court or person had authority to administer it.—Gray v. State, 4 Okla. Cr. 292, 32 L. R. A. (N. S.) 142, 111 Pac. 825.

6 Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72.

7 See Com. v. Pickering, 49 Va. (8 Gratt.) 628, 56 Am. Dec. 158.

Thus, in Steinston v. State, 14 Tenn. (6 Yerg.) 531, an indictment charging the accused with perjury in "the matter of traverse joined between the State of Tennessee and Matthew P. Dunn, tried in the county court of Weakley for an assault and battery," was held not to sufficiently charge the jurisdiction of the court before which the cause was tried.

8 CAL.—People v. De Carlo, 124 Cal. 462 57 Pac. 383. MO.—State v. Belew, 79 Mo. 584. N. Y.—Eighmy v. People, 79 N. Y. 546. TEX.—State v. Peters, 42 Tex. 7.

9 Com. v. Bouvier, 164 Mass. 398, 41 N. E. 651.

10 State v. Byrd, 28 S. C. 18, 13 Am. St. Rep. 660, 4 S. E. 793.

11 State v. McCone, 59 Vt. 117, 7 Atl. 406.

does not state the inspectors of election of the ward before which board the alleged perjury was committed were acting for such ward.[12] Charging perjury to have been committed by a witness in the course of a proceeding pending before the "board of commissioners of said county," the name of the county having been previously mentioned, sufficiently names the board.[13]

—— *Corporation court,* of a designated city, trying a criminal cause charging gambling, an indictment or information alleging perjury in such trial which merely avers that the gambling complained of occurred in the county, but does not allege that the games were played within the city in which the corporation court was held, is fatally defective, because it fails to allege facts sufficient to confer jurisdiction upon such court to try the cause in which the perjury is alleged to have been committed.[14]

—— *Justices' court* charged as the body before which perjury is alleged to have been committed upon a trial of a cause held therein, it is sufficient to aver in relation to the jurisdiction that it was at a justices' court held at the proper time and place, on an issue duly joined in his court in a cause which came on to be tried in due form of law, and that the justice had sufficient authority to administer the oath, without alleging that the cause in which the perjury is alleged to have been committed was within the jurisdiction of the justice.[15] An allegation that the magistrate before whom accused testified "then and there had full power and authority to administer the

12 Burns v. People, 59 Barb. (N. Y.) 531.

13 State v. Schultz, 57 Ind. 19.

14 Under the Texas statute the corporation court would have been without jurisdiction unless the gambling had taken place within the city, and the alleged false testimony would therefore not have been material. In such a prosecution testimony tending to show that the gambling occurred beyond the territorial limits of the city, and that therefore the court in which the alleged perjury occurred was without jurisdiction, is erroneously excluded.—Moss v. State, 47 Tex. Cr. Rep. 459, 11 Ann. Cas. 710, 83 S. W. 829.

15 State v. Newton, 1 G. Greene (Iowa) 160, 48 Am. Dec. 367.

said oath to the said" accused "in that behalf," is a sufficient averment, by necessary inference, that such magistrate had such jurisdiction.[16] It is not necessary to set out the name of the justice before whom the trial was had;[17] but where the offense is alleged to have been committed in a designated town and county of the state, in the court of a designated person, a justice of the peace, which court had authority to administer an oath, sufficiently describes and designates the court,[18] although it is not a description of the court by its official title.[19]

—— *Grand jury* alleged as the body before which perjury is charged to have been committed, it is necessary to aver that an offense was under investigation by that body,[20] and to specify the subject-matter thereof;[21] but it is not necessary to allege that the grand jury had jurisdiction over the subject-matter of the inquiry,[22] or that the person whose alleged offense was being investigated, and respecting which the accused swore falsely, was or was not guilty of the offense charged, or set out the facts in regard to such offense.[23] It is not necessary to allege that the grand jury was selected at a meeting of the board of supervisors properly convened, or in other manner pointed out and provided by law, nor to prove such fact, under a statute providing that an indictment for perjury shall be sufficient without setting out the com-

16 Maynard v. People, 135 Ill. 416, 25 N. E. 740; State v. Davis, 69 N. C. 495.

17 State v. Flowers, 109 N. C. 841, 13 S. E. 718.

18 State v. Stein, 48 Minn. 466, 51 N. W. 474.

19 Oath is alleged to have been taken before "Joseph Pratt, a justice of the peace in and for said county," instead of "a court of a justice of the peace for township A, of Chowan county," is not a substantial variance. — State v. Davis, 69 N. C. 495.

20 Banks v. State, 78 Ala. 14; State v. Wiggins (Miss.), 30 So. 712; People v. Tatum, 60 Misc. (N. Y.) 311, 22 N. Y. Cr. Rep. 557, 42 N. Y. Supp. 36; Gallegos v. State, 50 Tex. Cr. Rep. 190, 95 S. W. 123.

21 Com. v. Taylor, 96 Ky. 394, 29 S. W. 138; State v. Webber, 78 Vt. 463, 62 Atl. 1018.

22 State v. Keel, 54 Mo. 182; People v. Greenwell, 5 Utah 112, 13 Pac. 89.

23 State v. Schill, 27 Iowa 263.

mission or authority of the court, or body, or officer, before whom the perjury was committed.[24]

—— *Legislative committee* appointed to investigate a charge of bribery of members of a legislative body at an election by that body, being charged as the court or body before which perjury was committed, the indictment or information must allege that the election under investigation was one authorized by law to be held by the legislature, and failing to do so, will be fatally defective.[25]

—— *Referee* charged to be the officer before whom an alleged perjury was committed, an indictment or information setting out the appointment of the referee in an action then pending in a named court in a designated cause, naming the parties, but not alleging in terms the commencement and pendency of such cause, is a sufficient averment to show that the court had jurisdiction of the parties.[26]

—— *Regimental court of inquiry* being charged as the body before whom perjury was committed, the indictment or information must set forth the number of officers that constituted the court and what were their ranks respectively, in order that the trial court may determine whether the regimental court was instituted according to law.[27]

§ 1064. ———— AVERMENT AS TO INTENT. Intent being an essential element in every crime except those which are simply malum prohibitum, and perjury being an offense which is a crime because of its nature and not because it is prohibited simply, an indictment or information charging the commission of perjury must allege an intent of the accused to wilfully[1] and to

24 People v. Miller, 264 Ill. 148, Ann. Cas. 1915B, 1240, 106 N. E. 191.

25 Com. v. Hillenbrand, 96 Ky. 407, 29 S. W. 287.

26 Eighmy v. People, 79 N. Y. 546.

27 Conner v. Com., 4 Va. (2 Va. Cas.) 30.

1 CAL.—People v. Turner, 122 Cal. 679, 55 Pac. 685. FLA.—Parrish v. State, 18 Fla. 902. IOWA—State v. Morse, 1 G. Greene 503. MO.—State v. Morse, 90 Mo. 91, 2

corruptly[2] swear falsely; and in those cases in which perjury is made a felony by statute, it must also be charged as having been feloniously done,[3] although it is otherwise under statutes in which the word "felonious" or "feloniously" is not used in the description and definition of the offense.[4] The appropriate technical words in which to describe the offense are given in a subsequent section.[5]

§ 1065. ——— AVERMENT AS TO TIME. It has been said that an indictment or information charging perjury must lay the date on which the offense was committed with certainty,[1] but it is thought that where time is not

S. W. 137. N. C.—State v. Davis, 84 N. C. 787. VA.—Thomas v. Com., 41 Va. (2 Rob.) 795. FED.—United States v. Eddy, 134 Fed. 114.

2 ILL.—Wilkinson v. People, 226 Ill. 135, 80 N. E. 699. IOWA—State v. Morse, 1 G. Greene 503. MO.—State v. Morse, 90 Mo. 91, 2 S. W. 137. N. C.—State v. Davis, 84 N. C. 787. VA.—Thomas v. Com., 41 Va. (2 Rob.) 795.

3 ARK.—Nelson v. State, 32 Ark. 192. KY.—Com. v. Swanger, 108 Ky. 579, 57 S. W. 10. MISS.—Wile v. State, 60 Miss. 260. MO.—State v. Williams, 30 Mo. 364. N. C.—State v. Bunting, 118 N. C. 1200, 24 S. E. 118.

4 State v. Harris, 145 N. C. 456, 59 S. E. 115.

5 See, infra, § 1067.

1 State v. Offutt, 4 Blackf. (Ind.) 355; State v. Peters, 107 N. C. 876, 12 S. E. 74; State v. Oppenheimer, 41 Tex. 82; Rhodes v. Com., 78 Va. 692; United States v. Bowman, 2 Wash. 328, Fed. Cas. No. 14,631; United States v. Law, 50 Fed. 915.

In North Carolina, where the indictment misdescribes the term at which the crime was committed, the error is fatal.—State v. Lewis, 93 N. C. 581.

Not sufficiently set forth where allegation in reference to time is stated to be "heretofore, to-wit, at the supreme judicial court begun and holden at Machias within and for the county of Washington aforesaid, on the first Tuesday of January in the year of our Lord one thousand eight hundred and eighty-six."—State v. Fenlason, 79 Me. 117, following State v. Hanson, 39 Me. 337.

To charge that it was committed "on the —— day of September, 1891," is insufficient.—United States v. Law, 50 Fed. 915.

Variance of one day was held not fatal in Keator v. People, 32 Mich. 484. But where indictment charged the perjury to have been committed at the circuit court, held on the "19th day of May," and the record showed the court to have been held on the "20th day of May," the variance was held to be fatal.—United States v. McNeal, 1 Gall. 387, Fed. Cas. No. 15700.

an essential ingredient of the offense, it need not be laid with exactness,[2] further than to show that the offense took place before the indictment was found or the information filed,[3] and within a period in which prosecution thereof may be had,[4] it being sufficient to aver that the offense charged was committed "on or about" a given date;[5] although there is authority to the effect that in prosecutions for perjury the common-law rule that the time when the crime was committed must be truly laid in the indictment, and proved as laid,[6] and that this is true particularly in those cases in which the time stated is to be proved by matter of record.[7]

2 GA.—Clarke v. State, 90 Ga. 448, 16 S. E. 96. IOWA—State v. Perry, 117 Iowa 463, 91 N. W. 765. N. Y.—People v. Hoag, 2 Park. Cr. Rep. 9. N. C.—State v. Peters, 107 N. C. 876, 12 S. E. 74. TEX.—Foreman v. State, 47 Tex. Cr. Rep. 179, 85 S. W. 809.

Charging that oath was administered on the second day of March, and that the perjury was committed on the third day of March, it was held that the time stated when the oath was administered was not material so that it was before the indictment and within the statute of limitations.—Wood v. People, 1 Hun (N. Y.) 381, 3 Thomp. & C. (N. Y.) 506, reversed on another point, 59 N. Y. 117.

Charging perjury committed in course of a proceeding before the board of commissioners of the county at a certain time, a subsequent averment that the perjury occurred "then and there" sufficiently fixes the time.—State v. Schultz, 57 Ind. 19.

Stating time when perjury committed as "at the April term of the Hendricks Circuit Court, in the year 1867," it is sufficient.—State v. Thrift, 30 Ind. 211.

3 State v. John (Iowa), 93 N. W. 61; Goslin v. Com., 28 Ky. L. Rep. 683, 90 S. W. 223.

4 People v. Miller, 12 Cal. 291; State v. Rust, 8 Blackf. (Ind.) 195; People v. Gregory, 30 Mich. 371; State v. G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 722; Vaugh v. Congdon, 56 Vt. 111, 48 Am. Rep. 758.

5 State v. Perry, 117 Iowa 463, 91 N. W. 765.

6 State v. Ah Lee, 18 Ore. 540, 23 Pac. 424. See: ALA.—McMurry v. State, 6 Ala. 324. CAL.—People v. Parsons, 6 Cal. 487. MASS.—Com. v. Manahan, 75 Mass. (9 Gray) 119. TEX.—State v. Oppenheimer, 41 Tex. 82. FED.—United States v. McNeal, 1 Gall. 387, Fed. Cas. No. 15700; United States v. Bowman, 2 Wash. 328, Fed. Cas. No. 14631.

7 State v. Ah Lee, 18 Ore. 540, 23 Pac. 424.

§ 1066. ——— AVERMENT AS TO PLACE. The place where the perjury was committed must be averred,[1] to the extent of giving jurisdiction to the court to try the cause; but the allegation as to place and locality as given respecting the false testimony of the accused, not being descriptive of the identity of the offense, it is not essential thereto, and a variance in the proof in respect thereto is immaterial.[2]

§ 1067. ——— APPROPRIATE TECHNICAL WORDS. The appropriate technical words and phrases in which the crime of perjury is to be charged depend largely upon the wording of the statute under which the prosecution is had.[1] The indictment or information should follow strictly the technical words found in the statute charging that the act complained of was "wilfully, corruptly, falsely, knowingly and feloniously done," where those words are used in the definition and description of the offense, and an omission of either in the indictment or information, it has been said, will be fatal to its sufficiency,[2] although it has been held otherwise as to all of such words which are not "terms of art"; thus, it has been said that any word of equal import may be used for the word "wilfully,"[3] although that word was required by the common law and is also regarded as essential under the various statutes.[4] While the word "felo-

1 People v. Miller, 264 Ill. 148, 106 N. E. 191. (Holding an indictment fatally defective for failing to aver that the perjury was committed before the grand jury.)

2 State v. Terline, 23 R. I. 530, 91 Am. St. Rep. 650, 51 Atl. 204.

1 ARK.—Marvin v. State, 53 Ark. 395. FLA. — Robinson v. State, 18 Fla. 898. GA.—King v. State, 103 Ga. 263, 30 S. E. 30. IOWA—State v. Anderson, 92 Iowa 764, 60 N. W. 630. LA.—State v. Spencer, 45 La. Ann. 1, 12 So. 135. MD.—State v. Bixler, 62 Md. 354. MO.—State v. Morse, 90 Mo. 91, 2 S. W. 137. VT.—State v. Smith, 63 Vt. 201, 22 Atl. 604. FED.—United States v. Hearing, 26 Fed. 744.

2 People v. Williams, 2 N. Y. Supp. 382.

3 People v. Ross, 103 Cal. 425, 37 Pac. 379.

4 ARK. — Marvin v. State, 53 Ark. 395. CAL.—People v. Ross, 103 Cal. 425, 37 Pac. 379. FLA.—Miller v. State, 15 Fla. 577; Robin-

niously" was essential at common law, and is still essential in all those jurisdictions in which the word "feloniously" is used in the statute,[5] yet where that word does not occur in the statutory definition, an indictment charging that accused did "wilfully, corruptly, and falsely swear," etc., will be sufficient without the use of the word "feloniously."[6] The word "falsely," essential at common law, has been held not to be essential in some jurisdictions in this country, but the careful practitioner will not omit to aver that the accused "did falsely swear" in all those cases in which the word appears in the definition and description of the offense.[7] "Corruptly" need not be used provided some other word or words of the same meaning or import are used in its place.[8] The word "knowingly" need not be used in an indictment or information unless that word appears in the definition of the offense in the statute under which the prosecution is had,[9] and where it does so appear, its omission is usually held to be fatal.[10]

son v. State, 18 Fla. 898; Parrish v. State, 18 Fla. 902. IOWA—State v. Morse, 1 G. Greene 503. LA.—State v. Gibson, 26 La. Ann. 71. MO.—State v. Day, 100 Mo. 242, 12 S. W. 365. N. C.—State v. Carland, 14 N. C. (3 Dev. L.) 114; State v. Davis, 84 N. C. 787. TEX.—Allen v. State, 42 Tex. 12; State v. Perry, 42 Tex. 238. VA.—Thomas v. Com., 41 Va. (2 Rob.) 795. FED.—United States v. Edwards, 43 Fed. 67.

5 State v. Purdie, 67 N. C. 25; State v. Shaw, 117 N. C. 764, 22 S. E. 246; State v. Bunting, 118 N. C. 1200, 24 S. E. 118; Wile v. State, 60 Miss. 260; State v. Williams, 30 Mo. 64; State v. Terry, 30 Mo. 368.

"Feloniously" used in place of "falsely" is good, especially where it is further alleged that the statements sworn to by the accused were known by him to be false at the time of making them.—State v. Anderson, 103 Ind. 170, 2 N. E. 332.

6 People v. Parsons, 6 Cal. 487.

7 State v. Nickerson, 46 Iowa 447.

8 State v. Anderson, 92 Iowa 764, 60 N. W. 630; State v. Bixler, 62 Md. 354; United States v. Hearing, 26 Fed. 744.

9 King v. State, 103 Ga. 263, 30 S. E. 30; Ferguson v. State, 36 Tex. Cr. 60, 35 S. W. 369; State v. Sleeper, 37 Vt. 122.

10 People v. Ross, 103 Cal. 425, 37 Pac. 379; Com. v. Taylor, 96 Ky. 394, 29 S. W. 138.

§ 1068. ——— INNUENDO. In those cases in which the testimony alleged to be false is of such a character that its falsity is not apparent from setting it out and a simple averment as to its being false, an innuendo[1] should be introduced into the indictment stating, after the recital of the false testimony, "meaning thereby to testify that," setting forth the real meaning of the testimony as given;[2] but when there is nothing previously stated to which it can refer, an innuendo in an indictment for perjury is bad.[3]

§ 1069. ——— JOINDER OF ASSIGNMENTS OF PERJURY. Assignments of perjury will be treated in subsequent sections,[1] but the joinder of various assignments and the effect thereof are properly treated in this place. An indictment or information charging perjury may join, in one count, all the particulars in which the accused is alleged to have testified falsely,[2] although the assignments are in relation to separate and distinct false statements,[3] where all the statements assigned as false were made under oath and in one proceeding;[4] but each assignment must be separately and distinctly stated, and if either assignment is sustained by the evidence on the trial, the indictment or information will be sufficient to

1 As to innuendo and its office, see discussion, supra, § 924.

2 State v. Lea, 3 Ala. 602; People v. German, 110 Mich. 244, 68 N. W. 150; R. v. Aylett, 1 T. R. 63, 69, 100 Eng. Repr. 973, 976.

3 People v. Collier, 1 Mich. 137, 48 Am. Dec. 699.

1 See, infra, §§ 1110-1112.

2 LA.—State v. Joiner, 128 La. 876, 55 So. 560. MASS.—Com. v. Johns, 72 Mass. (6 Gray) 274. MO.—State v. Gordon, 196 Mo. 185, 95 S. W. 420; State v. Taylor, 202 Mo. 1, 100 S. W. 41. N. C.—State v. Bordeaux, 93 N. C. 560. PA.—Cover v. Com., 5 Pa. Cas. 79, 8 Atl. 196. VT.—State v. Bishop, 1 D. Chip. 120.

3 McLaren v. State, 4 Ga. App. 643, 62 S. E. 138.

4 Cover v. Com., 5 Pa. Cas. 79, 8 Atl. 196; Castro v. R., L. R. 6 App. Cas. 229, 14 Cox C. C. 546.

Separate perjuries in distinct suits, it seems, may be joined in the same indictment, in separate counts, and upon conviction the accused may be sentenced to distinct punishments, although the suits were instituted with a common object.—L. R. 5 Q. B. Div. 490, 29 Moak's Eng. Repr. 408.

support conviction,[5] because the indictment or information will not be vitiated by a defective assignment, where one is good.[6]

§ 1070. ——— NEGATIVE AVERMENTS. An indictment or information charging perjury is not required to negative, as in the provision of the statute under which the prosecution is had,[1] that the false statement was made "through inadvertence, or under agitation, or by mistake," or other similar exception found in the statute.[2]

§ 1071. ——— SUBORNATION OF PERJURY. The offense of procuring another to testify falsely is made a distinct offense by the statutes in the various jurisdictions, but an indictment or information charging the offense of subornation of perjury must set out all the essential elements required in an indictment charging perjury,[1] and in addition thereto allegations that accused procured another to give testimony known by him and such other to be false, and that such false testimony was given,[2]

5 ALA.—De Burnie v. State, 19 Ala. 23. LA.—State v. Joiner, 128 La. 876, 55 So. 560. MASS.—Com. v. Johns, 72 Mass. (6 Gray) 274. TEX.—Foreman v. State, 47 Tex. Cr. Rep. 179, 58 S. W. 809; Higgins v. State, 50 Tex. Cr. Rep. 433, 97 S. W. 1054. VT.—State v. Smith, 63 Vt. 201, 22 Atl. 604.

More than one assignment, some of which are bad, will not vitiate the indictment.—State v. Smith, 63 Vt. 201, 22 Atl. 604.

One assignment bad, it is not reversible error to refuse to quash the indictment because of such defective assignment, or to refuse to admit testimony upon such assignment.—Foreman v. State, 47 Tex. Cr. Rep. 179, 58 S. W. 809.

6 Id. Com. v. McLaughlin, 122 Mass. 449.

1 As in Tex. Pen. Code, art. 189.

2 Brown v. State, 9 Tex. App. 171.

1 People v. Ross, 103 Cal. 425, 37 Pac. 379; Coyne v. People, 124 Ill. 17, 7 Am. St. Rep. 324, 14 N. E. 668; State v. Geer, 46 Kan. 529, 26 Pac. 1027; United States v. Wilcox, 4 Blatchf. 393, Fed. Cas. No. 16,693; United States v. Evans, 10 Sawy. 132, 19 Fed. 912. United States v. Dennee, 3 Woods 39, Fed. Cas. No. 14947.

2 ILL.—Coyne v. People, 124 Ill. 17, 7 Am. St. Rep. 324, 14 N. E. 668. MASS.—Com. v. Stone, 152 Mass. 498, 25 N. E. 967. MO.—State v. Howard, 137 Mo. 289, 38 S. W. 908. N. Y.—Elkin v. People, 28 N. Y. 177, affirmed 24 How. Pr. 272. TEX.—Watson v. State, 5 Tex. App. 11. VT.—State v. Simons, 30 Vt. 620.

because an indictment or information which fails to state that the false testimony or the false affidavit of the suborned witness was used, or procured to be used, in some cause, matter, or proceeding before some court, tribunal, public body, or officer, is fatally defective.[3] The indictment or information must also set forth the nature of the proceedings in which the false testimony was procured to be used,[4] the court in which the false testimony was given,[5] or the officer before whom the false oath was taken;[6] state that the witness giving the false testimony was duly sworn,[7] that the testimony which he gave was material,[8] and that it was false;[9] and it must be further alleged that the accused knowingly and wilfully procured such witness to swear falsely;[10] that the false witness

3 State v. Geer, 46 Kan. 529, 26 Pac. 1027.

4 People v. Carpenter, 136 Cal. 391, 68 Pac. 1027; United States v. Robinson, 4 Dak. 72, 23 N. W. 90; Smith v. State, 125 Ind. 440, 25 N. E. 508; Thompson v. State, 89 Wis. 253, 61 N. W. 535.

5 People v. Carpenter, supra; United States v. Howard, 132 Fed. 325.

6 Babcock v. United States, 34 Fed. 873; United States v. Cobban, 134 Fed. 290.

Sworn application for purchase of public lands being the proceeding in which accused is charged with subornation of perjury, it being alleged that the person suborned appeared before William Ranft, who was then and there a receiver of the United States land office within the district where the land is situated, which appears by the statement to be at a designated place, in a designated state, is sufficient.—United States v. Cobban, 134 Fed. 290.

7 People v. Carpenter, 136 Cal. 391, 68 Pac. 1027; State v. Jewett, 48 Ore. 577, 85 Pac. 994; United States v. Howard, 132 Fed. 325.

"Was in due manner sworn" is sufficient without setting forth the manner in which the oath was taken.—State v. Jewett, 48 Ore. 577, 85 Pac. 994.

8 CAL.—People v. Brilliant, 58 Cal. 218; People v. Ross, 103 Cal. 425, 37 Pac. 379. KAN.—State v. Geer, 46 Kan. 529, 26 Pac. 1027. MASS.—Com. v. Pollard, 53 Mass. (12 Metc.) 225. MICH.—Hoch v. People, 3 Mich. 554. TEX.—Miller v. State, 43 Tex. Cr. Rep. 367, 65 S. W. 908.

9 United States v. Howard, 132 Fed. 325.

10 IOWA—State v. Porter, 105 Iowa 677, 75 N. W. 519. KAN.—State v. Geer, 48 Kan. 752, 30 Pac. 236. MASS.—Com. v. Devine, 155 Mass. 224, 29 N. E. 515. TEX.—Watson v. State, 5 Tex. App. 11. FED.—United States v. Dennee, 3 Woods 39, Fed. Cas. No. 14,947.

knowingly[11] and wilfully[12] swore falsely;[13] that the accused knew that the testimony to be given by such witness would be false,[14] and that he had knowledge that such witness knew the testimony to be given to be false.[15] Where subornation of perjury is made a felony by the statute under which the prosecution is had, the indictment or information must use the word "feloniously" in charging the offense.[16] A count charging subornation of perjury may be joined with a count charging perjury.[17]

§ 1072. ———— ATTEMPT TO SUBORN. An attempt to suborn a witness is also made a special crime by statute in many of the jurisdictions, and an indictment or information charging that offense must not only follow the form of the statute under which the prosecution is had,[1] but should be as specific, definite and certain as in

11 People v. Ross, 103 Cal. 425, 37 Pac. 379; State v. Ah Lee, 18 Ore. 540, 23 Pac. 424; State v. Jewett, 48 Ore. 577, 85 Pac. 994; United States v. Cobban, 134 Fed. 290.

12 People v. Parsons, 6 Cal. 487; People v. Ross, 103 Cal. 425, 37 Pac. 379; United States v. Wilcox, 4 Blatchf. 393, Fed. Cas. No. 16,693; United States v. Evans, 10 Sawy. 132, 19 Fed. 912; United States v. Howard, 132 Fed. 325.

13 Com. v. Devine, 155 Mass. 224, 29 N. E. 515.

14 People v. Carpenter, 136 Cal. 391, 68 Pac. 1027; Com. v. Devine, 155 Mass. 224, 29 N. E. 515; United States v. Dennee, 3 Woods 39, Fed. Cas. No. 14,947; United States v. Fero, 18 Fed. 901; Babcock v. United States, 34 Fed. 873.

Positive allegation of the falsity of suborned testimony and as to the knowledge of its falsity by the accused and the suborned witness is sufficient, even though followed by the expression "whereas, in truth and in fact," notwithstanding the fact that the word "whereas" may be used as introductory to a recital, because it may also be appropriately used to introduce positive allegations.—People v. Carpenter, 136 Cal. 391, 68 Pac. 1027.

15 People v. Ross, 103 Cal. 425, 37 Pac. 379; State v. Williams, 111 La. 1033, 36 So. 111; Stewart v. State, 22 Ohio St. 477; State v. Jewett, 48 Ore. 577, 85 Pac. 994.

16 Com. v. Devine, 155 Mass. 224, 29 N. E. 515.

17 People v. Ross, 103 Cal. 425, 37 Pac. 379; Com. v. Taylor, 96 Ky. 394, 29 S. W. 138.

1 People v. Clement, 127 Mich. 130, 86 N. W. 535; Stratton v. People, 20 Hun (N. Y.) 288, affirmed 81 N. Y. 629.

an indictment for perjury.[2] That is to say, must further set forth the act or acts of the accused which would have resulted in the subornation of a witness if that act or acts had not been frustrated by extraneous circumstances;[3] that the testimony which accused tried to have given was material to the issue,[4] and that he did not believe it to be true.[5] It is not proper in charging an attempt to suborn to set out in the indictment or information the specific perjury which the accused is charged with having attempted to suborn a witness to give;[6] but it must be charged that the testimony attempted to be procured was to be given in a pending, and not in a prospective, suit.[7]

§ 1073. ——— CONCLUSION. At common law an indictment charging perjury was required to conclude with the formal allegation that "so the accused did commit wilful and corrupt perjury"; but under the statutes this formal conclusion that the accused did commit perjury is not required,[1] it being sufficient to conclude "against the form of the statute," etc.,[2] where there is but one statute in the state regarding the subject; where the indictment or information sufficiently charges the crime of common-law perjury the conclusion "contrary to the form of the statute," etc., may be rejected as surplusage.[3]

§ 1074. DESCRIPTION OF PROCEEDINGS IN WHICH OFFENSE COMMITTED—IN GENERAL. An indictment or information

2 Rivers v. State, 97 Ala. 72, 12 So. 434.

See, supra, § 1071, footnote 1.

3 Rivers v. State, 97 Ala. 72, 12 So. 434; People v. Thomas, 63 Cal. 482; Nicholson v. State, 97 Ga. 672, 25 S. E. 360; State v. Blebusch, 32 Mo. 276.

See, also, 1 Kerr's Whart. Crim. Law, § 220.

4 People v. Thomas, 63 Cal. 482; State v. Tappan, 58 N. H. 152.

5 People v. Thomas, 63 Cal. 482.

6 State v. Holding, 1 McC. L. (S. C.) 31.

7 State v. Joaquin, 69 Me. 218.

1 Henderson v. People, 117 Ill. 265, 7 N. E. 677; Massie v. State, 5 Tex. App. 81; United States v. Wood, 44 Fed. 753.

2 State v. Hoyle, 28 N. C. (6 Ired. L.) 1; State v. Peters, 107 N. C. 876, 12 S. E. 74.

3 State v. Kennerly, 10 Rich. L. (S. C.) 152.

charging perjury must set out that the false testimony or false oath was taken in a judicial proceeding[1] before a court or magistrate, or before an officer or body, having authority to administer, and having occasion to administer, the oath,[2] for the reason that perjury can not be predicated upon a false swearing, or a false oath, purely voluntary.[3] It is essential that the indictment or information correctly describe, and the evidence on the trial must accurately prove, the judicial or other proceeding in which the alleged perjury was committed,[4] and must further show that a proceeding was actually pending before such court or magistrate, or that a hearing was actually

1 ILL.—Morrell v. People, 32 Ill. 499. KAN.—State v. Ayer, 40 Kan. 43, 19 Pac. 403. MD.—State v. Mercer, 101 Md. 535, 61 Atl. 220. N. C.—State v. Peters, 107 N. C. 876, 12 S. E. 74. OHIO—Crusen v. State, 10 Ohio St. 258. OKLA.—Peters v. United States, 2 Okla. 116, 33 Pac. 1031. VT.—State v. Chamberlain, 30 Vt. 559. WASH. — State v. McLain, 43 Wash. 124, 86 Pac. 388. WIS.—State v. Lamont, 2 Wis. 437; State v. Lloyd, 77 Wis. 630, 64 N. W. 898. FED. — United States v. Wood, 44 Fed. 753.

"In case pending before commissioner of pensions of the United States, being a special examiner into the merits of the pension-claim of one Edward Brackett," did falsely swear, etc., was held to be sufficient, although the indictment failed to allege that the Brackett mentioned was the same Brackett who in his pension-claim alleged himself to have been a member of a designated company in a specified regiment.—United States v. Wood, 44 Fed. 753.

Name of court in which testimony was proposed to be used held to be necessary.—State v. Ayer, 40 Kan. 43, 19 Pac. 403; State v. Hamilton, 65 Mo. 667.

2 ALA.—Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465; Hicks v. State, 86 Ala. 30, 5 So. 425. GA.—Thompson v. State, 120 Ga. 132, 47 S. E. 566. ILL.—Morrell v. People, 32 Ill. 499. KY.—Com. v. Kane, 92 Ky. 457, 18 S. W. 7. MICH.—People v. Gaige, 26 Mich. 30. MO.—State v. Hamilton, 7 Mo. 300; State v. Crumb, 68 Mo. 206.

3 ALA.—Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465. MO.—State v. Owen, 73 Mo. 440. OKLA.—Finch v. United States, 1 Okla. 396, 33 Pac. 638. TEX.—Anderson v. State, 18 Tex. App. 17. VT.—State v. Chamberlain, 30 Vt. 559.

As to extra-judicial oaths, see, infra, § 1081.

4 Wilson v. State, 115 Ga. 206, 90 Am. St. Rep. 104, 41 S. E. 696.

pending before such officer or body, at the time the oath was taken and the false statement made.[5]

§ 1075. ——— MATTER UNDER INVESTIGATION AND ISSUE—ACTION PENDING. At common law it was not necessary that the indictment or information should allege that any issue was pending in a court having jurisdiction, or that any matter was being judicially examined before an officer or body duly authorized by law to investigate;[1] but under statutes in this country it is required to be set out that a cause or proceeding was pending,[2] and that the issues had been joined,[3] or that the cause was on

[5] State v. Hanson, 39 Me. 337; State v. Oppenheimer, 41 Tex. 82; King v. R., 14 Ad. & E. N. S. (14 Q. B.) 31, 68 Eng. C. L. 31; R. v. Pearson, 8 Car. & P. 119, 34 Eng. C. L. 642.

[1] State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270; King v. R., 14 Ad. & E. N. S. (14 Q. B.) 31, 68 Eng. C. L. 31; Ex parte Beeching, 4 Barn. & C. 137, 10 Eng. C. L. 515; R. v. Christian, 1 Car. & M. 388, 41 Eng. C. L. 214; R. v. Meek, 9 Car. & P. 513, 38 Eng. C. L. 201; R. v. Crossley, 7 T. R. 315, 101 Eng. Rep. 994.

[2] State v. Hanson, 39 Me. 337; R. v. Pearson, 8 Car. & P. 119, 34 Eng. C. L. 321.

Affidavit to hold to bail sworn to before action pending by the issuance of a summons in an action, may be made the basis of a charge of perjury, and it has been held that in such a case the indictment need not aver an action was pending.—King v. R., 14 Ad. & E. N. S. (14 Q. B.) 31, 68 Eng. C. L. 31.

[3] State v. McCormick, 52 Ind. 169; State v. Hanson, 39 Me. 337.

False oath before grand jury charged indictment or information must show that the testimony was given in an issue pending before that body.—State v. McCormick, 52 Ind. 169.

See, also, supra, § 1063, footnotes 20 and 21.

Indictment for perjury describing the case in which the accused was sworn as a witness, stating the names of the parties and issues joined, and the court in which the action was pending, and then charging that accused "did, upon the trial of the matters set forth in said pleadings take his corporal oath" to testify touching the issues joined in a certain action then pending in said court, wherein A and B were plaintiffs and C was accused, describing the parties as before, it charges with sufficient certainty that the action in which accused was sworn and in which he testified was the same in which the issues described were joined.—State v. Flagg, 25 Ind. 369.

Joinder of issue in the cause in which the perjury is alleged to have been committed need not be averred in the indictment or in-

trial,[4] and that the testimony was material or the oath required,[5] it not being sufficient to aver simply that the offense was committed in the due course of justice.[6] But it is not necessary that the pendency of the cause shall be directly averred, it being sufficient to allege in general terms that certain issues were joined or action pending.[7] Thus, charging that the offense was committed before a referee[8] who had been appointed in an action then pending in a named court of record, is sufficient, without directly and specifically alleging the commencement and pendency of the cause.[9]

Criminal cause charged as the one in which the alleged offense was committed, the indictment or information must accurately describe the defendant in such criminal cause,[10] and the offense charged against him therein;[11]

formation in order to charge sufficiently the issue therein.—State v. Nelson, 146 Mo. 256, 48 S. W. 84.

See, infra, § 1076.

4 State v. Hanson, 39 Me. 337.

"Cause or issue," perjury alleged to have been committed on the trial, this will not vitiate the indictment.—State v. Bishop, 1 D. Chip. (Vt.) 120.

Issues joined in justices' court alleged in indictment or information, is sufficient allegation of a cause on trial in such court, although, strictly speaking, issues can not be joined before a justice of the peace.—State v. Bishop, 1 D. Chip. (Vt.) 120.

As to pleading perjury in a justice's court, see, supra, § 1063, footnotes 15-19, and text going therewith.

5 **Oath not required by law** or oath taken not capable of being used in evidence on a hearing in court or before other tribunal, it can not be made the basis of perjury, and if the indictment or information does not show its necessity and admissibility, it will be insufficient.—People v. Gaige, 26 Mich. 30.

6 State v. Hanson, 39 Me. 337.

7 See People v. Ah Bean, 77 Cal. 12, 18 Pac. 815; Maynard v. People, 135 Ill. 416, 25 N. E. 740; Covey v. State, 23 Tex. App. 388, 5 S. W. 283.

8 **As to charging perjury before a referee,** see, supra, § 1063.

9 Eighmy v. People, 79 N. Y. 546.

10 Banks v. State, 78 Ala. 14.

11 State v. Gibson, 26 La. Ann. 71; Com. v. Wright, 166 Mass. 174, 44 N. E. 129; United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16692.

"A warrant for debt, due by account for rent," alleged in the indictment to have been sued out by accused, and the evidence shows that the claim was not for rent, the variance is fatal.—Com. v. Hickman, 4 Va. (2 Va. Cas.) 323.

Arson charged as the alleged

but it is not necessary to state whether the person accused in such criminal cause pleaded not guilty,[12] or was or was not guilty.[13] Thus, burglary being charged against the defendant in the criminal cause in which accused is alleged to have testified falsely, it must be alleged on whose property the burglary was committed;[14] and in a case where the charge in the criminal trial was that of larceny,[15] it should be stated to whom the goods stolen belonged, for the same reason that ownership of the house burglarized should be stated. Where the charge in the criminal cause was murder, it is not essential that the indictment or information should show whether the prosecution at which accused is alleged to have testified falsely was commenced and pending on an indictment found by a grand jury,[16] or that a proceeding before a trial justice was commenced on an information under oath.[17]

§ 1076. ——— ALLEGATION AS TO ISSUES AND PLEADINGS. While it is necessary that there shall be a statement of the issues in the cause or proceeding in which the perjury is alleged to have been committed by the

offense in the criminal cause, it need not be set out in what county the arson was committed, or the record of proceedings or process in the criminal trial.—State v. Keel, 54 Mo. 182.

That cause a criminal one need not be specifically alleged.—Com. v. Wright, 166 Mass. 174, 44 N. E. 129.

12 Montgomery v. State (Tex. Cr.), 40 S. W. 805.

13 State v. Schill, 27 Iowa 263.

14 Davis v. State, 79 Ala. 20.

Averment offense was committed "on the trial of one Henry Dentist, in the circuit court of Clarke county, Alabama, at the spring term thereof, 1885, under an indictment for the offense of burglary," without stating the name of the person on whose property the crime was committed, is insufficient.—Davis v. State, 79 Ala. 20.

15 Larceny charged as the crime under investigation in the criminal cause at which accused is alleged to have sworn falsely, indictment or information must show whether the larceny charged was either a felony by the common law or made such by statute.—Hinch v. State, 2 Mo. 158.

16 State v. Grover, 38 La. Ann. 567; State v. Wise, 71 Tenn. (3 Lea) 38, overruling Steinston v. State, 14 Tenn. (6 Yerg.) 531.

17 State v. Byrd, 28 S. C. 18, 13 Am. St. Rep. 660, 4 S. E. 793.

accused, yet, when that proceeding was the trial of a cause in a court of record, it is not necessary that it shall be directly charged in the indictment or information that issue was joined therein,[1] or state what that issue was;[2] it need only set forth the substance of the controversy in respect to which the offense was committed,[3] it not being necessary to set forth the pleadings,[4] record or proceedings[5] with which the false oath is connected.[6]

1 State v. Nelson, 146 Mo. 256, 48 S. W. 84.

2 MISS.—State v. Silverberg, 78 Miss. 858, 20 So. 276. MO.—State v. Nelson, 146 Mo. 256, 48 S. W. 84. N. J.—State v. Voorhis, 52 N. J. L. 351, 20 Atl. 26. N. Y.—People v. Grimshaw, 33 Hun 505, 2 N. Y. Cr. Rep. 390. OKLA.—Peter v. United States, 2 Okla. 138, 37 Pac. 1081. R. I.—State v. Miller, 26 R. I. 282, 58 Atl. 882. TEX.—Covey v. State, 23 Tex. App. 388, 5 S. W. 283; Montgomery v. State, 40 S. W. 805.

3 ALA.—Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465, 467; Davis v. State, 79 Ala. 20. CAL.—People v. Ah Bean, 77 Cal. 12, 18 Pac. 815. ILL.—Maynard v. People, 135 Ill. 416, 25 N. E. 724. WASH.—State v. Eaid, 55 Wash. 302, 33 L. R. A. (N. S.) 946, 104 Pac. 275.

Allegation proceeding was "a certain complaint in due form of law against Frank Maynard for bastardy, before them duly made by one Margaret Nillen, duly depending," sufficiently shows that the proceeding was a prosecution under the bastardy law.—Maynard v. People, 135 Ill. 416, 25 N. E. 740.

Alleging accused was sworn in a certain case "then and there at issue, to wit, the case of The People v. Martine," and setting out accused's testimony, with an averment of its materiality, sufficiently sets forth the substance of the controversy in respect to which the offense was committed.—People v. Ah Bean, 77 Cal. 12, 18 Pac. 815.

4 **Pleadings**, proceedings and evidence in the cause in which the alleged perjury committed need not be set out in full, it being sufficient to allege that the false testimony was upon a material matter.—State v. Avery, Man. Unrep. Cas. (La.) 258.

5 See, infra, § 1079.

Record of proceedings in cause in which perjury alleged to have been committed admissible in evidence. See note 26 L. R. A. (N. S.) 465.

6 ALA.—Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465; Bradford v. State, 134 Ala. 141, 32 So. 742. CAL.—People v. Ah Bean, 77 Cal. 12, 18 Pac. 815. FLA.—Humphreys v. State, 17 Fla. 381; Dennis v. State, 17 Fla. 389. ILL.—Maynard v. People, 135 Ill. 416, 25 N. E. 740. IND.—State v. Flagg, 25 Ind. 369; State v. Walls, 54 Ind. 407; Burk v. State, 81 Ind. 128. KY.—Com. v. Combs, 30 Ky. L. Rep. 1300, 101 S. W. 312. LA.—State v. Gibson, 26 La. Ann. 71. MD.—State v. Bixler, 62 Md. 354. MISS.—State v. Jolly, 73 Miss. 42, 18 So.

But it must be shown by the indictment or information, with reasonable certainty, that the offense was committed in a judicial proceeding, before an officer or body of competent jurisdiction.[7]

§ 1077. ——— ALLEGING NAME OF ACTION. The particular cause or proceeding in which the alleged false testimony was given, or the false oath made, must be so clearly described and identified that the accused may know, with reasonable certainty, the exact charge against him and prepare to meet the same on the trial.[1] To accomplish this purpose it is usual to give the name of the cause or proceeding in which the alleged offense occurred,—e. g., "in the trial of a cause on attachment," or other particular civil cause; or "in the trial of a charge of arson," or other particular criminal cause,—setting out also the name and style of the court in which the cause was pending,[2] the names of the parties to the ac-

541. MO.—Hinch v. State, 2 Mo. 158. N. C.—State v. Hoyle, 28 N. C. (6 Ired. L.) 1. OHIO—Crusen v. State, 10 Ohio St. 258. ORE.—State v. Witham, 6 Ore. 366. TENN.—Woods v. State, 82 Tenn. (14 Lea) 460; State v. Argo, 118 Tenn. 377, 100 S. W. 106. TEX.—State v. Oppenheimer, 41 Tex. 82; McMurtry v. State, 38 Tex. Cr. Rep. 539, 43 S. W. 1012; Bailey v. State, 41 Tex. Cr. Rep. 157, 53 S. W. 117; Curtis v. State, 46 Tex. Cr. Rep. 480, 81 S. W. 29. VT.—State v. Chamberlain, 30 Vt. 559; State v. Sleeper, 37 Vt. 122; State v. Rowell, 70 Vt. 405, 82 Am. St. Rep. 918, 15 Am. Cr. Rep. 567, 41 Atl. 430. WASH.—State v. Roberts, 22 Wash. 1, 60 Pac. 65. WIS.—State v. Lamont, 2 Wis. 437. FED.—United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16692; United States v. Bartow, 20 Blatchf. 351, 10 Fed. 873; United States v. Wood, 44 Fed. 753; United States v. Pettus, 84 Fed. 791.

7 ALA.—Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465; Davis v. State, 79 Ala. 20; Bradford v. State, 134 Ala. 141, 32 So. 742. MASS.—Com. v. Wright, 166 Mass. 174, 44 N. E. 129. VA.—Conner v. Com., 4 Va. (2 Va. Cas.) 30. FED.—United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16692.

1 Harp v. State, 59 Ark. 113, 26 S. W. 714; People v. Ah Bean, 77 Cal. 12, 18 Pac. 815; R. v. Child, 5 Cox C. C. 197; R. v. Neville, 6 Cox C. C. 69.

2 State v. Eaid, 55 Wash. 302, 33 L. R. A. (N. S.) 946, 104 Pac. 275.

tion,[3] the matter in issue[4] and the substance of the issues.[5]

§ 1078. ———— ALLEGING NAMES OF PARTIES—VARIANCE. In an indictment or information charging perjury in the trial of a cause, the names of the parties to such cause are essential to its identity,[1] and there should be set out in such instrument not only the name and style of the court in which the trial was held, but also the names of the plaintiff and the defendant in such action; although it has been held in New Hampshire[2] and New York,[3] and perhaps elsewhere, that the names of the parties to the cause on trial at which the alleged perjury was committed need not be set out. Where the names of the parties are required to be set out, or are set out without being required, the names as given become material and must be proved as laid, and any material variance in the evidence in respect thereto will be fatal.[4] Thus, where the name of the party against whom a criminal action was tried, and in which alleged perjury is said to have been committed, was given as "Cobbs" and the evidence showed that the defendant in such criminal action was one "Cobb," it was held to be a fatal variance,[5] the court saying the names were not idem sonans;[6] and where the

3 See, infra, § 1078.

4 See, supra, § 1075.

5 See, supra, § 1076.

1 Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465; Cowan v. State, 15 Ala. App. —, 72 So. 578.

In an indictment for subornation of perjury committed before a grand jury the name of the defendant under investigation need not be averred. — Hendricks v. United States, 223 U. S. 178, 56 L. Ed. 394, 32 Sup. Ct. 313.

Substance of the proceedings is sufficiently given where the action was described by naming the parties, and the court, and setting out the alleged testimony.—Dennison v. State, 15 Ala. App. —, 72 So. 589.

2 State v. Bailey, 31 N. H. 521.

3 People v. Burroughs, 1 Park. Cr. Rep. (N. Y.) 211.

4 Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465; Walker v. State, 96 Ala. 53, 11 So. 401; Gandy v. State, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108.

5 Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465.

6 Id. See Humphreys v. Whitten, 17 Ala. 30.

names of the parties were given as A v. B, and the proof showed that the parties were A et al. v. B, this was held to be a fatal variance.[7] On the other hand, where the name of one of the parties was given as Thomas R. Robertson and the evidence showed his name to be Thomas Robertson, this was held an immaterial variance;[8] where the indictment alleged the perjury to have been in an action wherein "the State was plaintiff and Amos Phillips defendant," and the evidence showed that the warrant was entitled "State and City of Greenboro against Amos Phillips," this was held not a material variance;[9] and an averment in an indictment that the accused was sworn as a witness between the bank and A, and the evidence showed that the accused was sworn in a suit brought by the bank on a promissory note against A as the indorser and against B and the accused as joint makers, the evidence of accused in such case being available only in behalf of the indorser, it was held that the variance was immaterial.[10]

§ 1079. ——— SETTING OUT RECORD OF PROCEEDINGS—COMMON-LAW RULE. At common law it was deemed necessary that an indictment or information charging perjury should, with great particularity, set forth the proceedings in which the oath was taken, and the character and jurisdiction of the court or officer administering it, and should set out the pleadings, the record of proceedings, and the commission or authority of the court or person before whom the perjury was committed;[1] but this requirement was done away with by statute in England,[2]

7 Walker v. State, 96 Ala. 53, 11 So. 401.

8 State v. Hester, 122 N. C. 1047, 29 S. E. 380.

9 State v. Peters, 107 N. C. 876, 12 S. E. 74.

10 People v. Burroughs, 1 Park. Cr. Rep. (N. Y.) 211.

1 Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465; State v. Gallimon, 24 N. C. (2 Ired. L.) 372; State v. Hoyle, 28 N. C. (6 Ired. L.) 1; State v. Stillman, 47 Tenn. (7 Coldw.) 341; Com. v. Lodge, 43 Va. (2 Gratt.) 579.

2 23 Geo. II, ch. 11, § 3. See 2 Russ. on Crime (9th ed.) 621.

which statute has been followed by similar statutes in probably all the jurisdictions in this country, so that it is not now necessary to set out any of the record or proceedings,[3] it being sufficient to set out enough of the proceedings to show that the oath was administered by a court or officer duly empowered and authorized to administer oaths,[4] and that the oath was one which was authorized or required by law to be taken.[5]

§ 1080. ——— SETTING OUT RESULT OF PROCEEDINGS. An indictment or information charging accused with perjury, either in the trial of a cause before a court, or in a judicial proceeding before an officer or other body duly authorized and empowered to inquire into the matter, need not allege that the cause or the proceeding has been determined.[1] Thus, in the case of perjury alleged to have been committed before a referee,[2] it is not necessary to allege that the reference is closed and the referee's findings reported into court;[3] where the false testimony is in a land-contest case, it is not necessary to allege that the contest is finally settled;[4] and where it is charged that the perjury was committed in a criminal trial, it is not necessary to allege that the cause has been finally determined, because perjury can be predicated on false swearing upon the trial of an indictment which is finally

[3] State v. Gallimon, 24 N. C. (2 Ired. L.) 372; State v. Hoyle, 28 N. C. (6 Ired. L.) 1; Woods v. State, 82 Tenn. (14 Lea) 460.

[4] See, infra, §§ 1082 et seq.

[5] ALA.—Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465. ARK.—State v. Green, 24 Ark. 591. CAL.—People v. Ah Bean, 77 Cal. 12, 18 Pac. 815. IND.—State v. Walls, 54 Ind. 407; Burk v. State, 81 Ind. 128. IOWA—State v. Booth, 88 N. W. 344. LA.—State v. Gibson, 26 La. Ann. 71. MO.—State v. Keel, 54 Mo. 182; State v. Gordon, 196 Mo. 185, 95 S. W. 420. ORE.—State v. Witham, 6 Ore. 366. TENN.—Woods v. State, 82 Tenn. (14 Lea) 460.

[1] State v. Keene, 26 Me. 33; Finch v. United States, 1 Okla. 396, 33 Pac. 638; Com. v. Moore, 9 Pa. Co. Ct. Rep. 501.

[2] As to charging perjury before a referee, see, supra, § 1063.

[3] State v. Keene, 26 Me. 33.

[4] Finch v. United States, 1 Okla. 396, 33 Pac. 638.

adjudged to be insufficient,[5] where the trial court had jurisdiction to try the cause;[6] but in a case where the court has no jurisdiction of the cause or of the person of the defendant[7] in a criminal trial, the proceeding is coram non judice, and perjury can not be predicated upon any false testimony given at such trial.[8]

§ 1081. ——— VOLUNTARY AFFIDAVITS OR EXTRA-JUDICIAL OATHS. At common law the perjury alleged to have been committed must have been in a judicial proceeding.[1] Under the American statutes, however, false oaths are treated as perjury, and it is sufficient if the oath was taken or the affidavit made in the course of justice, where the oath or affidavit is within the purview of the statute,[2] and was taken before a party authorized to administer oaths.[3] But a mere voluntary affidavit or extra-judicial oath, not being authorized or required by law, however false and corrupt, can not be made the basis of a charge

5 State v. Rowell, 72 Vt. 28, 82 Am. St. Rep. 918, 15 Am. Cr. Rep. 567, 47 Atl. 111; see McCall v. Cohen, 16 S. C. 445, 42 Am. Rep. 641; R. v. Meek, 9 Car. & P. 513, 38 Eng. C. L. 302.

6 Vaughn v. Congdon, 56 Vt. 111, 48 Am. Rep. 758; Perry v. Morse, 57 Vt. 509; State v. Wakefield, 60 Vt. 618, 15 Atl. 181.

7 See, supra, § 1057; infra, §§ 1082 et seq.

8 Com. v. White, 25 Mass. (8 Pick.) 452.

Magistrate without jurisdiction because statute of limitations had intervened, proceedings void, because he has no jurisdiction either over the person of the accused or the subject-matter of the complaint.—Vaughn v. Congdon, 56 Vt. 111, 48 Am. Rep. 758. See Morgan v. Hughes, 2 T. R. 225, 100 Eng. Rep. 123.

1 N. J.—State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270. VT.—State v. Chamberlain, 30 Vt. 559; State v. Simons, 30 Vt. 620. FED.—Anonymous, 1 Wash. 84, Fed. Cas. No. 475. ENG.—R. v. Hurrell, 3 Fost. & F. 271; R. v. Aylett, 1 T. R. 63, 99 Eng. Rep. 973.

2 State v. Faulks, 57 Mo. 461; State v. Helle, 2 Hill L. (S. C.) 290; United States v. Sonachall, 4 Biss. 425, Fed. Cas. No. 16352; United States v. Babcock, 4 McL. 113, Fed. Cas. No. 14488; United States v. Kendrick, 2 Mas. 69, Fed. Cas. No. 15519; R. v. Barnes, 10 Cox C. C. 539.

3 United States v. Curtis, 107 U. S. 671, 25 L. Ed. 534, 2 Sup. Ct. Rep. 507; Ralph v. United States, 11 Biss. 88, 9 Fed. 699.

of perjury.[4] Thus, an oath before a notary public made in an application to obtain a saloon license, where the law governing the granting of saloon licenses does not authorize or require such an oath, is not perjury.[5] So likewise of any affidavit not authorized by, or as to matter not required by law,—as an affidavit made voluntarily at request of a fire-insurance adjuster relative to the correctness of the books of the insured and the amount of stock on hand at the time of the fire-loss;[6] by parties pre-empting land;[7] concerning a wager, made before a justice of the peace, where no cause was pending;[8] on application for naturalization, relative to previous residence;[9] on application to commute homestead entry into cash entry;[10] to an account prepared as a set-off or for trial;[11] to a memorandum of surety's property, made on

4 LA.—State v. Parrish, 129 La. 547, 39 L. R. A. (N. S.) 96, 56 So. 503. ME.—State v. Mace, 76 Me. 64, 5 Am. Cr. Rep. 588. MD.—Warner v. Fowler, 8 Md. 25. MICH.—People v. Fox, 25 Mich. 492; Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539. MO.—Mahan v. Berry, 5 Mo. 21. N. J.—State v. Union Quarter Sessions, 45 N. J. L. (16 Vr.) 523. N. Y.—People v. Travis, Sheld. 545, 4 Park. Cr. Rep. 213; Foreman v. Union A. Co., 83 Hun 385, 31 N. Y. Supp. 947. N. C.—State v. Wyatt, 3 N. C. (2 Hayw.) 56. OHIO—Silver v. State, 17 Ohio 365; Waggoner v. Richmond, Wright 173. PA.—Linn v. Com., 96 Pa. St. 285. S. C.—Pegram v. Styron, 1 Bail. L. 595; State v. Helle, 2 Hill L. 290. TENN.—Lamden v. State, 24 Tenn. (5 Humph.) 83. FED.—United States v. Babcock, 4 McL. 113, Fed. Cas. No. 14488; United States v. Nickerson, 1 Spr. 232, Fed. Cas. No. 15878; United States v. Dupont, 176 Fed. 823. ENG.—R. v. Bishop, 1 Car. & M. 302, 41 Eng. C. L. 169; R. v. Ewington, 1 Car. & M. 319, 2 Mo. C. C. 223, 41 Eng. C. L. 178; R. v. Cohen, 1 Stark. 511, 2 Eng. C. L. 195.

5 State v. Parrish, 129 La. 547, 39 L. R. A. (N. S.) 96, 56 So. 513.

6 Metzger v. Manchester Fire Assur. Co., 102 Mich. 334, 63 N. W. 650.

7 Containing matter not required by statute or the land-office rules to be sworn to, does not constitute perjury.—United States v. Bedgood, 49 Fed. 54.

8 Shaffer v. Kintzer, 1 Binn. (Pa.) 37, 2 Am. Dec. 488.

9 Statute not only does not authorize or provide for such oath, but expressly excludes it.—State v. Helle, 2 Hill L. (S. C.) 290.

10 Relative to residence, containing matter not authorized or required by law.—United States v. Howard, 37 Fed. 666.

11 Waggoner v. Richmond, Wright (Ohio) 173.

occasion of his justification as such surety,[12] and the like. The same is true of oaths made under like conditions,— e. g., as to competency of applicant for license to marry;[13] by officer of corporation to answer filed by the corporation, no verification being required;[14] by person regarding his qualifications as a voter;[15] to application and proof for obtaining fishing bounty;[16] to exceptions to sufficiency of bond on appeal;[17] to protest taken before a notary public as part of proofs of marine loss;[18] taken in a matter verbally submitted to arbitration;[19] verifying bill in equity where verification not required,[20] and the like.

Perjury under statute alleged in voluntary affidavit or extra-judicial oath, the indictment or information must charge such offense in accordance with the special provisions of the particular statute under which prosecution is had, and must allege that the particular affidavit or oath on which the charge of perjury is predicated was authorized by law, was necessary and proper to be made, and was made and used for an authorized and lawful purpose;[21] but it seems that it is not necessary to allege that such affidavit or oath was filed, or exhibited in court, or used in any action or proceeding,[22] although it has

12 Clugg v. McPhee, 16 Colo. App. 39, 63 Pac. 709.

13 State v. Theriot, 50 La. Ann. 1087, 24 So. 179; Com. v. Williams, 45 Va. (4 Gratt.) 554.

14 Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539.

15 Com. v. Polluck, 6 Pa. Dist. Rep. 559.

16 United States v. Nicholson, 3 Wood 215, Fed. Cas. No. 15877.

17 Linn v. Com., 96 Pa. St. 285.

18 People v. Travis, Sheld. (N. Y.) 545, 4 Park. Cr. Rep. (N. Y.) 213.

19 Mahan v. Berry, 5 Mo. 21.

20 People v. Gaige, 26 Mich. 30; Silver v. State, 17 Ohio 365.

21 ARK.—Thomas v. State, 54 Ark. 584. ILL.—Morrell v. People, 32 Ill. 499. KAN.—State v. Geer, 46 Kan. 529, 26 Pac. 1027. N. J.—Heintz v. General Court of Sessions, 45 N. J. L. (16 Vr.) 523. N. Y.—Ortner v. People, 4 Hun 323, 6 Thomp. & C. 548, 2 Cow. Cr. Rep. 268. TEX.—Shely v. State, 35 Tex. Cr. Rep. 190, 32 S. W. 901. WASH.—State v. Smith, 3 Wash. 14. WIS.—State v. Lloyd, 77 Wis. 630, 64 N. W. 898. FED.—United States v. Nicker, 58 U. S. (17 How.) 204, 15 L. Ed. 219.

22 State v. Whittemore, 50 N. H.

been held that under the California statute there must be an allegation of a delivery for use of the false affidavit.[23]

§ 1082. AUTHORITY AND JURISDICTION TO ADMINISTER OATH—OF COURT, GENERALLY. An indictment or information charging perjury must clearly show that the oath[1] was administered by a person authorized to administer it,[2] and that it was taken before a court or other tribunal, body or officer, and that such court, tribunal, body or officer had jurisdiction of the subject-matter under investigation,[3] although a different rule seems to prevail in Alabama,[4] Iowa[5] and Massachusetts;[6] but it is not necessary, however, to allege the nature of the authority of the officer or how he acquired it, or the manner in which the

245, 9 Am. Rep. 196; People v. Williams, 92 Hun (N. Y.) 354, 36 N. Y. Supp. 511; affirmed 149 N. Y. 1, 11 N. Y. Cr. Rep. 577, 43 N. E. 407; R. v. Crossley, 7 T. R. 315, 101 Eng. Rep. 994.

23 People v. Robles, 117 Cal. 681, 49 Pac. 1042.

1 As to the oath, see, infra, §§ 1091-1094.

2 Com. v. Kane, 92 Ky. 457, 18 S. W. 7.

3 ILL.—Morrell v. People, 32 Ill. 499; Kerr v. People, 42 Ill. 307. IND.—McGragor v. State, 1 Ind. 232. IOWA—State v. Nickerson, 46 Iowa 447. ME.—State v. Furlong, 26 Me. 69; State v. Plummer, 50 Me. 217. MO.—State v. Hamilton, 65 Mo. 667; State v. Owen, 73 Mo. 440. N. C.—State v. Ammons, 7 N. C. (3 Murph.) 123; State v. Knight, 84 N. C. 789. TENN.—Steinston v. State, 14 Tenn. (6 Yerg.) 531; State v. Wise, 71 Tenn. (3 Lea) 38. TEX.—State v. Webb, 41 Tex. 67. VA.—Conner v. Com., 4 Va. (2 Va. Cas.) 30; Com. v. Pickering, 49 Va. (8 Gratt.) 628, 56 Am. Dec. 158.

4 Alabama statute has dispensed with many of the allegations essential to an indictment for perjury at common law, but it is still necessary, in addition to the general averment of authority in the court or officer to administer the oath, to set forth the substance of the proceedings, that it may distinctly appear the oath was not extra-judicial, that it was taken on an occasion, in reference to a fact material, and before a court or officer having power to administer it. An indictment which does not set forth enough of the proceedings to disclose these facts is insufficient under the statute.—Jacobs v. State, 61 Ala. 448, 4 Am. Cr. Rep. 465, 467.

5 State v. Newton, 1 G. Greene (Iowa) 160, 48 Am. Dec. 367.

6 Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72; Com. v. Hughes, 87 Mass. (5 Allen) 499; Com. v. Hatfield, 107 Mass. 227.

court or other tribunal, body or officer acquired jurisdiction;[7] although where the oath is taken before a court, the indictment or information should set out the legal appellation of such court.[8]

§ 1083. ——— AT COMMON LAW. It was necessary for an indictment at common law to show the jurisdiction of the court over the subject-matter of the trial in which the perjury was alleged to have been committed,[1] and in order to do this it was customary to set out the record of the proceedings[2] in that action,[3] and the like. After the passage of the statute of 23 Geo. II, the rigor of the common law was abated and the jurisdiction of the court over the action at which the perjury was alleged to have been committed could be shown by direct averment, or by allegation of facts from which the jurisdiction necessarily appeared.[4]

§ 1084. ——— UNDER AMERICAN STATUTES. Under the statutes in the various states in this country the alle-

7 MO.—State v. Belew, 79 Mo. 584. N. J.—State v. Ludlow, 5 N. J. L. (2 South) 772; State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270. N. Y.—Eighmy v. People, 79 N. Y. 546; People v. Phelps, 5 Wend. 9; People v. Warner, 5 Wend. 271; People v. Tredway, 3 Barb. 470; Burns v. People, 59 Barb. 531. TEX.—State v. Peters, 42 Tex. 7; Stewart v. State, 6 Tex. App. 184; Bradberry v. State, 7 Tex. App. 375; Powers v. State, 17 Tex. App. 428; Anderson v. State, 18 Tex. App. 17. W. VA.—Stofer v. State, 3 W. Va. 689. ENG.—R. v. Callanan, 6 Barn. & C. 102, 9 Dow. & R. 97, 13 Eng. C. L. 57.

8 State v. Street, 5 N. C. (1 Murph.) 156, 3 Am. Dec. 682; State v. Lewis, 93 N. C. 581; Lavey v. R., 17 Ad. & E. N. S. (17 Q. B.) 496, 79 Eng. C. L. 496; R. v. Child, 5 Cox C. C. 197.

In what court the oath alleged to be false was taken, and that such court had authority to administer the oath, with proper allegations of the falsity of the matter on which the perjury is' assigned.—State v. Eaid, 55 Wash. 302, 33 L. R. A. (N. S.) 946, 104 Pac. 275.

1 State v. Plummer, 50 Me. 217.

2 See, supra, § 1079.

3 State v. Thurstin, 35 Me. 205, 58 Am. Dec. 695.

4 Franklin v. State, 91 Ga. 712, 17 S. E. 987; State v. Webb, 41 Tex. 67; State v. Oppenheimer, 41 Tex. 82; Anderson v. State, 18 Tex. App. 17.

gation of jurisdiction is sufficiently pleaded by a direct allegation that the court administering the oath and conducting the trial in which the perjury is alleged to have been committed had jurisdiction and authority to administer the oath,[1] or by stating facts from which that jurisdiction and authority are necessarily inferred.[2] How jurisdiction was acquired need not be alleged,[3] although in Texas it has been held that it should be alleged whether a criminal cause was brought before the court by indictment or by information,[4] and this was formerly the rule in Tennessee, also.[5] Neither is it necessary to set out the

1 CAL.—People v. De Carlo, 124 Cal. 462, 57 Pac. 383. COLO.—Thompson v. People, 26 Colo. 496, 59 Pac. 51. GA.—Franklin v. State, 91 Ga. 712, 17 S. E. 987. ILL.—Maynard v. People, 135 Ill. 416, 25 N. E. 740; Kizer v. People, 211 Ill. 407, 71 N. E. 1035. IOWA—State v. Newton, 1 G. Greene 160, 48 Am. Dec. 367. LA.—State v. Harlis, 33 La. Ann. 1172. MASS.—Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72. MO.—State v. Keel, 54 Mo. 182. N. Y.—Eighmy v. People, 79 N. Y. 546; People v. Phelps, 5 Wend. 9; Burns v. People, 59 Barb. 531. N. C.—State v. Green, 100 N. C. 419, 5 S. E. 422. OHIO—Halleck v. State, 11 Ohio 400. TEX.—State v. Webb, 41 Tex. 67; State v. Oppenheimer, 41 Tex. 82; Anderson v. State, 18 Tex. App. 17. UTAH—People v. Greenwell, 5 Utah 112, 13 Pac. 89. VA.—Fitch v. Com., 92 Va. 824, 24 S. E. 272. WASH.—State v. Douetto, 31 Wash. 6, 71 Pac. 556.

2 GA.—Franklin v. State, 91 Ga. 712, 17 S. E. 987. ILL.—Johnson v. People, 94 Ill. 505; People v. Howard, 111 Cal. 655, 44 Pac. 342. IND.—Burk v. State, 81 Ind. 128; State v. Hopper, 133 Ind. 460, 32 N. E. 878; Masterson v. State, 144 Ind. 240, 43 N. E. 138. KY.—Com. v. Kane, 92 Ky. 457, 18 S. W. 7. LA.—State v. Grover, 34 La. Ann. 567; State v. Schlessinger, 38 La. Ann. 564; State v. Thibodaux, 49 La. Ann. 15, 21 So. 127. MD.—Deckard v. State, 38 Md. 186. MASS.—Com. v. Hughes, 87 Mass. (5 Allen) 499. MO.—State v. Marshall, 47 Mo. 378. N. Y.—People v. Tredway, 3 Barb. 470. OHIO—Halleck v. State, 11 Ohio 400. S. C.—State v. Farrow, 10 Rich. L. 165. TEX.—State v. Webb, 41 Tex. 67; State v. Oppenheimer, 41 Tex. 82; Stewart v. State, 6 Tex. App. 184; State v. Anderson, 18 Tex. App. 17.

3 State v. Byrd, 28 S. C. 18, 13 Am. St. Rep. 660, 4 S. E. 793; State v. Wise, 71 Tenn. (3 Lea) 38; Powers v. State, 17 Tex. App. 428.

4 State v. Webb, 41 Tex. 67; State v. Oppenheimer, 41 Tex. 82.

5 Steinston v. State, 14 Tenn. (6 Yerg.) 531.

6 State v. Marshall, 47 Mo. 378; State v. Bryson, 4 N. C. (1 Car. Law. Repos. 503) 115; Stewart v.

commission of the court, magistrate or officer,[6] although a different rule prevails in Vermont.[7]

§ 1085. ——— ——— VOIDABLE PROCEEDINGS—COMPETENCY OF TESTIMONY OR WITNESS. We have already seen that there is a distinction drawn between proceedings which are void because of want of authority or a want of jurisdiction of the subject-matter or of jurisdiction of the person of the defendant and those which are simply voidable,[1] in predicating perjury upon false testimony given in a trial. Where the court or tribunal or officer has jurisdiction, the crime of perjury may be predicated upon any false testimony given, or any false oath taken therein, notwithstanding the fact that the whole proceeding is voidable by reason of some infirmity in the indictment or information, or other process by which the cause was inaugurated and the trial had at which the alleged false testimony was given, but over which cause the trial court had jurisdiction.[2] The reason for this rule is the fact that the crime of perjury does not consist in the injury to the individual in procuring a wrong verdict, or in the inconvenience which the public may sustain by reason thereof, but is founded upon the abuse of and insult to public justice.[3] Hence, the whole question of the liability of the accused depends, not upon the regularity and sufficiency of the proceedings, but upon the authority and jurisdiction of the court administering

State, 6 Tex. App. 184; Bradberry v. State, 7 Tex. App. 375.

See, however, discussion, infra, § 1090.

7 State v. Peters, 57 Vt. 86.

1 See, supra, § 1080.

As to voluntary affidavits and extra-judicial oaths, see, supra, § 1081.

2 State v. Brown, 128 Iowa 24, 102 N. W. 799; State v. Rowell, 72 Vt. 28, 82 Am. St. Rep. 918, 15 Am. Cr. Rep. 567, 47 Atl. 111; R. v. Meek, 9 Car. & P. 513, 38 Eng. C. L. 302; R. v. Bray, 9 Cox C. C. 218 (a case where the plaintiff was non-suited).

Strict regularity of the proceedings in the trial at which the alleged false testimony was given is not requisite to founding a charge of perjury on such false testimony.—State v. Lavalley, 9 Mo. 384.

3 Id. 7 Bac. Abr. 426; Chit. Crim. Law 157.

the oath.[4] The incompetency of the testimony[5] or of accused to be a witness in the cause,[6] will not relieve him for liability to prosecution and punishment for false testimony given; neither will the fact that the testimony he was called upon to give accused might have declined to give, because of its self-sacrificing nature.[7]

§ 1086. —— OF OFFICER—AS TO NAME OF OFFICER. An indictment or information charging perjury must allege the authority and jurisdiction of the officer to administer the oath to the accused on which the false swearing is charged,[1] but it is not necessary to show how such officer

4 As to jurisdiction and authority to administer oaths, see, supra, §§ 1082-1084.

5 United States v. Earnshaw, 30 Fed. 672.

6 State v. Moore, 111 La. 1006, 36 So. 100; Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255; People v. Trumphour, 64 Hun (N. Y.) 346, 10 N. Y. Cr. Rep. 198, 19 N. Y. Supp. 331; affirmed 135 N. Y. 639, 32 N. E. 647.

7 Mackin v. People, 115 Ill. 312, 56 Am. Rep. 167, 3 N. E. 222; State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

1 See, supra, § 1082, footnote 3; also: FLA.—Craft v. State, 42 Fla. 567, 29 So. 418. ILL.—Pankey v. People, 2 Ill. 80; Van Dusen v. People, 78 Ill. 645. IND.—Muir v. State, 8 Blackf. 154; McGragor v. State, 1 Ind. 323; Weston v. Lumley, 33 Ind. 486. IOWA—State v. Phippen, 62 Iowa 54, 17 N. W. 146. KY.—Biggerstaff v. Com., 74 Ky. (11 Bush) 169, 1 Am. Cr. Rep. 497; Com. v. Hillenbrand, 96 Ky. 407, 29 S. W. 287. LA.—State v. Harlis, 33 La. Ann. 1172. ME.—State v. Hall, 49 Me. 412. MASS.—Com. v. White, 25 Mass. (8 Pick.) 453. MISS.—White v. State, 9 Miss. (1 Smed. & M.) 149. MO.—State v. Owen, 77 Mo. 440; State v. Cannon, 79 Mo. 343. N. Y.—Ortner v. People, 4 Hun (N. Y.) 323, 6 Thomp. & C. 548, 2 Cow. Cr. Rep. 268. N. C.—Boling v. Luther, 4 N. C. (1 Term Rep. 202) 635; State v. Alexander, 11 N. C. (4 Hawks) 182. OHIO—Warwick v. State, 25 Ohio St. 21; State v. Jackson, 36 Ohio St. 281; Staight v. State, 39 Ohio St. 496. ORE.—State v. Woolridge, 45 Ore. 389, 78 Pac. 333. S. C.—State v. Hayward, 1 Nott. & McC. 540; State v. McCroskey, 3 McC. L. 308. TEX.—State v. Powell, 28 Tex. 626; Stewart v. State, 6 Tex. App. 184. VT.—State v. McCone, 59 Vt. 117, 7 Atl. 406. FED.—United States v. Curtis, 107 U. S. 671, 25 L. Ed. 534, 2 Sup. Ct. Rep. 507; United States v. Sonachall, 4 Biss. 425, Fed. Cas. No. 16352; United States v. Nickerson, 1 Spr. 232, Fed. Cas. No. 15878; United States v. Neale, 14 Fed. 767. ENG.—R. v. Pearce, 3 Best & S. 531, 113 Eng. C. L. 530, 9 Cox C. C. 258; R. v. Verelst, 8 Campb. 433; R. v. Newton, 1 Car. & K. 469, 47 Eng. C. L. 467; R. v.

acquired the authority, or the nature of it.[2] The authority of the officer to administer the oath may be alleged in general terms, without setting forth the official character of such officer, or otherwise specifying the particular authority under which he acted;[3] and where the facts alleged are such as show that the officer had authority, under the statute, to administer the oath, it is not necessary to specially aver such authority,[4] for the courts will take judicial notice of the fact.[5] In some jurisdictions it is held that the allegation that accused committed perjury, in and of itself, necessarily implies that an oath was lawfully administered, and that it is not essential to specifically allege the authority of the officer administering such oath.[6] When it is alleged that the oath was administered in open court, it is presumed that it was regularly done, and that the officer administering the oath had authority so to do.[7] It is sufficient to allege that the officer administering the oath in open court was an acting magistrate,[8] or that he was a deputy clerk of the court.[9]

Hanks, 3 Car. & P. 419, 14 Eng. C. L. 641; R. v. ——, 1 Cox C. C. 50; R. v. Shaw, 10 Cox C. C. 66; R. v. Townsend, 10 Cox C. C. 356; R. v. Bacon, 11 Cox C. C. 540; R. v. Lewis, 12 Cox C. C. 163; R. v. Willis, 12 Cox C. C. 164; R. v. Stone, 1 Dears. C. C. 251; R. v. Hughes, 1 Dears. & B. 188, 7 Cox C. C. 286; R. v. Senior, 1 Leigh & C. 409, 9 Cox C. C. 469; Paine's Case, 1 Yelv. 111, 80 Eng. Rep. 76.

2 See, supra, § 1082, footnote 7.

3 Com. v. Hughes, 87 Mass. (5 Allen) 499; State v. Langley, 34 N. H. 529; Burns v. People, 59 Barb. (N. Y.) 531; United States v. Boggs, 31 Fed. 337.

4 Foreman of grand jury alleged to have duly sworn accused to speak the truth concerning all such legal questions as should be put to him by said foreman touching matters under investigation, sufficiently shows the authority of the officer to administer the oath.—State v. Green, 24 Ark. 591.

5 Masterson v. State, 144 Ind. 240, 43 N. E. 138; State v. Cunningham, 66 Iowa 94, 23 N. W. 280.

6 State v. Webber, 78 Vt. 463, 62 Atl. 1018.

7 State v. Mace, 86 N. C. 668.

8 State v. Hascall, 6 N. H. 352; R. v. Roberts, 38 L. T. N. S. 690.

9 Keator v. People, 32 Mich. 484; Warwick v. State, 25 Ohio St. 21; Staight v. State, 39 Ohio St. 496; State v. Townley, 67 Ohio St. 21, 93 Am. St. Rep. 636, 65 N. E. 149; Stephens v. State, 31 Tenn. (1 Swan) 157.

Name of officer administering the oath is not required to be alleged in the case of an office provided by law, and its incumbent authorized to administer oaths,[10] but it is not error to do so;[11] although there are cases holding that the name of the officer administering the oath is a matter of substance and must be set out.[12] In all cases of a charge of perjury by false swearing before a specially appointed commission, or before a body not of a strictly judicial character, the name of the officer administering the oath should be alleged.[13]

§ 1087. ———— JUSTICES OF THE PEACE. An indictment or information charging perjury committed in the trial of a cause before a justice of the peace must contain the same averments as to jurisdiction and authority to administer the oath, under which accused is alleged to have falsely sworn, which are required in charging perjury on the trial of a cause in a court of record,[1] as above pointed out;[2] but an allegation as to the justice of the peace "then and there having competent authority to administer said oath," has been said to be a sufficient allegation of authority, as the officer's special authority is not required to be set out.[3] Where a justice of the peace,

10 CAL.—People v. Ennis, 137 Cal. 363, 70 Pac. 84. COLO.—Smith v. People, 32 Colo. 251, 75 Pac. 914. IOWA—State v. Harter, 131 Iowa 199, 108 N. W. 232. ORE.—State v. Spencer, 6 Ore. 152; State v. Ah Lee, 18 Ore. 540, 23 Pac. 424; State v. Woolridge, 45 Ore. 389, 78 Pac. 333; State v. Jewett, 48 Ore. 577, 85 Pac. 994. TEX.—St. Clair v. State, 11 Tex. App. 279. FED.—United States v. Walsh, 22 Fed. 644.

11 State v. Flowers, 109 N. C. 841, 13 S. E. 718.

12 Kerr v. People, 42 Ill. 307; State v. Oppenheimer, 41 Tex. 82.

13 United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16692.

1 IND. — State v. Ellison, 8 Blackf. 225. KY.—Com. v. Weingartner, 16 Ky. L. Rep. 221, 27 S. W. 815. ME.—State v. Furlong, 26 Me. 69. MASS.—Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72. MINN.—State v. Stein, 48 Minn. 466, 51 N. W. 474. N. C.—State v. Alexander, 11 N. C. (4 Hawks) 182; State v. Knight, 84 N. C. 789. TEX.—State v. Peters, 42 Tex. 7; Bradberry v. State, 7 Tex. App. 375; Anderson v. State, 24 Tex. App. 705, 7 S. W. 40.

2 See, supra, §§ 1082-1085.

3 United States v. Boggs, 31 Fed. 337.

by the statute, is authorized to act as ex officio coroner[4] or notary public,[5] an indictment or information charging perjury under an oath administered in either of such ex officio capacities must declare that the justice was acting in that special capacity at the time and in administering such oath.

§ 1088. ——— MINISTERIAL AND QUASI-JUDICIAL OFFICERS AND BODIES. In the case of ministerial officers, appointed and acting under a general statute providing for the office and designating the powers of such officer, an indictment or information charging perjury on an oath administered by such officer in proceedings before him, will be sufficient, if it alleges authority to administer the oath under which the false testimony was given, without setting out facts showing his jurisdiction.[1] Thus, where perjury is charged to have been committed before a United States land officer, it is not necessary to set forth the grounds upon which the contest was based, and the court will take judicial notice of the fact that the register and receiver of the land office have jurisdiction to hear a contest in relation to the public lands, and have authority to administer oaths to witnesses in such contest.[2] So charging authority of the particular officer or body will be sufficient in an indictment alleging perjury under an oath taken before a grand jury,[3] a body of election in-

4 **Justice swearing witness** at coroner's inquest held by the coroner, is without authority on the part of the justice to administer the oath, even though it be administered at the request or by the direction of the coroner.—State v. Knight, 84 N. C. 789.

Perjury can not be predicated on such an oath, or upon any other oath administered by a justice of the peace without authority, and an indictment charging perjury on such an oath will be bad on demurrer.—State v. Furlong, 26 Me. 69.

5 See Waters v. State, 30 Tex. App. 284, 17 S. W. 411.

1 State v. Belew, 79 Mo. 584; People v. Tredway, 3 Barb. (N. Y.) 470; People v. Phelps, 5 Wend. (N. Y.) 9.

2 Peters v. United States, 2 Okla. 138, 37 Pac. 181; Rich v. United States, 2 Okla. 146, 37 Pac. 183, reversing 1 Okla. 354, 33 Pac. 804; Babcock v. United States, 34 Fed. 873.

3 State v. Green, 24 Ark. 591;

spectors,[4] a pension examiner,[5] a committee of the legislature,[6] a regimental court of inquiry,[7] or any other officer or body having quasi-judicial powers.[8]

§ 1089. —— DESCRIPTION OF TRIBUNAL OR OFFICER. It has already been suggested that on a charge of perjury committed in a trial before a court, the court should be described by its legal appellation;[1] such court must be properly designated and described,[2] and the style of the court set out,[3] but the name of the person holding such court need not be given,[4] although it is not error to do so;[5] neither is it necessary to name the officer or clerk of the court administering the oath.[6] An allegation in an indictment or information charging the offense to have been committed in a named town, in a designated county of the state, at a trial in the court of a named justice of the peace,

Galloway v. State, 29 Ind. 442; State v. Hamilton, 65 Mo. 667; St. Clair v. State, 11 Tex. App. 297; People v. Greenwell, 5 Utah 112, 13 Pac. 89.

4 ILL.—Johnson v. People, 94 Ill. 505. IND.—State v. Hopper, 133 Ind. 460, 32 N. E. 878. N. Y.—Campbell v. People, 8 Wend. 636; Burns v. People, 59 Barb. 531. VT.—State v. McCone, 59 Vt. 117, 7 Atl. 406.

5 Markham v. United States, 160 U. S. 319, 40 L. Ed. 441, 16 Sup. Ct. Rep. 288.

6 Com. v. Hillenbrand, 96 Ky. 407, 29 S. W. 287.

7 Conner v. Com., 4 Va. (2 Va. Cas.) 30.

8 Commissioner to take bail under Massachusetts statute.—Com. v. Carel, 105 Mass. 582; Com. v. Hatfield, 107 Mass. 277; Com. v. Butland, 119 Mass. 317.

1 See, supra, § 1082, footnote 8.

2 ILL.—Kerr v. People, 42 Ill. 307. IND.—State v. Ellison, 8 Blackf. 225; Hitesman v. State, 48 Ind. 473. KY.—Woolsey v. Com., 4 Ky. L. Rep. 353. LA.—State v. Harlis, 33 La. Ann. 1172. N. Y.—Guston v. People, 66 Barb. (N. Y.) 35, sub nom. Geston v. People, 4 Lans. (N. Y.) 487. N. C.—State v. Street, 5 N. C. (1 Murph.) 156, 3 Am. Dec. 682. TEX.—State v. Oppenheimer, 41 Tex. 82. VA.—Conner v. Com., 4 Va. (2 Va. Cas.) 30. FED.—United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16692.

3 State v. Street, 5 N. C. (1 Murph.) 156, 3 Am. Dec. 682.

4 Smith v. People, 32 Colo. 251, 75 Pac. 914; State v. Flowers, 109 N. C. 841, 13 S. E. 718; United States v. Walsh, 22 Fed. 644.

5 State v. Flowers, 109 N. C. 841, 13 S. E. 718.

6 COLO.—Smith v. People, 32 Colo. 251, 75 Pac. 914. IOWA—State v. Harter, 131 Iowa 199, 108 N. W. 232. MINN.—State v. Stein, 48 Minn. 466, 51 N. W. 474. ORE.—State v. Spencer, 6 Ore. 152.

which court was duly authorized to administer oaths, sufficiently describes the court.[7]

Non-judicial proceedings, the occasion when, and the place where, the perjury charged is alleged to have been committed, it is necessary that the indictment or information shall set out the name of the officer before whom the oath was taken.[8]

§ 1090. —— APPOINTMENT, ELECTION AND QUALIFICATION OF JUDGE, OFFICER OR BODY. It has been pointed out that there is a want of harmony in the decisions in the various jurisdictions as to the necessity of setting out in an indictment or information charging perjury the commission of the court, magistrate or officer administering the oath under which the accused is alleged to have testified falsely.[1] The general rule may be said to be that while it is required that the indictment or information shall allege that the court, officer, body or tribunal administering the oath was legally authorized to administer it, as already pointed out,[2] and must in addition aver whatever other facts are, in the particular instance, a necessary part of the foundation of the investigation, proceeding or trial at which the alleged false testimony was given, or false affidavit made, and these other necessary allegations of fact will vary with the differences in the provisions and wording of the particular statutes under which the prosecution is had;[3] but there is no necessity for set-

7 State v. Stein, 48 Minn. 466, 51 N. W. 474.

8 ILL.—Kerr v. People, 42 Ill. 307. IND.—State v. Ellison, 8 Blackf. 225; Hitesman v. State, 48 Ind. 473. LA.—State v. Harlis, 33 La. Ann. 1172. TEX.—State v. Oppenheimer, 41 Tex. 82. FED.—United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16692.

1 See, supra, § 1084, footnotes 6 and 7.

2 See, supra, §§ 1082-1085.

3 See: GA.—Pennaman v. State, 58 Ga. 336; Johnson v. State, 58 Ga. 397. ILL.—Morrell v. People, 32 Ill. 499. IND.—State v. Reynolds, 108 Ind. 353, 9 N. E. 287. MASS.—Com. v. Warden, 52 Mass. (11 Metc.) 406. MICH.—People v. Fox, 25 Mich. 492. MO.—State v. Crumb, 68 Mo. 206. MINN.—Young v. Young, 18 Minn. 90; State v. Day, 108 Minn. 121, 121 N. W. 611. N. Y.—People v. Phelps, 5 Wend. 9; People v. Warner, 5 Wend. 271;

ting out the various facts which conferred that jurisdiction, and among the things not usually required to be set out are the appointment, election, qualification, and commission of the particular officer or body,[4] it being usually sufficient to allege that the officer administering the oath held an office which apparently confers upon him the authority to administer the oath in the particular instance specified.[5] Where the body or tribunal is a body other than a court of record, justice of the peace, or officer whose power to administer the oath in the particular case exists under a general statute, and of which authority and power courts take judicial cognizance, the further facts which are a necessary part of the foundation of jurisdiction and authority to administer the oath in the particular instance should be set out. Thus, as an illustration, in a charge of perjury in making a false oath regarding the residence and qualification of a voter, the indictment or information should show that the election board was sufficiently organized, by stating that an election was held, which had been lawfully called for a specified purpose, and that the judge of election who administered the oath, under which the false swearing charged was made, had full authority and power to administer it; it is not necessary to allege the manner of organization of such election board, or to state what officer administered the oath, or aver

People v. Tredway, 3 Barb. 470. ENG.—R. v. Koops, 6 Ad. & E. 198, 33 Eng. C. L. 124; R. v. Virrier, 12 Ad. & E. 317, 40 Eng. C. L. 163; King v. R., 14 Ad. & E. N. S. (14 Q. B.) 31, 68 Eng. C. L. 31, 3 Cox C. C. 561; R. v. Dudman, 4 Barn. & C. 850, 10 Eng. C. L. 828, 7 Dears. & R. 324; R. v. Bishop, 1 Car. & M. 302, 41 Eng. C. L. 169; R. v. Pearson, 8 Car. & P. 119, 34 Eng. C. L. 642; R. v. Gardiner, 2 Moo. 95; Ryalls v. R., 13 Jur. 259, 18 L. J. (N. S.) M. C. 69.

[4] ILL.—Johnson v. People, 94 Ill. 505. IND.—Burk v. State, 81 Ind. 128. MO.—State v. Marshall, 47 Mo. 378; State v. Nelson, 146 Mo. 256, 48 S. W. 84; State v. Dineen, 203 Mo. 628, 102 S. W. 480. N. C.—State v. Bryson, 4 N. C. (1 Car. Law Repos. 503) 115. TEX.—State v. Peters, 42 Tex. 7; Stewart v. State, 6 Tex. App. 184; Bradberry v. State, 7 Tex. App. 375. FED.—United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16692.

[5] See United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16692.

that he was duly selected or elected, or set out his commission and oath of office.[6] But an indictment charging perjury to have been committed on an examination before A, "a commissioner of the United States, newly appointed," without setting out how, or by whom, or under what statute, or for what purpose, he was appointed, was held to be bad on demurrer;[7] and where a tax-lister is charged with perjury in the violation of his official oath, the indictment or information must allege the election and qualification of a board of tax-listers.[8]

§ 1091. THE OATH, ADMINISTRATION, FORM, MAKING, ETC. —IN GENERAL. An indictment or information charging perjury must directly and positively, and not by way of argument or recital or inference, allege that accused was duly sworn in the trial, investigation, or proceeding in which the false testimony, or false affidavit, is alleged to have been given or made,[1] and failing to do this, the instrument will be insufficient,[2]—although it has been held that under the Vermont statute an allegation that the

6 Johnson v. People, 94 Ill. 505.

7 United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16692.

8 State v. Peters, 57 Vt. 86, 5 Am. Cr. Rep. 591.

1 CAL. — People v. Dunlap, 113 Cal. 72, 45 Pac. 183; People v. Cohen, 118 Cal. 74, 50 Pac. 20; People v. Simpton, 133 Cal. 367, 65 Pac. 834. FLA.—Craft v. State, 42 Fla. 567, 29 So. 418. LA.—State v. Eddens, 52 La. Ann. 1461, 27 So. 742. MASS.—Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72. MO.—State v. Hamilton, 7 Mo. 300; State v. Hamilton, 65 Mo. 667. N. H.—State v. Divoll, 44 N. H. 140. TEX.—Curtley v. State, 42 Tex. Cr. Rep. 227, 59 S. W. 44; Parker v. State, 44 Tex. Cr. Rep. 147, 69 S. W. 75. WIS.—Brown v. State, 91 Wis. 245, 64 N. W. 749. FED.—United States v. McConaughy, 13 Sawy. 141, 33 Fed. 168; United States v. Hearing, 26 Fed. 744. ENG.—R. v. Stevens, 5 Barn. & C. 246, 11 Eng. C. L. 448; R. v. Goodfellow, 1 Car. & M. 569, 41 Eng. C. L. 310; R. v. Richards, 7 Dow. & R. 665, 16 Eng. C. L. 313.

"Then and there" taken in a cause pending before a justice, sufficient averment that oath had been administered to him before he gave the testimony.—People v. Ennis, 137 Cal. 263, 70 Pac. 84.

2 People v. Dunlap, 113 Cal. 72, 45 Pac. 183; Brown v. State, 91 Wis. 245, 64 N. W. 749; United States v. McConaughy, 13 Sawy. 141, 33 Fed. 168; United States v. Hearing, 26 Fed. 744.

accused committed "perjury" is a sufficient allegation, without specifically alleging that he was sworn, because the technical term "perjury" carries with it the necessary implication that the accused was sworn.[3] Thus, it has been said that a general allegation that accused "was lawfully required to declare and depose," is insufficient because it does not allege that he was sworn;[4] the same is true of an allegation that "being lawfully required to depose the truth, on his oath, legally administered, and being required to testify, did wilfully and corruptly commit the crime and offense of perjury";[5] "did depose and swear" is not equivalent to "being duly sworn, did depose and say";[6] "made and subscribed in open court, . . . wickedly, falsely, wilfully, corruptly, and knowingly, the following false and corrupt oath," does not allege that accused was sworn;[7] "state and testify," omitting the word "did," held to be insufficient;[8] and charging that accused came before the magistrates hearing the cause, and exhibited an information on oath, is not an allegation that accused was sworn.[9]

§ 1092. —— MAKING AFFIDAVIT OR OATH. Perjury being predicated upon an affidavit, or oath to depositions, and the like, the indictment or information must specifically allege that the accused was sworn,[1] in the same manner pointed out in the preceding section. This may be done in two ways, (1) by alleging that the accused did corruptly say, depose, swear, and make affidavit in writing, or (2) that accused did produce and exhibit a certain affidavit in writing;[2] and in some jurisdictions, under statu-

3 State v. Carnley, 67 Vt. 257, 31 Atl. 840.

See footnote 5, this section.

4 People v. Gaige, 26 Mich. 30.

5 Brown v. State, 91 Wis. 245, 64 N. W. 749.

6 United States v. McConaughy, 13 Sawy. 141, 33 Fed. 168.

7 State v. Divoll, 44 N. H. 140.

8 Menasco v. State, (Tex.) 11 S. W. 898.

9 R. v. Goodfellow, 1 Car. & M. 569, 41 Eng. C. L. 310.

1 Copeland v. State, 23 Miss. 257; United States v. Hearing, 26 Fed. 744.

2 People v. Robertson, 3 Wheel. Cr. Cas. (N. Y.) 180, 191.

tory provision, it is sufficient to allege that the false affidavit "was made and is entitled in an action or special proceeding."[3] But a simple allegation that defendant "did depose and swear" to a deposition set forth, is not sufficient;[4] and it has been said that an allegation regarding an affidavit alleged to be false was "made and subscribed in open court, wickedly, falsely, wilfully, corruptly, and knowingly, the following false and corrupt oath, which is in substance as follows," setting out the alleged false affidavit, is not a sufficient allegation that the accused was sworn.[5] It is not necessary that it shall be alleged that the officer before whom the alleged false affidavit was made, or false oath was taken, wrote a jurat or memorandum of the transaction on the instrument, it being sufficient, after setting out the affidavit, to allege that the accused falsely swore that it was true.[6] In California,[7] and in New York,[8] it must be alleged and proved that the affidavit was delivered.

§ 1093. —— FORM OF OATH AND MANNER OF TAKING. While the formality of the oath, the instrumentalities by which administered, and the manner of taking may be necessary to bind the conscience of the witness and lay him under obligations to speak the truth,[1] this is a matter

3 People v. Williams, 149 N. Y. 1, 11 N. Y. Cr. Rep. 557, 43 N. E. 407.

4 United States v. McConaughy, 13 Sawy. 141, 33 Fed. 168.

5 State v. Divoll, 44 N. H. 140.

6 United States v. Hearing, 26 Fed. 744.

7 People v. Robles, 117 Cal. 681, 49 Pac. 1042.

8 People v. Williams, 149 N. Y. 1, 11 N. Y. Cr. Rep. 557, 43 N. E. 407.

1 **Religious belief**, whether of the Christian or any other variety of faith, is a matter entering largely into the conception of the witness as to the binding obligation of the oath; and not infrequently the formalities accompanying the administration of the oath, and its manner of administration, are largely concerned in binding the conscience of the witness. Thus, certain Christians do not consider themselves bound to speak the truth unless they are sworn upon the Holy Scriptures, and some classes of Christians even are not bound unless the cover of the book is ornamented with a cross; others insist that to be binding on their conscience the Bible must be the Douay version of the Scriptures;

the discussion of which, and the authorities bearing upon the subject are not within the scope of this work. At common law it was customary in an indictment charging perjury to allege that the accused "did take his corporal oath upon the Holy Gospel of God."[2] In this country it is not necessary that an indictment or information charging perjury should allege in what particular form of words the oath was given, or state what formalities accompanied the act of administration, it being sufficient to allege that the accused was "duly sworn,"[3] it not being

and there was a well-known character around New York for years—and much in the courts—who considered he was free to testify as he pleased, regardless of the truth, if he could succeed in kissing his thumb instead of the cross upon the cover of the Bible. Hebrews are to be sworn upon the Old Testament; Mohammedans must be sworn upon the Koran; Chinese, if their conscience is to be bound, or if it can be bound, to speak the truth, must be sworn in a form, and with formalities, which are binding upon their conscience under their peculiar religious beliefs; and the like forms and formalities as to other nationalities and peculiar beliefs. See, in this connection, 1 Green Bag 526; 9 Id. 57; 15 Id. 149; 25 Alb. L. J. 339; 26 Irish L. T. 471; 32 L. J. 324; 30 Chic. L. N. 181; 15 Cent. L. J. 378.

2 An account book called "The Young Man's Best Companion" was substituted for the Holy Scriptures in R. v. Brodribb, 6 Car. & P. 571, 25 Eng. C. L. 580.

Under English statute 23 Geo. III, ch. 123, the precise form of the oath is immaterial, it being an oath within the meaning of that statute if it was understood by the party tendering it and by the party taking it, as having the form and obligation of an oath.—R. v. Loveless, 1 Moo. & R. 349.

3 ARK.—State v. Green, 24 Ark. 591. CAL.—People v. Dunlap, 113 Cal. 72, 45 Pac. 183; People v. Collins, 6 Cal. App. 492, 92 Pac. 513. IOWA—State v. O'Hagan, 38 Iowa 504. KY.—Com. v. Keane, 92 Ky. 457, 18 S. W. 7; Com. v. Taylor, 96 Ky. 394, 29 S. W. 138; Com. v. Hillenbrand, 96 Ky. 407, 29 S. W. 287. MD.—State v. Mercer, 101 Md. 535, 61 Atl. 220. MASS.—Com. v. Warden, 52 Mass. (11 Metc.) 406. MINN.—State v. Madigan, 57 Minn. 425, 59 N. W. 490; State v. Scott, 78 Minn. 311, 81 N. W. 3. MO.—State v. Foulks, 57 Mo. 461; State v. Hamilton, 65 Mo. 667. N. J.—Dodge v. State, 24 N. J. L. (4 Zab.) 455. N. Y.—Tuttle v. People, 36 N. Y. 431, 2 Transc. App. 306; Burns v. People, 59 Barb. 531; Burns v. People, 5 Lans. 189. ORE.—State v. Woolridge, 45 Ore. 389, 78 Pac. 333. PA.—Respublica v. Newell, 3 Yeates 407, 2 Am. Dec. 381. S. C.—State v. Farrow, 10 Rich. L. 165. TEX.—State v. Umdenstock, 43 Tex. 554; Beach v. State, 32 Tex. Cr. Rep. 240, 22

necessary to allege that the accused "was sworn on the Holy Gospel of God to speak the truth, the whole truth and nothing but the truth,"[4] or to state that the accused "was sworn by uplifted hand";[5] and the omission by the officer administering the oath of the usual words "so help you God," is a mere irregularity which furnishes no defense to a charge of perjury.[6] It is not even indispensable to allege that the accused was "duly sworn," it being sufficient to say that he was sworn "in due form of law,"[7] or that the oath was "legally administered by the clerk,"

S. W. 976; Flournoy v. State, 59 S. W. 902. VT. — State v. Camley, 67 Vt. 322, 31 Atl. 840. WIS.—Brown v. State, 91 Wis. 245, 64 N. W. 749.

Charging perjury in statement before inspectors of election, which merely states that accused was "duly sworn," without averring that the proper statutory oath was administered, is fatally defective.—Burns v. People, 5 Lans. (N. Y.) 189.

"Duly sworn" is not objectionable on the ground that it does not charge the oath to have been administered by any one.—State v. O'Hagan, 38 Iowa 504.

4 **"Sworn on the Holy Gospel of God** to speak the truth, the whole truth and nothing but the truth," need not be alleged where it is charged that the accused was duly sworn as a witness in the suit, etc. —State v. Miller, Man. Unrep. Cas. (La.) 317.

5 **"Corporal oath" and "solemn oath"** are used synonymously, and an oath taken with the uplifted hand may be properly described by either term.—Jackson v. State, 1 Ind. 184; State v. Norris, 9 N. H. 96; Burns v. People, 59 Barb. (N. Y.) 531, 543.

The term "corporal oath" must be considered as applying to any bodily assent to the oath of the witness.—State v. Norris, 9 N. H. 96.

Did "then and there, in due form of law, take his corporal oath," without stating that he was sworn on the Gospels, or by uplifted hand, is sufficiently certain.—Respublica v. Newell, 3 Yeates (Pa.) 407, 2 Am. Dec. 381.

6 People v. Parent, 139 Cal. 600, 73 Pac. 422.

7 Fudge v. State, 57 Fla. 7, 17 Ann. Cas. 919, 49 So. 128; State v. Mercer, 101 Md. 535, 61 Atl. 220.

"Duly sworn" or "in due form of law sworn," or words of equivalent import, should be used where the indictment does not attempt to set forth the words of the oath.—Fudge v. State, 57 Fla. 7, 17 Ann. Cas. 919, 49 So. 128.

"In due form of law," alleged of oath taken in the administration of a decedent's estate, is sufficient, although accompanied by a statement that the oath was administered by the deputy register of wills. — State v. Mercer, 101 Md. 535, 61 Atl. 220.

without giving the form of the oath, in those cases where the indictment states the circumstances under which the oath was required and the occasion on which it was made, in such a way as to show that its violation was perjury.[8] But it has been said that where the indictment or information sets out the oath, or the method of taking it, with needless particularity, the proof must correspond with the allegation,[9] although the contrary has been held.[10] The oath administered to the witness need not be set out in the indictment or information,[11] but it is said that where the alleged perjury is an affidavit made or filed, the indictment or information should set out such affidavit.[12]

§ 1094. —— ADMINISTRATION OF OATH AND BY WHOM. It was required at common law that an indictment charging perjury should allege with exactness the details entering into the commission of the alleged offense, but in this country it is sufficient to set out the name of the officer of the court administering the oath[1] upon which the prosecution for perjury is based, and specifically allege that the officer or court administering such oath had authority and jurisdiction to administer it;[2] it is unnecessary to set

8 State v. Umdenstock, 43 Tex. 554.

9 State v. Davis, 96 N. C. 383; State v. Porter, 2 Hill L. (S. C.) 611; Stewart v. State, 6 Tex. App. 184.

10 Patrick v. Smoke, 3 Strob. L. (S. C.) 147.

11 Lamar v. State, 49 Tex. Cr. Rep. 563, 95 S. W. 509.

12 State v. Perry, 42 Tex. 238; Shely v. State, 35 Tex. Cr. Rep. 190, 32 S. W. 901.

1 In **Vermont**, an indictment for perjury need not set forth by what court, magistrate or person the oath was administered to the accused.—State v. Sargood, 80 Vt. 415, 130 Am. St. Rep. 995, 13 Ann. Cas. 367, 68 Atl. 49.

2 ALA.—Smith v. State, 103 Ala. 57, 15 So. 866. CAL.—People v. Dunlap, 113 Cal. 72, 45 Pac. 183. FLA.—Craft v. State, 42 Fla. 567, 29 So. 418. IND.—State v. Hopper, 133 Ind. 460, 32 N. E. 878. IOWA—State v. Newton, 1 G. Greene 160, 48 Am. Dec. 367. KY.—Com. v. Ransdall, 153 Ky. 334, 155 S. W. 1117; Com. v. Combs, 125 Ky. 273, 101 S. W. 312. LA.—State v. Harlis, 33 La. Ann. 1172. MD.—State v. Mercer, 101 Md. 535, 61 Atl. 220. N. H.—State v. Langley, 34 N. H. 529. TEX.—Stewart v. State, 6 Tex. App. 184. FED.—United States v. Eddy, 134 Fed. 114.

out all the facts showing such authority,[3] but it must be alleged that the officer or court had authority to administer the particular oath on which the charge of perjury is based.[4] While the jurisdiction and authority of the officer or court to administer the oath must be shown by proper averment, this may be done either by an express averment that the officer had jurisdiction and authority, or by setting out such facts as make it judicially to appear that he had such jurisdiction;[5] although it has been held

Failure to do so renders the indictment fatally defective.—State v. Owen, 73 Mo. 440.

3 ALA.—Smith v. State, 103 Ala. 57, 15 So. 866; McClerkin v. State, 105 Ala. 107, 17 So. 123. ARK.—State v. Green, 24 Ark. 591. CAL.—People v. De Carlo, 124 Cal. 462, 57 Pac. 383. GA.—Franklin v. State, 91 Ga. 712, 17 S. E. 987. ILL.—Johnson v. People, 94 Ill. 505; Maynard v. People, 135 Ill. 416, 25 N. E. 740; Kizer v. People, 211 Ill. 407, 71 N. E. 1035. IND.—Burk v. State, 81 Ind. 128. IOWA—State v. Newton, 1 G. Greene 160, 48 Am. Dec. 367; State v. O'Hagan, 38 Iowa 504; State v. Cunningham, 66 Iowa 94, 6 Am. Cr. Rep. 551, 23 N. W. 280; State v. Harter, 131 Iowa 199, 9 Ann. Cas. 764, 180 N. W. 232. KY.—Com. v. Combs, 125 Ky. 273, 101 S. W. 312; Goslin v. Com., 28 Ky. L. Rep. 683, 90 S. W. 223. LA.—State v. Maxwell, 28 La. Ann. 361. MD.—State v. Mercer, 101 Md. 535, 61 Atl. 220. MO.—State v. Marshall, 47 Mo. 378; State v. Keel, 54 Mo. 187; State v. Belew, 79 Mo. 584. N. H.—State v. Langley, 34 N. H. 529. N. J.—State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270. N. Y.—People v. Phelps, 5 Wend. 9. N. C.—State v. Bryson, 4 N. C. (1 Car. L. Repos. 503) 115; State v. Robertson, 98 N. C. 751, 4 S. E. 511; State v. Green, 100 N. C. 419, 5 S. E. 422. OHIO—Halleck v. State, 11 Ohio 400. OKLA.—Rich v. United States, 2 Okla. 146, 37 Pac. 1083, reversing 1 Okla. 354, 33 Pac. 804; Gray v. State, 4 Okla. Cr. 292, 32 L. R. A. (N. S.) 142, 111 Pac. 825. ORE.—State v. Spencer, 6 Ore. 152; State v. Woolridge, 45 Ore. 389, 78 Pac. 333. PA.—Com. v. O'Neill, 5 Pa. Co. Ct. Rep. 209. S. C.—State v. Byrd, 28 S. C. 18, 13 Am. St. Rep. 660, 4 S. E. 793. TEX.—State v. Peters, 42 Tex. 7; Bradberry v. State, 7 Tex. App. 375; Eoff v. State, 75 Tex. Cr. Rep. 244, 170 S. W. 707. FED.—United States v. Eddy, 134 Fed. 114.

4 People v. Cohen, 118 Cal. 74, 50 Pac. 20.

5 State v. Cunningham, 66 Iowa 94, 6 Am. Cr. Rep. 551, 554, 23 N. W. 280.

Under Iowa statute relating to indictments for perjury, an indictment alleging that the accused appeared as a witness on the trial of a criminal prosecution in the district court of a specified county, "and was then and there duly sworn before the duly authorized clerk of said court," is not open to the objection that it does not prop-

that where an indictment, following the statutory form,[6] fails to set forth by what court, magistrate, or person the oath to the accused was administered on the occasion when the crime is alleged to have been committed, it is sufficient.[7] The court's jurisdiction of the cause in which the perjury is alleged to have been committed is sufficiently set out by the allegation that the clerk before whom the false oath was taken had authority to administer it.[8] Inasmuch as jurisdiction of the court is an essential element, the indictment must allege such jurisdiction either directly or through statement of the facts from which it affirmatively appears;[9] but it is generally held to be sufficient to aver that the court or officer had authority to administer the oath, without any allegation as to the jurisdiction of the court of the subject-matter regarding which the false testimony was given.[10]

erly charge the name or authority of the person by whom the oath was administered.—State v. Harter, 131 Iowa 199, 9 Ann. Cas. 764, 108 N. W. 232.

6 As to following statutory form, see, supra, § 1062.

7 State v. Sargood, 80 Vt. 415, 130 Am. St. Rep. 995, 13 Ann. Cas. 367, 68 Atl. 49.

8 ALA.—McClerkin v. State, 105 Ala. 107, 17 So. 123. COLO.—Thompson v. People, 26 Colo. 496, 59 Pac. 52. ILL.—Kiser v. People, 211 Ill. 407, 71 N. E. 1035. OKLA.—State v. Gray, 4 Okla. 292, 32 L. R. A. (N. S.) 142, 111 Pac. 825. WASH.—State v. Douette, 31 Wash. 6, 71 Pac. 556.

9 CAL.—People v. Howard, 111 Cal. 655, 44 Pac. 342. GA.—Franklin v. State, 91 Ga. 712, 17 S. E. 987. ILL.—Maynard v. People, 135 Ill. 416, 25 N. E. 740. IOWA—State v. Booth, 88 N. W. 344. KY.—Com. v. Combs, 30 Ky. L. Rep. 1300, 101 S. W. 312. LA.—State v. Eddens, 52 La. Ann. 1461, 27 So. 742. ME.—State v. Plummer, 50 Me. 217. MO.—State v. Keel, 54 Mo. 182. TENN.—State v. Wise, 71 Tenn. 38. TEX.—Moss v. State, 47 Tex. Cr. Rep. 459, 11 Ann. Cas. 710, 83 S. W. 829.

10 ARK.—Loudermilk v. State, 110 Ark. 549, 162 S. W. 569. CAL.—People v. De Carlo, 124 Cal. 462, 57 Pac. 383. COLO.—Bedsole v. State, 59 Fla. 3, 52 So. 1. ILL.—Thompson v. People, 26 Colo. 496, 59 Pac. 51. FLA.—Kizer v. People, 211 Ill. 407, 71 N. E. 1035. IOWA—State v. Newton, 1 G. Greene 160, 48 Am. Dec. 367. KY.—Cope v. Com., 20 Ky. L. Rep. 721, 47 S. W. 436. MASS.—Com. v. Knight, 12 Mass. 274, 7 Am. Dec. 72. N. Y.—Eighmy v. People, 79 N. Y. 546. N. C.—State v. Green, 100 N. C. 419, 5 S. E. 422. OHIO—Halleck v. State, 11 Ohio 400. TEX.—State v. Peters, 42 Tex. 7. UTAH—People

§ 1095. MATERIALITY OF TESTIMONY OR AFFIDAVIT—IN GENERAL. An indictment or information charging perjury must, in the absence of statutory provisions to the contrary, distinctly show, either by direct averment or by a statement of the facts in the cause, that the testimony alleged to be false was material to the issues in the cause in which given; and where several distinct parts of the testimony are alleged to be false, the indictment or information must distinctly show that each part alleged to be false was material,[1] although in some states, by statute, it is provided that it shall be sufficient to charge that accused "committed perjury," because such a charge necessarily involves the fact that the false testimony given was material.[2] Where the alleged false testimony

v. Greenwell, 5 Utah 112, 13 Pac. 89. WASH.—State v. Douette, 31 Wash. 6, 71 Pac. 556.

1 CAL. — People v. Von Tiedeman, 120 Cal. 128, 52 Pac. 155. FLA.—Robinson v. State, 18 Fla. 898; Parrish v. State, 18 Fla. 902. GA.—Hembree v. State, 52 Ga. 242, 1 Am. Cr. Rep. 504; State v. King, 103 Ga. 263, 30 S. E. 30. ILL.—Wilkinson v. People, 226 Ill. 135, 80 N. E. 699. IND.—Weathers v. State, 2 Blackf. 278; State v. Flagg, 25 Ind. 243; State v. Thrift, 30 Ind. 211; Burk v. State, 81 Ind. 128. LA.—State v. Brown, 111 La. 170, 35 So. 501. ME.—State v. Ela, 91 Me. 309, 39 Atl. 1001. MICH.—People v. Collier, 1 Mich. 137, 48 Am. Dec. 699. MISS. — State v. Booker, 84 Miss. 187, 36 So. 241. MO.—State v. Holden, 48 Mo. 93. N. J.—State v. Beard, 25 N. J. L. (1 Dutch.) 384. N. Y.—Wood v. People, 59 N. Y. 117, 2 Cow. Cr. Rep. 116; People v. Root, 94 App. Div. 84, 18 N. Y. Cr. Rep. 371, 87 N. Y. Supp. 962; Guston v. People, 61 Barb. 35; sub nom. Geston v. People, 4 Lans. 487. S. C.—State v. Hayward, 1 Nott & McC. 546. TENN.—State v. Moffatt, 26 Tenn. (7 Humph.) 250; State v. Bowlus, 50 Tenn. (3 Heisk.) 29. TEX.—Donohoe v. State, 14 Tex. App. 638; Agar v. State, 29 Tex. App. 605, 16 S. W. 761; Weaver v. State, 34 Tex. Cr. Rep. 554, 31 S. W. 400; Dorrs v. State, (Tex.) 40 S. W. 311; McAvoy v. State, 39 Tex. Cr. Rep. 684, 47 S. W. 1000; Ross v. State, 40 Tex. Cr. Rep. 349, 50 S. W. 336; McCoy v. State, 43 Tex. Cr. Rep. 606, 68 S. W. 686; Moroney v. State, 45 Tex. Cr. Rep. 524, 78 S. W. 696; Morris v. State, 47 Tex. Cr. Rep. 420, 83 S. W. 1126; Rosebud v. State, 50 Tex. Cr. Rep. 475, 98 S. W. 858; McVicker v. State, 52 Tex. Cr. Rep. 508, 107 S. W. 834. VT.—State v. Trask, 42 Vt. 152; State v. Chandler, 42 Vt. 446. FED.—United States v. Cowing, 4 Cr. 613, Fed. Cas. No. 14880; United States v. Singleton, 54 Fed. 488; United States v. Pettus, 84 Fed. 791.

2 State v. Cline, 146 N. C. 640,

was given before a grand jury or other quasi-judicial body,[3] the indictment or information must show that there was a matter under investigation before such body, that the testimony was given in relation thereto, and that the alleged false testimony was material in such investigation.[4] Where the false swearing charged consisted of an affidavit, the indictment or information must show that the affidavit was authorized by law and proper to be made[5] and that it was material on the point in question,[6] although there are authorities to the effect that an indictment or information charging the statutory offense of false swearing need not allege the materiality.[7] Failing to clearly show these required facts, which are essential elements in the crime of perjury, the indictment or information will be fatally defective.[8]

§ 1096. —— AS TO MANNER OF PLEADING. The indictment or information may set out the materiality to the issues or point of inquiry of the testimony alleged to be false in either of two ways: (1) by a direct averment of that fact,[1] or (2) by setting forth the facts from which

61 S. E. 522; State v. Miller, 26 R. I. 282, 58 Atl. 880; State v. Byrd, 28 S. C. 18, 13 Am. St. Rep. 660, 4 S. E. 793.

3 As to quasi-judicial bodies, see, supra, § 1088.

4 State v. Anderson, 103 Ind. 170, 2 N. E. 332.

Alleging subject of examination material, without alleging that false testimony was material to the issue before the grand jury, is insufficient. — Buller v. State, 33 Tex. Cr. Rep. 551, 28 S. W. 465.

5 As to voluntary affidavits, see, supra, § 1081.

6 State v. McCormick, 52 Ind. 169; Ford v. Com., 16 Ky. L. Rep. 528, 29 S. W. 446; State v. Gibson, 26 La. Ann. 71; Buller v. State, 33 Tex. Cr. Rep. 551, 28 S. W. 465.

7 Gammage v. State, 119 Ga. 380, 46 S. E. 409; Richey v. Com., 81 Ky. 524; Ford v. Com., 16 Ky. L. Rep. 528, 29 S. W. 446.

8 GA.—Hembree v. State, 52 Ga. 242, 1 Am. Cr. Rep. 504. IND.—State v. McCormick, 52 Ind. 169: State v. Anderson, 103 Ind. 170, 2 N. E. 332. LA.—State v. Gibson, 26 La. Ann. 71. MASS.—Com. v. Byron, 80 Mass. (14 Gray) 31. TEX.—Martin v. State, 33 Tex. Cr. Rep. 317, 26 S. W. 400; McMurtry v. State, 38 Tex. Cr. Rep. 521, 43 S. W. 1010. FED. — United States v. Singleton, 54 Fed. 488.

1 ALA. — Williams v. State, 68 Ala. 551. CAL. — People v. Von Tiedeman, 120 Cal. 128, 52 Pac. 155. ILL.—Kimmel v. People, 92 Ill. 457. IND.—State v. Johnson, 7

the materiality is made apparent or necessarily inferred;[2] and an averment of the materiality of the alleged false testimony by either of these methods is usually suffi-

Blackf. 49; State v. Flagg, 25 Ind. 243. LA.—State v. Maxwell, 28 La. Ann. 361; State v. Jean, 42 La. Ann. 946, 8 So. 480. MASS.—Com. v. McCarty, 152 Mass. 577, 26 N. E. 140. MICH.—Flint v. People, 35 Mich. 491. MISS.—Lea v. State, 64 Miss. 278, 1 So. 235. NEB.—Gandy v. State, 23 Neb. 436, 36 N. W. 817. N. M. — Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106. N. Y.—People v. Burroughs, 1 Park. Cr. Rep. 211; People v. Grimshaw, 33 Hun 505, 2 N. Y. Cr. Rep. 390. N. C.—State v. Davis, 69 N. C. 495. OHIO—Dilcher v. State, 39 Ohio St. 130. OKLA.—Rich v. United States, 1 Okla. 354, 3 Pac. 804; reversed on another point, 2 Okla. 146, 37 Pac. 1083. TEX.—Washington v. State, 22 Tex. App. 26, 3 S. W. 228; Sisk v. State, 28 Tex. App. 432, 13 S. W. 647; Carvey v. State, 33 Tex. Cr. Rep. 557; sub nom. Carven v. State, 28 S. W. 472; Adams v. State, 29 S. W. 270; Scott v. State, 35 Tex. Cr. Rep. 11, 29 S. W. 274. VT.—State v. Magoon, 37 Vt. 122. ENG.—R. v. Bennett, 3 Car. & K. 124; R. v. Scott, L. R. 2 Q. B. Div. 415, 21 Moak's Eng. Repr. 193; R. v. Dowlin, 5 T. R. 311, 101 Eng. Repr. 174.

Charging generally that the false oath was material to the trial of the issue upon which it was taken, without showing particularly how it was material, is sufficient.—State v. Mumford, 12 N. C. (1 Dev. L.) 519, 17 Am. Dec. 573.

Not sufficient to aver in an indictment for perjury, by an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to," immediately preceding the statement of the matters alleged to have been falsely sworn to. — People v. Collier, 1 Mich. 137, 48 Am. Dec. 699.

2 ARK.—State v. Nees, 47 Ark. 553. CAL.—People v. Kelly, 59 Cal. 372; People v. Lem You, 97 Cal. 224, 32 Pac. 11. IND.—State v. Hall, 7 Blackf. 25; State v. Johnson, 7 Blackf. 49; Hendricks v. State, 26 Ind. 493; Galloway v. State, 29 Ind. 442. IOWA—State v. Cunningham, 66 Iowa 94, 6 Am. Cr. Rep. 551, 23 N. W. 280. LA.—State v. Schlessinger, 38 La. Ann. 564; State v. Gonsoulin, 42 La. Ann. 579, 7 So. 633. MASS.—Com. v. Johns, 72 Mass. (6 Gray) 274; Com. v. McCarty, 152 Mass. 577, 26 N. E. 140. MISS.—Lea v. State, 64 Miss. 278, 1 So. 235. MO.—State v. Blehusch, 32 Mo. 276; State v. Marshall, 47 Mo. 378; State v. Cave, 81 Mo. 450; State v. Huckeby, 87 Mo. 414; State v. Powers, 136 Mo. 194, 37 S. W. 936. N. J.—State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270; State v. Voorhis, 52 N. J. L. 351, 20 Atl. 26. N. Y.—Campbell v. People, 8 Wend. 636; People v. Ostrander, 64 Hun 335, 19 N. Y. Supp. 324. N. C.—State v. Groves, 44 N. C. (1 Busb. L.) 402. OHIO—Dilcher v. State, 39 Ohio St. 130. ORE. — State v. Witham, 6 Ore. 366. VT.—State v. Smith, 63 Vt. 201, 22 Atl. 604; State v. Clogston, 63 Vt. 215, 22 Atl. 607.

cient,[3] although there are occasional cases to the con-

[3] ALA.—Williams v. State, 68 Ala. 551. ARK.—Nelson v. State, 32 Ark. 193. CAL.—People v. Brilliant, 58 Cal. 214; People v. Kelly, 59 Cal. 372; People v. Ah Bean, 77 Cal. 12, 18 Pac. 815; People v. Von Tiedeman, 120 Cal. 128, 52 Pac. 155. COLO.—Thompson v. People, 26 Colo. 496, 59 Pac. 51. FLA.—Robinson v. State, 18 Fla. 898; Stevens v. State, 18 Fla. 902; Brown v. State, 47 Fla. 16, 36 So. 705; Gibson v. State, 47 Fla. 34, 36 So. 706. GA.—Hembree v. State, 52 Ga. 242, 1 Am. Cr. Rep. 504. ILL.—Morrell v. People, 32 Ill. 499; Kimmel v. People, 92 Ill. 457; Pollard v. People, 69 Ill. 148; Johnson v. People, 94 Ill. 505; People v. Brown, 254 Ill. 260, 98 N. E. 535. IND.—Weathers v. State, 2 Blackf. 278; State v. Hall, 7 Blackf. 25; State v. Johnson, 7 Blackf. 49; State v. Flagg, 25 Ind. 243; State v. McCormick, 52 Ind. 169; Burk v. State, 81 Ind. 128; State v. Cunningham, 116 Ind. 209, 18 N. E. 613; State v. Hopper, 133 Ind. 460, 32 N. E. 878; State v. Wilson, 156 Ind. 343, 59 N. E. 932. IOWA—State v. Cunningham, 66 Iowa 94, 6 Am. Cr. Rep. 551, 23 N. W. 280. KAN.—State v. Horine, 70 Kan. 256, 78 Pac. 411. LA.—State v. Maxwell, 28 La. Ann. 361; State v. Brown, 111 La. 170, 35 So. 501; State v. Smith, 126 La. 135, 52 So. 244. MASS.—Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72; Com. v. Byron, 80 Mass. (14 Gray) 31; Com. v. McCarty, 152 Mass. 577, 26 N. E. 140. MICH.—People v. Collier, 1 Mich. 137, 48 Am. Dec. 699; Hoch v. People, 3 Mich. 552; People v. Gaige, 26 Mich. 30; Flint v. People, 35 Mich. 491. MISS.—State v. Booker, 84 Miss. 187, 36 So. 241. MO.—Hinch v. State, 2 Mo. 158; State v. Bailey, 34 Mo. 350; State v. Holden, 48 Mo. 93; State v. Keel, 54 Mo. 182; State v. Shanks, 66 Mo. 560; State v. Cave, 81 Mo. 450. N. J.—State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270; State v. Beard, 25 N. J. L. (1 Dutch.) 384; State v. Voorhis, 52 N. J. L. 351, 20 Atl. 26. N. Y.—Wood v. People, 59 N. Y. 117, 2 Cow. Cr. Rep. 116; People v. Burroughs, 1 Park. Cr. Rep. 211; Campbell v. People, 8 Wend. 636; Guston v. People, 61 Barb. 35; sub nom. Geston v. People, 4 Lans. 487; People v. Grimshaw, 33 Hun 505, 2 N. Y. Cr. Rep. 390. N. C.—State v. Ammons, 7 N. C. (3 Murph.) 123; State v. Dodd, 7 N. C. (3 Murph.) 226; State v. Mumford, 12 N. C. (1 Dev. L.) 519, 17 Am. Dec. 573; State v. Cline, 150 N. C. 854, 64 S. E. 591. OHIO—Dilcher v. State, 39 Ohio St. 130. OKLA.—Rich v. United States, 1 Okla. 354, 33 Pac. 804. S. C.—State v. Hayward, 1 Nott. & McC. 546. TENN.—State v. Bowlus, 50 Tenn. (3 Heisk.) 29. TEX.—State v. Chandler, 42 Tex. 446; Smith v. State, 1 Tex. App. 620; Lawrence v. State, 2 Tex. App. 479; Massie v. State, 5 Tex. App. 81; Martinez v. State, 7 Tex. App. 394; Mattingly v. State, 8 Tex. App. 345; Donohoe v. State, 14 Tex. App. 638; Partain v. State, 22 Tex. App. 100, 2 S. W. 854; Buller v. State, 33 Tex. Cr. Rep. 551, 28 S. W. 465; Harrison v. State, 41 Tex. Cr. Rep. 274, 53 S. W. 863; Henry v. State, 43 Tex. Cr. Rep. 176, 63 S. W. 642.

trary.[4] But it is to be remembered that a simple allegation of materiality, without setting out the facts showing such materiality, is merely the averment of a conclusion of law, and such an averment can not save an indictment or information otherwise bad,[5]—as where it is shown by the facts set forth in the indictment or information, or by the record, that the alleged false matter complained of could not have been material;[6] but where it is not thus

VT.—State v. Chamberlain, 30 Vt. 559. VA.—Com. v. Pickering, 49 Va. (8 Gratt.) 628, 56 Am. Dec. 158; Fitch v. Com., 92 Va. 824, 24 S. E. 272. WASH.—State v. Guse, 21 Wash. 269, 57 Pac. 831. FED.—United States v. McHenry, 6 Blatchf. 503, Fed. Cas. No. 15681; United States v. Cowing, 4 Cr. 613, Fed. Cas. No. 14880; United States v. Singleton, 54 Fed. 488; United States v. Nelson, 199 Fed. 464; United States v. Salen, 216 Fed. 420. ENG.—R. v. Nicholl, 1 Barn. & Ad. 21, 20 Eng. C. L. 381; R. v. Dowlin, 5 T. R. 311, 61 Eng. Repr. 174; R. v. McKeron, 5 T. R. 316, note, 101 Eng. Repr. 177, note; R. v. Kimpton, 2 Cox C. C. 296; R. v. Cutts, 4 Cox C. C. 435; R. v. Harvey, 8 Cox C. C. 99; R. v. Scott, 13 Cox C. C. 594.

4 State v. Shanks, 66 Mo. 560; Territory v. Remuzon, 3 N. M. 648, 9 Pac. 598; R. v. Goodfellow, 1 Car. & M. 569, 41 Eng. C. L. 310.

In the Remuzon case accused was convicted under an indictment alleging that "upon the trial of said issue so joined between the parties aforesaid it did then and there become and was a material question whether the said Lucien J. Remuzon had been at the house of Jose Gutierrez, [meaning the home of the plaintiff], between the years 1845 and 1872." The court say: "There were no facts alleged showing or tending to show how the question as to whether the accused had been at the house of Jose Gutierrez between those years could be material to the issues then on trial. It is not sufficient to charge generally that a certain question was or became material, but the indictment must set forth facts showing how it became material. This omission of these essential averments in this indictment is fatal." — Territory v. Remuzon, supra, citing State v. Bailey, 34 Mo. 350; State v. Keel, 54 Mo. 182.

But the case of Territory v. Remuzon was overruled in Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106.

5 Kizer v. People, 211 Ill. 407, 71 N. E. 1035; State v. Ela, 91 Me. 309, 39 Atl. 1001.

6 ILL.—Roberts v. People, 99 Ill. 275. IND.—State v. Sutton, 147 Ind. 158, 46 N. E. 468. KAN.—State v. Smith, 40 Kan. 631, 20 Pac. 529. ME.—State v. Ela, 91 Me. 309, 39 Atl. 1001. MASS.—Com. v. Farley, Thach. Cr. Cas. 654. MICH.—People v. Gaige, 26 Mich. 30. MO.—State v. Bailey, 34 Mo. 350. TEX.—Weaver v. State, 34 Tex. Cr. Rep. 554, 31 S. W. 400.

shown that the alleged false matter was immaterial, an express averment that it was material will be sufficient to let in evidence on the trial to prove that it was so.[7]

Affidavit alleged to be false, the indictment or information should set out such affidavit in hæc verba; when this is done, the materiality of such alleged false affidavit will generally appear, without an averment that it was material;[8] but where the materiality does not appear from the affidavit itself, the facts should be pleaded showing materiality.[9]

§ 1097. —— NECESSITY OF AVERMENT OF FACTS SHOWING MATERIALITY. Where the materiality of the testimony charged to be false appears from the indictment to have been material on the issues of the cause under trial, it is sufficient to plead the materiality in the first method set out in the preceding section, that is, by simply charging it to have been material;[1] but in those cases in which, from the allegations in the indictment or information, it is not apparent how the alleged false testimony could

7 King v. State, 103 Ga. 263, 30 S. E. 30.

8 People v. Kelly, 59 Cal. 372; State v. Floto, 81 Md. 600, 32 Atl. 315; State v. Marshall, 47 Mo. 378.

9 State v. Anderson, 103 Ind. 170, 2 N. E. 332; State v. Hopper, 133 Ind. 460, 32 N. E. 878.

1 See, supra, § 1096, footnotes 1 and 7. See, also: ALA.—Todd v. State, 13 Ala. App. 301, 69 So. 325. ARK. — Loudermilk v. State, 110 Ark. 549, 162 S. W. 569. ILL.—People v. Threewit, 251 Ill. 509, 96 N. E. 242. KAN.—State v. Brownfield, 67 Kan. 627, 73 Pac. 925. LA.—State v. Rogers, 138 La. 867, 70 So. 863. N. Y.—People v. Tillman, 139 App. Div. 572, 25 N. Y. Cr. Rep. 32, 124 N. Y. Supp. 44; affirmed, 201 N. Y. 598, 95 N. E. 1136. OKLA.—Cutter v. Territory, 8 Okla. 101, 56 Pac. 861; Miller v. State, 9 Okla. Cr. 196, 131 Pac. 181. TEX.—Johnson v. State, 71 Tex. Cr. Rep. 428, 160 S. W. 964; Chavarria v. State, 63 S. W. 312. WYO. — Dickerson v. State, 18 Wyo. 440, 111 Pac. 857. FED.—Baskin v. United States, 126 C. C. A. 464, 209 Fed. 740; Offner v. United States, 126 C. C. A. 473, 209 Fed. 749.

Subornation of perjury charged, indictment is not indefinite for failing to specify in just what evidentiary way the perjured testimony became material. — Hendricks v. United States, 223 U. S. 178, 56 L. Ed. 394, 32 Sup. Ct. Rep. 313, citing Markham v. United States, 160 U. S. 319, 40 L. Ed. 441, 16 Sup. Ct. Rep. 288.

have become and was material under the issues as set out in the indictment or information, some of the cases hold it necessary,[2] and it may be the better practice, to set out sufficient of the facts and circumstances of the cause to show in what manner the alleged false testimony became and was material. But while it is necessary, or at least desirable and better pleading, to thus show how the alleged false testimony became and was material, it is never necessary to set out in the indictment or information the false testimony complained of,[3] although it is permissible to set out such testimony in detail; however, in so doing the statements of fact should be clear, concise and sufficient to connect the testimony as set out with the issues and show its materiality,[4] and it has been

2 See State v. Bailey, 34 Mo. 350; State v. Keel, 54 Mo. 182; State v. Shanks, 66 Mo. 560; Territory v. Remuzon, 3 N. M. 648, 9 Pac. 598; overruled in Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106.

3 ALA. — Williams v. State, 68 Ala. 551. CAL.—People v. Rodley, 131 Cal. 240, 63 Pac. 351. FLA.—Markey v. State, 47 Fla. 38, 37 So. 53. ILL.—Kimmel v. People, 92 Ill. 457; Green v. People, 182 Ill. 278, 55 N. E. 341. KAN. — State v. Brownfield, 67 Kan. 627, 73 Pac. 925. LA.—State v. Maxwell, 28 La. Ann. 361; State v. Jean, 42 La. Ann. 946, 8 So. 480. MASS.—Com. v. McCarty, 152 Mass. 577, 26 N. E. 140. MICH.—Flint v. People, 35 Mich. 491. MISS.—Lea v. State, 64 Miss. 278, 1 So. 235. MO.—State v. Nelson, 146 Mo. 256, 48 S. W. 84. N. M.—Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106, reversing Territory v. Remuzon, 3 N. M. 368, 9 Pac. 598. N. Y.—Campbell v. People, 8 Wend. 636. N. C.—State v. Mumford, 12 N. C. (1 Dev. L.) 519, 17 Am. Dec. 573; State v. Davis, 69 N. C. 495; State v. Cline, 146 N. C. 640, 61 S. E. 522. OHIO—Dilcher v. State, 39 Ohio St. 130. OKLA. — Rich v. United States, 1 Okla. 354, 33 Pac. 804; reversed on another point, 2 Okla. 146, 37 Pac. 1083; Cutler v. Territory, 8 Okla. 101, 56 Pac. 861. TEX. — Washington v. State, 22 Tex. App. 26, 3 S. W. 228; Partain v. State, 22 Tex. App. 100, 2 S. W. 854; Sisk v. State, 28 Tex. App. 432, 13 S. W. 647; Scott v. State, 35 Tex. Cr. Rep. 11, 29 S. W. 274; Jernigan v. State, 43 Tex. Cr. Rep. 114, 63 S. W. 560; Lamar v. State, 49 Tex. Cr. Rep. 563, 95 S. W. 509. VT.—State v. Sleeper, 37 Vt. 122. WASH. — State v. McLain, 43 Wash. 124, 86 Pac. 388. FED.—Barnard v. United States, 162 Fed. 618.

4 State v. Wakefield, 73 Mo. 549; Higgins v. State, 50 Tex. Cr. Rep. 433, 97 S. W. 1054.

said that a failure to do so will render the indictment or information bad for uncertainty.[5]

§ 1098. —— AVERMENT AS TO NECESSITY OF OATH. It has already been pointed out that perjury can not be committed upon a voluntary affidavit,[1] and an indictment or information predicating perjury upon an oath or affidavit must allege that it was one required or authorized by law, or was in fact used for some lawful purpose in a hearing or proceeding.[2] Thus, perjury can not be predicated upon a false affidavit attached to a claim presented to a public commissioner of a city for a certification, no affidavit being required by law to such claim.[3] And where the affidavit is one provided for and required by law, and is alleged to have been made for a purpose required by law, it must be further alleged in the indictment or information that the accused executed the affidavit alleged to be false.[4] Where perjury was charged against the accused in making a false affidavit for the dissolution of an injunction, and that the statements therein contained would have been material on the hearing of a motion to dissolve an injunction, but fails to allege that an injunction had been asked for or awarded, it not appearing that the affidavit was material otherwise than on a hearing to dissolve an injunction, the indictment or information will be insufficient because it fails to show how the affidavit was, or could be, material,[5] notwith-

5 State v. Rowell, 72 Vt. 28, 82 Am. St. Rep. 918, 15 Am. Cr. Rep. 569, 47 Atl. 11.

1 See, supra, § 1081.

2 ALA.—People v. Fox, 25 Mich. 492; People v. Galge, 26 Mich. 30. N. J.—Heintz v. Court of General Quarter Sessions etc., 45 N. J. L. (16 Vr.) 523. N. Y.—Ortner v. People, 4 Hun 323, 6 Thomp. & C. 548, 2 Cow. Cr. Rep. 268. TEX.—Shely v. State, 35 Tex. Cr. Rep. 190, 32 S. W. 901. VT.—State v. Collins, 62 Vt. 195, 19 Atl. 368. WASH.—State v. Smith, 3 Wash. 14, 27 Pac. 128.

3 People v. Allen, 9 N. Y. St. Rep. 622; affirmed, 108 N. Y. 623, 15 N. E. 74.

4 State v. Collins, 62 Vt. 195, 19 Atl. 368.

5 Com. v. Wood, 7 Kulp. (Pa.) 141, 13 Pa. Co. Ct. Rep. 477, 2 Pa. Dist. Rep. 823.

standing the fact that where an affidavit authorized or required by law has been made, which was false, it may be the foundation of a prosecution for perjury, although the affidavit was not actually used for the purposes intended.[6] Where perjury is charged upon the verification of a bill in equity, or other pleadings of a like nature, it must be alleged that the same was required by law to be verified.[7]

§ 1099. —— AVERMENT AS TO COMPETENCY AND ADMISSIBILITY OF TESTIMONY. An indictment or information charging perjury is not required to affirmatively show that the alleged false testimony was competent and admissible in the cause in which it was given, and that it could not have been excluded upon proper objection.[1]

§ 1100. —— AVERMENT AS TO IMMATERIAL MATTERS Where an indictment or information charging perjury sets out testimony by the accused on which perjury is charged, and it appears, from the face of the instrument and the statement of the issues as made therein, to have been material to those issues in the cause on trial in which the testimony was given, and there are other statements in such testimony set out and perjury alleged on the latter, also, and that such latter statements were plainly immaterial to the issues then under investigation, the fact that such immaterial matters are set out will not render the indictment defective;[1] but where all the testimony set out and alleged to have been false could not have been material in the cause in which

6 Herring v. State, 119 Ga. 709, 46 S. E. 876; State v. Whittemore, 50 N. C. 245, 9 Am. Rep. 196.

7 People v. Gaige, 26 Mich. 30.

1 State v. Spencer, 45 La. Ann. 1, 12 So. 135.

1 State v. Williams, 60 Kan. 837, 58 Pac. 476; affirmed, 61 Kan. 739, 60 Pac. 1050, distinguishing United States v. Butler, 38 Fed. 498; Dorrs v. State, (Tex.) 40 S. W. 311; Jefferson v. State, (Tex.) 49 S. W. 88.

Falsity of immaterial testimony given by defendant charged in an indictment for alleging perjury does not affect the validity of the indictment, where such instrument also charges the falsity of material testimony.—Dorrs v. State, (Tex.) 40 S. W. 311.

the alleged false testimony was given, under the issues in that cause as set out in such indictment or information, it is bad on demurrer,[2] notwithstanding the fact that there is a direct allegation in the indictment or information that the testimony alleged to be false was material,[3] because, as we have already seen, such allegation of materiality, without the statement of facts to support the allegation, is a mere conclusion of law.[4]

§ 1101. —— IN EX PARTE PROCEEDINGS. An indictment or information charging perjury in falsely swearing to an affidavit must not only set out that the affidavit was one authorized by law and material to be made but that it was made by the accused;[1] and in charging perjury upon an affidavit filed, or testimony given, in an ex parte proceeding the indictment or information must allege that it became necessary for the accused to make such affidavit or give such testimony, and that it was material that he should take such oath.[2]

§ 1102. —— IN EXTRA-JUDICIAL AND QUASI-JUDICIAL OATHS—IN GENERAL. The requisite allegations pointed out in the preceding section respecting an oath or affidavit alleged to be false apply to extra-judicial and quasi-judicial oaths. Thus, it being charged that accused made a false oath to a chattel mortgage, for the purpose of defrauding his creditors, the indictment or information must further allege that the property mortgaged was subject to attachment, and to execution on final process, or the materiality of such oath will not be shown.[1] A

2 United States v. Pettus, 84 Fed. 791.

Charging perjury for falsely listing taxable property, which shows on its face that the property charged to have been omitted was situated in another county, it is fatally defective.—Parker v. State, 44 Tex. Cr. Rep. 147, 69 S. W. 75.

3 State v. Ela, 91 Me. 309, 39 Atl. 1001; United States v. Rhodes, 212 Fed. 518.

4 See, supra, § 1096.

1 Copeland v. State, 23 Miss. 257.

2 Stofer v. State, 3 W. Va. 692.

1 State v. Collins, 62 Vt. 195, 19 Atl. 368.

False swearing upon an investigation before a police judge as to whether liquor had been sold in a

deputy sheriff charged to have made a false affidavit to a bill of expenses in conveying witnesses, the indictment or information must set out the circumstances under which the sheriff was entitled to receive fees for such services, in order to show the materiality of such affidavit.[2] A false affidavit charged to have been made in a final homestead proof in stating the beginning of affiant's residence to have been on a named year, the indictment or information must aver that the year stated was the beginning of the entry, otherwise it will not show the statement to have been material, and will be demurrable.[3] Perjury charged in the execution of a pension affidavit to enable the widow of a veteran to obtain a pension, the accused having stated in such affidavit that they did not think the veteran was married until his marriage to the applicant for a pension, that he was married to her on a named date, and that the affiants were both present at the wedding, sufficiently shows the averments alleged to be false were material;[4] but perjury charged in knowingly swearing to a false statement made in proof of loss submitted to an insurance company, the indictment or information will be insufficient where it fails to further allege the existence of a policy of insurance, and also to state that the proof of loss sworn to was one required by law to be under oath.[5]

§ 1103. ——— Before grand jury. An indictment or information charging perjury to have been committed in giving evidence before a grand jury must show that

named town, averring that an ordinance of the town prohibited such sale therein, does not show the materiality of the alleged false oath without setting out that such ordinance was passed by a body having due authority by law to prohibit such sale, the sale of liquors being regulated by a general statute.—Kerfoot v. Com., 89 Ky. 174, 12 S. W. 189.

2 Shely v. State, 35 Tex. Cr. Rep. 190, 32 S. W. 901.

3 United States v. Singleton, 54 Fed. 488.

4 Noah v. United States, 62 C. C. A. 618, 128 Fed. 270.

5 State v. Dow, 74 Vt. 119, 52 Atl. 419.

there was some question pending before such grand jury which they were authorized and empowered by law to investigate,[1] and must directly allege, or otherwise plainly show, that the testimony of the accused was material to the investigation of that question.[2] Thus, perjury charged in denying before a grand jury that accused had made sales of liquor in a local-option county, the indictment or information must further aver that the sales alleged to have been made by the accused were unlawful sales, otherwise it will not show the materiality of such testimony.[3]

§ 1104. ——— Before taxing officer. An indictment or information charging accused with perjury in making a false return of his taxable property to an assessor of taxes, must aver that the property which he is charged with having concealed from the assessor was assessable in the township of his residence, and that it was assessable by the assessor of that township, or it will be insufficient;[1] and in some jurisdictions it must be further alleged that the town was vested with power to appoint an assessor to levy taxes.[2] Where the charge is that the perjury was committed by the accused in falsely

1 No jurisdiction to inquire into the offense under investigation, by reason of the intervention of the statute of limitations, a charge that accused testified falsely before the grand jury on such investigation does not show materiality of the testimony.—Meeks v. State, 32 Tex. Cr. Rep. 420, 24 S. W. 98.

2 Mattingly v. State, 8 Tex. App. 345; Meeks v. State, 32 Tex. Cr. Rep. 420, 24 S. W. 98; Martin v. State, 33 Tex. Cr. Rep. 317, 26 S. W. 400; Weaver v. State, 34 Tex. Cr. Rep. 554, 31 S. W. 400; Com. v. Pickering, 49 Va. (8 Gratt.) 628, 56 Am. Dec. 158.

Question under investigation being whether a satchel was stolen by A, and accused being charged with wilfully and falsely having testified that A hid a satchel in a straw stack, the indictment or information must directly allege, or otherwise show plainly, that such testimony was material. — Martin v. State, 33 Tex. Cr. Rep. 317, 26 S. W. 400.

3 Mattingly v. State, 8 Tex. App. 345.

1 State v. Reynolds, 108 Ind. 353, 9 N. E. 287; State v. Cunningham, 66 Iowa 94, 6 Am. Cr. Rep. 551, 554, 23 N. W. 280; State v. Crumb, 68 Mo. 206; State v. Smith, 43 Tex. 655.

2 State v. Crumb, 68 Mo. 206.

testifying under oath upon an investigation before a board of equalization that he had on the first day of April no other property aside from that listed and given to the assessor, the indictment or information must show that the accused resided in the county on the first day of April or that, having become a resident of the county subsequent to the first day of April, he was not taxed on such property elsewhere.[3]

§ 1105. ——— IN INSOLVENCY AND SUPPLEMENTARY PROCEEDINGS. Perjury being charged against the accused in swearing to a false schedule of property as an insolvent, the indictment or information need not state the items given in such schedule,[1] but must set out the items omitted therefrom;[2] and an allegation that the accused "wilfully concealed a large amount of property, consisting, among other things, of diamonds, watches, jewelry, money, and other personal effects belonging to him and to his estate," is a sufficient description of such property on a charge of perjury in having wilfully sworn falsely to an inventory in insolvency, from which he omitted said property.[3] But the omission by the insolvent may be of a creditor as well as of an item or items of property, and where the omission of a creditor is by collusion with such creditor, swearing that the inventory of property and creditors is "just and true," it furnishes the basis for a charge of perjury.[4] The charge being that the insolvent swore falsely on a hearing on a proposal for composition with his creditors, in making answers to questions as to whether he had cashed checks and received money on them a designated number of days before filing his insolvency proceedings, the materiality of the testimony

3 State v. Wood, 110 Ind. 82, 10 N. E. 659.

1 United States v. Chapman, 3 McL. 390, Fed. Cas. No. 14784.

2 Id.; R. v. Hepper, 1 Car. & P. 608, 12 Eng. C. L. 345.

3 People v. Platt, 67 Cal. 21, 7 Am. Cr. Rep. 499, 7 Pac. 1.

4 People v. Naylor, 82 Cal. 607, 23 Pac. 116.

is sufficiently shown without alleging that the checks and money were of any value, or that they belonged to the insolvent.[5]

Perjury in supplementary proceedings charged in false statements of the accused as to the property owned by him, the indictment or information must show that the statements were as to property owned by accused at the time of the examination,[6] and further, that such property was subject to execution,[7] otherwise the testimony will be immaterial.

§ 1106. ——— IN REGISTRATION OF VOTERS AND ELECTIONS. An indictment or information charging false swearing regarding a person's qualifications as an elector, must set out specifically the occasion of administering the oath, and state that the officer administering the oath had authority and power to administer it,[1] the simple allegation that accused was "required by law to take such oath" being insufficient.[2] Thus, charging perjury for registration as a voter, it must be averred that the false statement was made to, and false oath taken before, the inspectors of elections or registrar of voters at the time of registration,[3] and must directly allege that the board of inspectors, or the registrar, had jurisdiction of the question, or state what the question was and set out that the false testimony was material.[4] Where the false affi-

5 Com. v. McCarty, 152 Mass. 577, 26 N. E. 140.

6 State v. Cunningham, 116 Ind. 209, 18 N. E. 618.

7 Id.

1 See, supra, §§ 1091-1094.

2 Dennis v. State, 17 Fla. 389.

3 United States v. Jaques, 55 Fed. 53.

"By and before the board" of inspectors, is a sufficient averment that the oath was administered by the board.—Campbell v. People, 8 Wend. (N. Y.) 636.

Names or number of inspectors of an election before whom the alleged false oath was taken need not be alleged.—Burns v. People, 59 Barb. (N. Y.) 531.

4 State v. McCone, 59 Vt. 117, 7 Atl. 406.

Affidavit as to the bona fide residence in the precinct of a challenged voter, sufficiently shows materiality.—State v. Hopper, 133 Ind. 460, 32 N. E. 878.

davit is as to the place of residence of a voter, the indictment or information must show whether the place where the accused testified the person desiring to vote lived was in the precinct.[5] Charging taking the oath prescribed by law as to accused's qualifications as an elector, the indictment or information must allege that the accused offered to vote, or was challenged by an inspector, or by another elector,[6] and that he was informed by an inspector of the qualifications of a voter.[7]

§ 1107. SETTING FORTH FALSE MATTER—ACCORDING TO SUBSTANCE AND EFFECT. An indictment or information charging perjury is not required to set out the false matter by tenor, it being sufficient to charge the substance of the testimony and its effect, upon which the perjury is assigned, not the mere conclusions of the pleader, or the mere meaning of the testimony;[1] it not being necessary

5 Com. v. McClelland, 83 Ky. 686.

6 **Name of person challenging** need not be set out.—State v. Hopper, 133 Ind. 460, 32 N. E. 878.

7 Humphreys v. State, 17 Fla. 381.

1 ALA.—Taylor v. State, 84 Ala. 157. ARK.—State v. Green, 24 Ark. 591. ILL.—Pankey v. People, 2 Ill. 80; Kimmel v. People, 92 Ill. 457; Johnson v. People, 94 Ill. 507; People v. Miller, 264 Ill. 148, **Ann. Cas.** 1915B, 1240, 106 N. E. 190, discussing and disapproving Wilkinson v. People, 226 Ill. 135, 80 N. E. 699. MO.—State v. Neal, 42 Mo. 119. ORE.—State v. Witham, 6 Ore. 366. R. I.—State v. Terline, 23 R. I. 530, 91 **Am. St. Rep.** 650, 51 Atl. 204. TENN. — State v. Stillman, 47 Tenn. (7 Coldw.) 341; Woods v. State, 82 Tenn. (14 Lea) 460. TEX.—Jackson v. State, 15 Tex. App. 579; Schoenfeld v. State, 56 Tex. Cr. 103, 133 **Am. St. Rep.** 956, 22 **L. R. A.** (N. S.) 1216, 119 S. W. 101.

After the introductory allegation as to jurisdiction, description of proceeding, taking of the oath, etc., charged, that the accused committed perjury, "by testifying in substance as follows," after which followed over six hundred questions thereto, several of the answers giving the name and residence of the accused the same as charged in the indictment, and others being such as would not seem to be false; the indictment not specifically alleging which answers were false. Held, that the indictment was vague, uncertain and insufficient.—State v. Rowell, 72 Vt. 28, 82 **Am. St. Rep.** 918, 15 **Am. Cr. Rep.** 567, 570, 17 Atl. 111.

Alleging substance of false testimony instead of setting it out in full is sufficient.—People v. Miller, 264 Ill. 148, **Ann. Cas.** 1915B, 1240, 106 N. E. 191.

to set out the precise words,[2] although it has been said that the indictment should allege the false testimony as nearly as possible in the language of the accused.[3] The indictment or information need traverse and negative only such of the testimony as is alleged to be false, and not all of the testimony;[4] but the different portions of the testimony alleged to be false must be set out with such

Indictment should in terms set out and charge the substance of the testimony upon which the perjury is assigned, and not the conclusion of the pleader or the meaning of the testimony.—Schoenfeld v. State, 56 Tex. Cr. Rep. 103, 133 Am. St. Rep. 956, 22 L. R. A. (N. S.) 1216, 19 S. W. 101.

Neither at the common law nor under the statutes generally prevailing in the United States is it necessary to set out the precise words of the testimony alleged to have been false.—State v. Terline, 23 R. I. 530, 91 Am. St. Rep. 650, 51 Atl. 204.

2 ILL.—People v. Miller, 264 Ill. 148, 106 N. E. 191. ME.—State v. Mace, 76 Me. 64, 5 Am. Cr. Rep. 588. N. Y.—People v. Phelps, 5 Wend. 9; People v. Warner, 5 Wend. 271; People v. Ostrander, 64 Hun 335, 19 N. Y. Supp. 324. N. C.—State v. Groves, 44 N. C. (1 Busb. L.) 402. R. I.—State v. Terline, 23 R. I. 530, 91 Am. St. Rep. 650, 51 Atl. 204. TEX.—State v. Umdenstock, 43 Tex. 554; Rohrer v. State, 13 Tex. App. 163; Gabrielsky v. State, 13 Tex. App. 428; Jackson v. State, 15 Tex. App. 579; Higgins v. State, 50 Tex. Cr. Rep. 433, 97 S. W. 1054; Johnson v. State, 71 Tex. Cr. Rep. 428, 160 S. W. 964. VT.—State v. Bishop, 1 D. Chip. 120. FED.—United States v. Walsh, 22 Fed. 644; Hogue v. United States, 106 C. C. A. 387, 184 Fed. 245.

"It is always good pleading to allege the perjury in the exact language or in the substance of the language employed." — People v. Bradbury, 155 Cal. 808, 103 Pac. 215.

3 Higgins v. State, 50 Tex. Cr. Rep. 433, 97 S. W. 1054.

Indictment may recite the alleged false testimony to show the crime, but where a great mass of testimony is thrown into an indictment without pointing out in what answers to questions the alleged perjury is contained, the indictment is bad for uncertainty.—State v. Rowell, 72 Vt. 28, 82 Am. St. Rep. 918, 15 Am. Cr. Rep. 567, 47 Atl. 111.

4 State v. Neal, 42 Mo. 119; Campbell v. People, 8 Wend. (N. Y.) 636; Gabrielsky v. State, 13 Tex. App. 428.

Indictment must show particularly to what falsehood the defendant has sworn; it is too indefinite to say that the defendant made oath to a false schedule in bankruptcy, where that schedule relates to a great variety of facts.—United States v. Morgan, Morr. (Iowa) 341, 41 Am. Dec. 234.

particularity as to inform the accused of the particular offense with which he is charged.[5]

§ 1108. —— Testimony in foreign language. Where the testimony alleged to be false was given in a foreign language, it is not necessary that the indictment or information charging perjury therein should show on its face, or state in such foreign language, the testimony alleged to have been false; it being sufficient to set out in English the substance and effect of the testimony.[1] Judge Tillinghast has well said that no useful purpose could be subserved by incorporating in an indictment charging perjury on testimony given in a foreign language the particular words used by the accused who speaks a language foreign to our own; and that such a practice, if required, would tend to confuse rather than to aid those whose duty it is to try and determine the cause. By having the services of an interpreter who is skilled in the particular language used by the accused when he is alleged to have sworn falsely, his rights are fully protected, and, the indictment being in English, the case is tried in an orderly and intelligent manner.[2]

§ 1109. —— Assigning perjury upon affidavit, etc. In those cases in which perjury is assigned upon an affidavit, or other written instrument, the indictment or information should set forth the instrument according to its tenor,[1] it not being sufficient, according to the authorities in some jurisdictions, to set forth the substance merely, of the affidavit or other written instrument,[2] while according to other authorities it is not necessary to

5 Thomas v. State, 54 Ark. 584, 16 S. W. 568; Harp v. State, 59 Ark. 113, 26 S. W. 714; State v. Mace, 76 Me. 64, 5 Am. Cr. Rep. 588.

1 State v. Terline, 23 R. I. 530, 91 Am. St. Rep. 650, 51 Atl. 204.

2 Id.

1 People v. Robertson, 3 Wheel. Cr. Cas. (N. Y.) 180; Shely v. State, 35 Tex. Cr. Rep. 190, 32 S. W. 901; Simpson v. State, 46 Tex. Cr. Rep. 77, 79 S. W. 153; United States v. Law, 50 Fed. 915.

2 Coppack v. State, 36 Ind. 513; State v. Blackstone, 74 Ind. 592.

set out the entire affidavit, but only those portions of it in which the perjury is alleged to have been committed.[3] Where the affidavit is not set out in hæc verba, but according to its substance and effect, a literal copy of the affidavit or other written instrument, or of those portions of such affidavit or written instrument alleged to be false, is not required,[4] because the "substance and effect" of an instrument in writing can not, either in common parlance or legal import, be understood to mean an exact copy thereof.[5]

Variance between the written instrument set out in hæc verba and the instrument offered in evidence, in respect to the date thereof, is material as to matter of description, and a conviction on such evidence can not be sustained.[6]

§ 1110. Assignment of perjury—In general. That part of the indictment charging perjury which expressly alleges the falsity of the testimony given by the accused is technically called the assignment. This is the gist of the offense, not mere inducement; consequently the allegation must be direct and specific, not in terms of uncertain meaning or by way of implication.[1] It is necessary that the indictment or information shall negative expressly and positively the truth of the alleged false swear-

3 State v. Neal, 42 Mo. 119; Campbell v. People, 8 Wend. (N. Y.) 636.

4 People v. Warner, 5 Wend. 271; Harris v. People, 4 Hun (N. Y.) 1, 6 Thomp. & C. 206, 2 Cow. Cr. Rep. 224; affirmed, 64 N. Y. 148; King v. State, 32 Tex. Cr. Rep. 463.

5 People v. Warner, 5 Wend. (N. Y.) 271.

6 Dill v. People, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229.

1 FLA.—Fudge v. State, 57 Fla. 7, 17 Ann. Cas. 919, 49 So. 128. IND.—State v. Cunningham, 116 Ind. 209, 18 N. E. 613. MICH.—People v. Vogt, 156 Mich. 594, 121 N. W. 293. MINN.—State v. Silverberg, 78 Miss. 858, 29 So. 761. N. M.—Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106. TEX.—Juaraqui v. State, 28 Tex. 625.

While the truth of the statement must be negatived, no particular language is required, and it is sufficient to specifically negative the truth of the alleged false statement.—Hart v. State, 73 Tex. Cr. Rep. 362, 166 S. W. 152.

ing, by stating the facts by way of antithesis.[2] A general allegation that the testimony in question was false, is not sufficient;[3] it must be specified wherein the testimony was false.[4] In addition to an averment that the testimony of

2 Fudge v. State, 57 Fla. 7, 17 Ann. Cas. 919, 49 So. 128.

3 ALA.—Gibson v. State, 44 Ala. 17. FLA.—Fudge v. State, 57 Fla. 7, 17 Ann. Cas. 919, 49 So. 128. GA.—King v. State, 103 Ga. 263, 30 S. E. 30. IOWA—United States v. Morgan, 1 Morr. 341, 41 Am. Dec. 234; State v. Gallaugher, 123 Iowa 378, 98 N. W. 906. KY.—Com. v. Still, 83 Ky. 275; Ferguson v. Com., 8 Ky. L. Rep. 257, 1 S. W. 435; Com. v. Porter, 17 Ky. L. Rep. 554, 32 S. W. 138; Com. v. Compton, 18 Ky. L. Rep. 479, 36 S. W. 1116; Com. v. Lashley, 25 Ky. L. Rep. 58, 74 S. W. 658; Howell v. Com., 31 Ky. L. Rep. 983, 104 S. W. 685. LA.—State v. Brown, 8 Rob. 566; State v. Williams, 111 La. 1033, 36 So. 111. MICH.—People v. Vogt, 156 Mich. 594, 121 N. W. 293. MISS.—Moore v. State, 91 Miss. 250, 124 Am. St. Rep. 652, 44 So. 817. N. J.—Heintz v. Court of General Quarter Sessions etc., 45 N. J. L. (16 Vr.) 523; State v. Voorhis, 52 N. J. L. 351, 20 Atl. 26. N. M. — Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106. N. Y.—Burns v. People, 59 Barb. 531; People v. Tatum, 60 Misc. 311, 22 N. Y. Cr. Rep. 557, 112 N. Y. Supp. 36. N. C.—State v. Mumford, 12 N. C. (1 Dev. L.) 519, 17 Am. Dec. 573. TEX. — Rohrer v. State, 13 Tex. App. 163; Turner v. State, 30 Tex. App. 691, 18 S. W. 792; Crow v. State, 49 Tex. Cr. Rep. 103, 90 S. W. 650; Higgins v. State, 50 Tex. Cr. Rep. 433, 97 S. W. 1054. VT.—State v. Rowell, 72 Vt. 28, 82 Am. St. Rep. 918, 15 Am. Cr. Rep. 567, 47 Atl. 111. FED.—United States v. Pettus, 84 Fed. 791. ENG.—R. v. Perrott, 2 Maul. & S. 379, 15 Rev. Rep. 280.

Alleging that the accused wilfully, corruptly and falsely testified to a certain stated fact; that said statement was not then and there true, but false; and was not then and there believed by the accused to be true, but was by the accused believed to be false, sufficiently negatives the truth of the alleged false testimony, without setting out the true facts by way of antithesis.—Gray v. State, 4 Okla. Cr. 292, 32 L. R. A. (N. S.) 142, 111 Pac. 825.

False swearing or perjury charged, indictment or information must negative, by special averment, the matter alleged to have been sworn to by the accused; and it is not sufficient to allege in general terms that it was false.—Ferguson v. Com., 8 Ky. L. Rep. 257, 1 S. W. 435.

General averment of the falsity of the testimony is insufficient; each fact falsely sworn to must be distinctly negatived.—State v. Mumford, 12 N. C. (1 Dev. L.) 519, 17 Am. Dec. 573.

4 ALA.—Gibson v. State, 44 Ala. 17. ARK. — Thomas v. State, 51 Ark. 138, 10 S. W. 193. GA.—King v. State, 103 Ga. 263, 30 S. E. 30. IOWA—United States v. Morgan, 1 Morr. 341, 41 Am. Dec. 234; State v. Gallaugher, 123 Iowa

the accused was false, the indictment or information should also set forth the truth in regard to the matter at issue.[5] Thus, after stating the substance of what was sworn to, the indictment should proceed: "Whereas in truth and in fact," adding wherein such matter was false.[6] The requirement that an indictment or information charging perjury shall make direct and specific allegations negativing the truth of the alleged false testimony by setting forth the true facts by way of antithesis, is not a mere matter of form, but is the very essence of the indictment, and necessary in order to inform the accused

378, 98 N. W. 906. KY.—Com. v. Weingarten, 16 Ky. L. Rep. 221, 27 S. W. 815; Howell v. Com., 31 Ky. L. Rep. 983, 104 S. W. 685. LA.—State v. Williams, 111 La. 1033, 36 So. 111. ME.—State v. Corson, 59 Me. 137. MICH.—People v. Vogt, 156 Mich. 594, 121 N. W. 293. N. J.—Heintz v. Court of General Quarter Sessions etc., 45 N. J. L. (16 Vr.) 523. N. M.—Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106. N. Y.—People v. Tatum, 60 Misc. 311, 22 N. Y. Cr. Rep. 557, 112 N. Y. Supp. 36. N. C.—State v. Mumford, 12 N. C. (1 Dev. L.) 519, 17 Am. Dec. 573. TEX.—Rohrer v. State, 13 Tex. App. 163; Turner v. State, 30 Tex. App. 691, 18 S. W. 792; Higgins v. State, 50 Tex. Cr. 433, 97 S. W. 1054. VT.—State v. Rowell, 72 Vt. 28, 82 Am. St. Rep. 918, 15 Am. Cr. Rep. 567, 47 Atl. 111. FED.—United States v. Pettus, 84 Fed. 791. ENG.—R. v. Parker, 1 Car. & M. 639, 41 Eng. C. L. 346.

Averment negativing and contradicting the matter alleged to have been falsely sworn to must be sufficiently definite to apprise the accused of the particular charge against which he ought to prepare to defend himself.—State v. Joiner, 128 La. 876, 55 So. 560.

5 ARK.—Smith v. State, 91 Ark. 200, 120 S. W. 985. FLA.—Fudge v. State, 57 Fla. 7, 17 Ann. Cas. 919, 49 So. 128. IOWA—State v. Gallaugher, 123 Iowa 378, 98 N. W. 906. KY.—Com. v. Schweiters, 122 Ky. 874, 93 S. W. 592. MASS.—Com. v. Sargent, 129 Mass. 115. MISS.—State v. Silverberg, 78 Miss. 858, 29 So. 761; Moore v. State, 91 Miss. 250, 124 Am. St. Rep. 652, 44 So. 817. N. Y.—People v. Tatum, 60 Misc. 311, 22 N. Y. Cr. Rep. 557, 112 N. Y. Supp. 36. TEX.—Rohrer v. State, 13 Tex. App. 163; Turner v. State, 30 Tex. App. 691, 18 S. W. 792; Crow v. State, 49 Tex. Cr. Rep. 103, 90 S. W. 650. FED.—United States v. Pettus, 84 Fed. 791.

6 FLA.—Fudge v. State, 57 Fla. 7, 17 Ann. Cas. 919, 49 So. 128. ILL.—Kimmel v. People, 92 Ill. 457. KY.—Com. v. Still, 83 Ky. 275; Com. v. Porter, 17 Ky. L. Rep. 554, 32 S. W. 138; Com. v. Compton, 18 Ky. L. Rep. 479, 36 S. W. 1116. MASS.—Com. v. Sargent, 129 Mass. 115. TEX.—Turner v. State, 30 Tex. App. 691, 18 S. W. 792.

of the nature and cause of the accusation against him, by setting out wherein, or in what respect, his testimony is claimed to be false;[7] and this rule is particularly applicable, and the reason therefor more apparent, when the alleged false matter consists of several distinct and independent items or portions of the testimony given by the accused, some of which may be true and some of which may be false, and the items or propositions in the testimony are not so connected as to make the falsity of one item or proposition the falsity of all.[8] The indictment or information must be sufficiently broad to cover all the items or portions.[9]

§ 1111. —— AVERMENT AS TO ACCUSED'S KNOWLEDGE OF FALSITY. Except in those instances in which the statute under which prosecution is had makes knowledge of falsity an essential element in perjury, an indictment or information charging perjury against accused in testifying of his own knowledge is not generally required to allege that accused knew his testimony to be false,[1] al-

7 Fudge v. State, 57 Fla. 7, 17 Ann. Cas. 919, 49 So. 128; Gabrielsky v. State, 13 Tex. App. 428; United States v. Pettus, 84 Fed. 791.

8 State v. Ela, 91 Me. 309, 39 Atl. 1001; State v. Nelson, 74 Minn. 409, 77 N. W. 223; Gabrielsky v. State, 13 Tex. App. 428; Harrison v. State, 41 Tex. Cr. Rep. 274, 53 S. W. 863; Morris v. State, 47 Tex. Cr. Rep. 420, 83 S. W. 1126.

9 ARK. — Thomas v. State, 54 Ark. 584. IOWA — State v. Raymond, 20 Iowa 582. LA.—State v. Brown, 8 Rob. 566. MICH.—People v. Fay, 89 Mich. 119, 50 N. W. 752. TEX.—Gabrielsky v. State, 13 Tex. App. 428. ENG.—R. v. London, 12 Cox C. C. 50; R. v. Burraston, 4 Jur. 697.

1 IDA.—Territory v. Anderson, 2 Ida. (Hasb.) 573, 21 Pac. 417. ILL. — Johnson v. People, 94 Ill. 505. IOWA—State v. Raymond, 20 Iowa 582; State v. Gallaugher, 123 Iowa 378, 98 N. W. 906. MISS.—Brown v. State, 57 Miss. 424. ORE.—State v. Ah Lee, 18 Ore. 540, 23 Pac. 424. TEX.—State v. Lindenburg, 13 Tex. 27; Ferguson v. State, 36 Tex. Cr. Rep. 60, 35 S. W. 369, overruling State v. Powell, 28 Tex. 626; Ross v. State, 40 Tex. Cr. Rep. 349, 50 S. W. 336. FED.—United States v. Pettus, 84 Fed. 791.

Falsely swearing that accused did not believe or recall that he did certain things alleged, does not sufficiently falsify the oath by averring that he did such things as he then and there well knew.—

though there are some authorities holding that it must be so alleged;[2] but where the statute makes knowledge of falsity an essential element, a failure to allege that the accused knowingly testified falsely will be fatal to the sufficiency of the indictment or information.[3] A charge that accused "wilfully and corruptly," or "wilfully and feloniously," testified falsely, has been held to sufficiently charge that accused knowingly testified falsely, because he could not do so "wilfully and corruptly," or "wilfully and feloniously," without doing so "knowingly," as those phrases necessarily include the element of knowledge.[4]

State v. Coyne, 214 Mo. 344, 21 L. R. A. (N. S.) 993, 114 S. W. 8.

Under Oregon Code (Hill's Ore. Code Crim. Proc., § 1272) knowledge of falsity of evidence is a matter that must be proved in order to secure conviction, but it is not a matter necessary to be alleged in the indictment or information.—State v. Ah Lee, 18 Ore. 540, 23 Pac. 424.

2 KY.—Adams v. Com., 29 Ky. L. Rep. 683, 94 S. W. 664. LA.—State v. Brown, 110 La. 591, 34 So. 698; State v. Williams, 111 La. 1033, 36 So. 111. VA.—Com. v. Cook, 40 Va. (1 Rob.) 729. FED.—United States v. Babcock, 4 McL. 113, Fed. Cas. No. 14488.

Accused was charged with having sworn feloniously, wilfully, falsely, and corruptly in a civil suit in which he testified as a witness. Upon his trial on the charge he objected to testimony offered to prove that he was aware at the time that the matter to the truth of which he had sworn was false. The trial court excluded the testimony at instance of accused on the ground that the accused was not charged with having testified, as before stated, knowing that his testimony was false. The ruling of the trial court is correct. Scienter enters into the definition of perjury, and should be expressly charged. The indictment should not leave it to be implied that accused knew that he was swearing to a false fact at the time he testified.—State v. Brown, 110 La. 591, 15 Am. Cr. Rep. 286, 288, 34 So. 698.

Failing to allege that the accused wilfully, corruptly and falsely testified as alleged, an indictment or information will be quashed, although it states the issues of the case, and the testimony given.—State v. Morse, 90 Mo. 91.

3 KY.—Adams v. Com., 29 Ky. L. Rep. 683, 94 S. W. 664. MO.—State v. Richardson, 248 Mo. 563, 44 L. R. A. (N. S.) 307, 154 S. W. 735. N. Y.—People v. Root, 94 App. Div. 84, 18 N. Y. Cr. Rep. 371, 87 N. Y. Supp. 962. N. C.—State v. Champion, 116 N. C. 987, 21 S. E. 700.

4 IDA.—Territory v. Anderson, 2 Ida. (Hasb.) 573, 21 Pac. 417. ILL.—Johnson v. People, 94 Ill. 505. IOWA—State v. Raymond, 20 Iowa 582; State v. Gallaugher, 123

Testimony on information and belief being the foundation upon which perjury is predicated, the indictment or information, it seems, should allege that the accused knew the testimony he gave to be false,[5] because in such a case knowledge of falsity is a necessary ingredient of the crime.[6]

§ 1112. —— AVERMENT OF ACCUSED'S INTENT. The crime of perjury, being a statutory offense, where specifically made a felony by the statute, an indictment or information charging the offense must allege that the accused "feloniously" testified falsely, because the intent of the accused is an essential element in the offense;[1] and in those jurisdictions in which the common-law definition of the crime of perjury has been adopted, it must further be charged that the accused gave his false testimony "wilfully" and "corruptly,"[2] although in some jurisdictions it is sufficient merely to charge the accused in the

Iowa 378, 98 N. W. 906. MINN.—State v. Stein, 48 Minn. 466, 51 N. W. 474. TEX. — Ferguson v. State, 36 Tex. Cr. Rep. 60, 35 S. W. 369, overruling State v. Powell, 28 Tex. 626; Chavarria v. State, 63 S. W. 312. VT.—State v. Sleeper, 37 Vt. 122; State v. Smith, 63 Vt. 201, 22 Atl. 604. FED. — United States v. Pettus, 84 Fed. 791.

"Did know" that facts set out were the exact reverse of the testimony given by the accused, held to be a sufficient allegation that accused knowingly testified falsely. — State v. Wood, 17 Iowa 18.

5 ALA. — State v. Lea, 3 Ala. 602; Gibson v. State, 44 Ala. 17. IND. — State v. Cruikshank, 6 Blackf. 62; State v. Ellison, 8 Blackf. 225. IOWA—State v. Raymond, 20 Iowa 582; State v. Gallaugher, 123 Iowa 378, 98 N. W. 906. MISS.—Brown v. State, 57 Miss. 424. MO.—State v. Coyne, 214 Mo. 344, 21 L. R. A. (N. S.) 993, 114 S. W. 8. N. Y.—Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293, 6 Abb. N. C. 181, reversing 14 Hun 512. N. C.—State v. Carland, 14 N. C. (3 Dev. L.) 114. TEX.—Juaragui v. State, 28 Tex. 625; Ferguson v. State, 36 Tex. Cr. Rep. 60, 35 S. W. 369, overruling State v. Powell, 28 Tex. 626. VA.—Fitch v. Com., 92 Va. 824, 24 S. E. 272. ENG.—R. v. Perrott, 2 Maul. & S. 379, 15 Rev. Rep. 280.

6 State v. Coyne, 214 Mo. 344, 21 L. R. A. (N. S.) 993, 114 S. W. 8.

1 See, supra, § 1064.

2 Id.

Wilfully and knowingly swore falsely.—Com. v. Kane, 92 Ky. 457, 18 S. W. 7.

language of the statute,[3] or in the form provided by the statute.[4]

§ 1113. PARTIES LIABLE—CORPORATIONS. The rules governing as to parties liable on a charge of perjury are the general rules as to liability for crime generally, which rules have been fully treated in another place.[1]

Corporations, as bodies corporate, may be held responsible for violations of the criminal law,[2]—e. g., for violation of the Elkins Act;[3] of the fishery laws;[4] for violation by officer or agent of the revenue laws in issuing, without the proper stamps, papers required to be stamped;[5] for failure to keep passenger cars adequately supplied with drinking water;[6] for selling less than the required quantity of an article of merchandise;[7] and the like,—but a corporation can not commit treason,[8] nor be held responsible for perjury.[9]

§ 1114. —— INFANTS. The liability of infants on the charge of commission of crime depends upon the age and physical development of the child. Under seven years of age a child is held irresponsible, but over seven years of age up to and including fourteen years of age it may be doli capax, determined by the circumstances of the case and the mental development and understanding of

3 See, supra, § 1061.

4 See, supra, § 1062.

Charging in statutory form that accused "knowing the said statement or statements to be false, or being ignorant whether or not said statement was true," is sufficient. —State v. Champion, 116 N. C. 987, 21 S. E. 700.

1 See 1 Kerr's Whart. Crim. Law, §§ 46-115.

2 Id., §§ 116-123.

3 New York C. & H. R. Co. v. United States, 212 U. S. 481, 53 L. Ed. 613, 29 Sup. Ct. Rep. 304.

4 United States v. Alaska Packers' Assoc., 1 Alaska 217.

5 United States v. Baltimore & O. R. Co., 7 Am. Law Reg. N. S. 757, 8 Int. Rev. Rec. 148, Fed. Cas. No. 14509.

6 Southern R. Co. v. State, 125 Ga. 287, 114 Am. St. Rep. 203, 5 Ann. Cas. 411, 54 S. E. 160.

7 State v. Belle Springs Creamery Co., 83 Kan. 389, 111 Pac. 474.

8 Sutton's Hospital Case, 10 Co. 23a, 77 Eng. Repr. 960.

9 Wych v. Meal, 3 Pr. Wms. 310, 24 Eng. Repr. 1078.

the child.[1] It was held in an ancient case[2] that if an infant judicially perjure himself in point of age or otherwise, he is punishable for the perjury.[3] By amendment to the criminal laws of England[4] a child may be guilty of perjury for giving false evidence, although not sworn because not of sufficient understanding to know the nature of an oath. In Kentucky, where a boy of twelve years was indicted for perjury, convicted and sentenced to state prison therefor, on review, a new trial was ordered because of the failure of the evidence to show such discretion on the part of the infant as to overcome the presumption of his innocence.[5]

1 See 1 Kerr's Whart. Crim. Law, §§ 85 et seq.; 7 Encyc. of Ev., §§ 263 et seq.

2 Johnson v. Pye, Trin. Term, 17 Car. II, B. R. Sid. 258.

3 1 Russ. on Crimes, 9th ed., p. 6; Viner Abr., vol. 9, p. 396; Bac. Abr., tit. Infants (H).

4 Act of 1885, 48 & 49 Vict., ch. 69.

5 Willet v. Com., 73 Ky. (13 Bush) 230.

CHAPTER LXVII.

INDICTMENT—SPECIFIC CRIMES.

Pimping.[1]

§ 1116. Form and sufficiency of indictment.
§ 1117. —— Negativing defenses.
§ 1118. —— Duplicity.

§ 1116. FORM AND SUFFICIENCY OF INDICTMENT. Under the rule of criminal pleading requiring that a statutory offense must be so definitely specified and described (1) that accused may not be charged with one thing and tried for another, (2) that accused may know the exact offense with which he is charged and be enabled to prepare his defense, (3) that the jury may be able to deliver an intelligible verdict, and (4) that the court may be enabled to render a proper judgment, an indictment or information, in the language of the statute, charging accused with pimping, or with being a pimp, in that he "did then and there unlawfully attempt to solicit a male person, one A, to have sexual intercourse with a prostitute," is insufficient because it fails to set out the name of the prostitute, or narrate any of the surrounding facts or circumstances, whereby the identity of the alleged prostitute could be established.[2]

1 See, also Pandering, supra, §§ 1052 and 1053; Prostitution, infra, chapter LXXI; Vagrancy, infra, chapter LXXXI, and White Slave Act, chapter LXXXII.

2 State v. Underwood, 79 Ore. 338, 155 Pac. 194.

Woman not a prostitute may be shown by accused, but where the indictment in no way discloses her identity the accused can not be prepared to rebut evidence of her unlawful occupation.—State v. Underwood, 79 Ore. 338, 155 Pac. 194.

"Flossie C.," who was then and there engaged in "her" occupation of prostitution, sufficiently shows that Flossie C. was a woman without using the statutory word "woman" in the indictment or information, and was a prostitute.—State v. Cavalluzzi, 113 Me. 41,

§ 1117. —— NEGATIVING DEFENSES. An indictment or information charging the accused with the offense of being a pimp, or pimping, under the statute is not required to negative defenses the accused might possibly set up.[1]

§ 1118. —— DUPLICITY. Under a statute[1] providing that any male person who frequents houses of ill-fame, or houses of assignation, and the like, knowing them to be such, or associates with females known or reputed as prostitutes, or is engaged in or about a house of prostitution, is a pimp, and prescribing punishment therefor, an indictment or information charging accused, "being a male person, did unlawfully frequent houses of ill-fame, well knowing them to be such, and did unlawfully frequent houses of assignation, well knowing them as such, and did unlawfully associate with females known and reputed to be prostitutes, to wit, one Hettie Knecht, and others whose names are to the grand jury unknown," etc., is not bad for duplicity, because it charges, in a single count, but one offense, that against public morals of being a "pimp."[2]

92 Atl. 937 (accepting money, without consideration, from a prostitute—but applies equally to pimping).

—**Statutory words** much better practice, but not essential, if equivalent words are used, and all the elements of the crime are set forth.—State v. Cavalluzzi, 113 Me. 41, 92 Atl. 937, citing State v. Hussey, 60 Me. 410, 11 Am. Rep. 172; State v. Lynch, 88 Me. 195, 33 Atl. 978; State v. Doran, 99 Me. 329, 105 Am. St. Rep. 278, 59 Atl. 440; Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264.

1 Com. v. Peretz, 212 Mass. 253, Ann. Cas. 1913D, 484, 98 N. E. 1054, citing Com. v. Hart, 65 Mass. (11 Cush.) 130 (deriving support from a prostitute — but principle applies to a charge of pimping, also).

1 As Ind. Rev. Stats., 1881, § 2002.

2 Fahnestock v. State, 102 Ind. 156, 1 N. E. 372.

CHAPTER LXVIII.

INDICTMENT—SPECIFIC CRIMES.

Piracy.

§ 1119. Form and sufficiency of indictment—In general.
§ 1120. —— Venue.
§ 1121. —— Time and place.
§ 1122. —— Nationality of ship and sailors.
§ 1123. —— Piratical murder or manslaughter.
§ 1124. Joinder of defendants.
§ 1125. Joinder of counts.

§ 1119. FORM AND SUFFICIENCY OF INDICTMENT[1]—IN GENERAL. The crime of piracy is regulated and punished by statute both in England and this country, and in this country the federal statutes alone control. The indictment must sufficiently charge the offense alleged, setting out all the elements of the particular act of piracy charged in due and legal form under the federal rules of criminal pleading in the particular jurisdiction in which the action is instituted, and must allege that the act was done "feloniously" and "piratically,"[2] and should conclude "against the form of the statute," or "against the form of the statutes," as the case may be.[3]

§ 1120. —— VENUE. An indictment charging piracy, in any of its forms, must lay the venue in the federal courts, circuit or district, as the circumstances and the statute require, and the venue is sufficiently laid by alleging that the offense was committed "on the high seas, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state."[1]

1 As to general form of indictment, see Form No. 1481.

2 See, supra, § 317; 1 Hawk. Ch. 37, §§ 6, 10.

3 United States v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15204.

1 St. Clair v. United States, 154 U. S. 134, 38 L. Ed. 936, 14 Sup. Ct.

§ 1121. —— Time and place. The time when, and the place where, the offense was committed must be alleged so as to show that the offense charged occurred within the period of limitation allowed for its prosecution, and within the territory over which the court has jurisdiction.[1]

§ 1122. —— Nationality of ship and sailors. Where the offense was committed in a place and under circumstances giving the court jurisdiction, on or by a vessel having no national character, the indictment or information is not required to set out a national character of such vessel or of the sailors thereon.[1]

§ 1123. —— Piratical murder or manslaughter. An indictment or information charging piratical murder need not allege that the accused is a citizen of the United States, or that the crime was committed on board of a vessel belonging to a citizen of the United States, it being sufficient to allege that it was committed from on board such a vessel by a mariner sailing thereon;[1] both the time and the place of the murder, or the manslaughter, must be alleged,[2] however, as pointed out in a preceding section.[3] But a failure to specify the locality on the high

Rep. 1002; United States v. Baker, 5 Blatchf. 6, Fed. Cas. No. 14501; United States v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15204; United States v. Jones, 3 Wash. 209, Fed. Cas. No. 15494; United States v. Peterson, 1 Woodb. & M. 305, Fed. Cas. No. 16037.

1 United States v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15204.

1 United States v. Furlong, 18 U. S. (5 Wheat.) 184, 5 L. Ed. 64; United States v. Demarchi, 5 Blatchf. 84, Fed. Cas. No. 14944.

1 United States v. Furlong, 18 U. S. (5 Wheat.) 184, 5 L. Ed. 64; United States v. Holmes, 18 U. S. (5 Wheat.) 418, 5 L. Ed. 123; United States v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15204.

Manslaughter on high seas charged, it is sufficient to allege that the accused committed it, first, by casting A from a vessel, the name of which is unknown; and, second, by casting A from the longboat of a named ship.—United States v. Holmes, 1 Wall. Jr. 1, Fed. Cas. No. 15383.

2 Ball v. United States, 140 U. S. 118, 35 L. Ed. 377, 11 Sup. Ct. Rep. 761.

3 See, supra, § 1121.

seas where the alleged offense occurred is not fatal to the indictment.[4]

§ 1124. JOINDER OF DEFENDANTS. An indictment or information charging piracy, in any of its phases, may join in the indictment all the individuals supposed to have participated in the offense complained of, but there can be a conviction of such only as the evidence warrants.[1]

§ 1125. JOINDER OF COUNTS. An indictment or information charging piracy may join the different phases of the crime, such as a count charging the running away with a ship's cargo, and a count charging the larceny of the cargo, and the like. A verdict may be delivered and judgment rendered on either count.[1]

[4] Anderson v. United States, 170 U. S. 481, 42 L. Ed. 1116, 18 Sup. Ct. Rep. 689.

[1] St. Clair v. United States, 154 U. S. 134, 38 L. Ed. 936, 14 Sup. Ct. Rep. 1002.

[1] United States v. Peterson, 1 Woodb. & M. 305, Fed. Cas. No. 16037; United States v. Stetson, 3 Woodb. & M. 164, Fed. Cas. No. 16390.

See, supra, §§ 335 et seq.

CHAPTER LXIX.

INDICTMENT—SPECIFIC CRIMES.

Prize-Fighting.

§ 1126. Form and sufficiency of indictment.

§ 1126. FORM AND SUFFICIENCY OF INDICTMENT.[1] Prize-fighting being malum prohibitum, an indictment or information charging the offense will generally be sufficient where it is in the language of the statute creating the crime,[2] where the offense charged is fully, directly and expressly alleged without uncertainty or ambiguity, and the offense of prize-fighting is defined in the statute and all the elements thereof given,[3] in such a case it not being necessary to set out the acts constituting the offense, it being sufficient simply to allege that the accused unlawfully engaged in a prize-fight;[4] but it must be alleged that both participants fought.[5] Where the statute does not contain a definition of the offense or set out the elements

1 As to forms of indictment for prize-fighting, in its various phases, see Forms Nos. 1845-1855.

2 State v. Patton, 159 Ind. 251, 64 N. E. 850; Com. v. Welsh, 73 Mass. (7 Gray) 324; Com. v. Barrett, 108 Mass. 302; People v. Taylor, 96 Mich. 576, 21 L. R. A. 287, 56 N. W. 27; Seville v. State, 49 Ohio St. 117, 15 L. R. A. 516, 30 N. E. 621.

3 Sullivan v. State, 67 Miss. 346, 8 Am. Cr. Rep. 656, 7 So. 275. See People v. Glazier, 159 Mich. 537, 124 N. W. 582.

4 People v. Taylor, 96 Mich. 576, 21 L. R. A. 287, 56 N. W. 27.

Under a statute providing that "whoever engages as principal in any prize-fight" shall be punished, etc., an indictment which, with proper averments of time and place, charges that the accused did unlawfully engage as principal in an unlawful and premeditated fight and contention commonly called a "prize-fight" with another person named, and in said fight the accused and such other person did each the other unlawfully strike and bruise, and attempt to strike and bruise, for and in consideration of prize and reward, is good.—Seville v. State, 49 Ohio St. 117, 15 L. R. A. 516, 30 N. E. 621.

5 Sullivan v. State, 67 Miss. 346, 8 Am. Cr. Rep. 656, 7 So. 275.

of the crime, an indictment in the language of the statute will not be sufficient.[6]

Public place in which the alleged prize-fight took place need not, in the absence of a statute making that an ingredient of the offense, be alleged, according to some authorities,[7] while there are other authorities holding that the allegation is essential,[8] the difference in the holdings being due to difference in the provisions and wording of the various statutes.

Negativing exceptions in the statute are not required, under the general rule of criminal pleading, unless such exceptions are found in the enacting or prohibiting clause of the statute.[9]

6 Sullivan v. State, 67 Miss. 346, 8 Am. Cr. Rep. 656, 7 So. 275. See People v. Glazier, 159 Mich. 537, 124 N. W. 582.

7 Sullivan v. State, 67 Miss. 346, 8 Am. Cr. Rep. 656, 7 So. 656.

8 Seville v. State, 49 Ohio St. 117, 15 L. R. A. 516, 30 N. E. 621.

9 Seville v. State, 49 Ohio St. 117, 15 L. R. A. 516, 30 N. E. 621; Smythe v. State, 2 Okla. Cr. 297, 101 Pac. 611.

CHAPTER LXX.

INDICTMENT—SPECIFIC CRIMES.

Profanity.[1]

§ 1127. Form and sufficiency of indictment.

§ 1127. Form and sufficiency of indictment.[2] An indictment or information charging profane[3] swearing and cursing must contain an averment of facts in the case sufficient to show on the face of the instrument that the offense charged is within the purview of the statute.[4] The language must be alleged to have been uttered in the presence and within the hearing of some person who is named,[5] it not being sufficient to allege that it was uttered in the public streets and highways,[6] or to allege that the act was "publicly done,"[7] although there is authority to

1 See Blasphemy, supra, § 449; Disorderly Conduct, supra, § 551.

2 **As to forms of indictment,** see Forms Nos. 763, 764, 1856 and 1857.

3 **"Profanely spoken,"** words must have been alleged to have been.—Updegraph v. Com., 11 Serg. & R. (Pa.) 394.

4 Com. v. Linn, 158 Pa. 22, 22 L. R. A. 353, 9 Am. Cr. Rep. 412, 27 Atl. 843.

5 Goree v. State, 71 Ala. 7; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637; Com. v. Linn, 158 Pa. St. 22, 22 L. R. A. 353, 9 Am. Cr. Rep. 412, 27 Atl. 843.

In presence of divers persons, alleged profane words, must be averred to have been uttered, and must be so proved in order to constitute a nuisance by profane swearing.—State v. Pepper, 68 N. C. 259, 12 Am. Rep. 667.

Indictment in other respects good is not fatally defective because it omits the allegation that the words were uttered in the presence of divers good citizens, the omission being supplied by the other averments in the instrument.—Gaines v. State, 75 Tenn. (7 Lea) 410, 40 Am. Rep. 64.

6 Com. v. Linn, 158 Pa. St. 22, 22 L. R. A. 353, 9 Am. Cr. Rep. 412, 27 Atl. 843; State v. Graham, 35 Tenn. (3 Sneed) 134; State v. Steele, 50 Tenn. (3 Heisk.) 135; Gaines v. State, 75 Tenn. (7 Lea) 410, 40 Am. Rep. 64; Young v. State, 78 Tenn. (10 Lea) 165.

7 Goree v. State, 71 Ala. 7.

Public cursing and swearing, and taking the name of Almighty God in vain, charged against the accused, who for a long time, to wit, for the space of two hours,

the contrary;[8] and there must be an averment of a common or public nuisance[9] created thereby. A single act of profane swearing has been said not to be usually indictable,[10] although there is authority to the contrary.[11] The language used should be set out.[12] It is not absolutely necessary that the name of the deity should be used; any words importing an imprecation of divine vengeance, or implying divine command, so used as to constitute a public nuisance, being alleged, will be sufficient.[13]

to the common nuisance of all the citizens of the state, etc., held sufficient to support a conviction. —State v. Jones, 31 N. C. (9 Ired. L.) 39.

"To the common nuisance of the good citizens of the state," will not be sufficient, unless the acts amount in law to a public nuisance.—State v. Jones, 31 N. C. (9 Ired. L.) 39.

8 An allegation that the words were uttered "in a public place" to the common nuisance of the citizens is sufficient.—Young v. State, 75 Tenn. (7 Lea) 410, 40 Am. Rep. 64.

9 Holcomb v. Cornish, 8 Conn. 375; State v. Jones, 31 N. C. (9 Ired. L.) 39; State v. Graham, 35 Tenn. (3 Sneed) 134; State v. Steele, 50 Tenn. (3 Heisk.) 135; Gaines v. State, 75 Tenn. (7 Lea) 410, 40 Am. Rep. 64.

10 State v. Powell, 70 N. C. 67; Gaines v. State, 75 Tenn. (7 Lea) 410, 40 Am. Rep. 64.

11 State v. Chrisp, 85 N. C. 528, 39 Am. Rep. 713.

12 "Did profanely curse and swear, and take the name of Almighty God in vain," to the common nuisance, etc., is not sufficient.—State v. Powell, 70 N. C. 67.

The conversation or words uttered should be set out, at least so much thereof as will be sufficient to show the offense charged comes within the purview of the statute.—State v. Steele, 50 Tenn. (3 Heisk.) 135.

"Did profanely swear," without setting forth the curses verbatim et literatim, will be sufficient where no objection is interposed on the trial.—State v. Freeman, 63 Vt. 496, 22 Atl. 621.

13 Gaines v. State, 75 Tenn. (7 Lea) 410, 40 Am. Rep. 64.

CHAPTER LXXI.

INDICTMENT—SPECIFIC CRIMES.

Prostitution.[1]

§ 1128. Form and sufficiency of indictment—Language of statute.
§ 1129. —— Accepting, without consideration, earnings of prostitute, etc.
§ 1130. Joinder and duplicity.

§ 1128. FORM AND SUFFICIENCY OF INDICTMENT[2]—LANGUAGE OF STATUTE. In those cases in which the statute prohibiting and punishing prostitution sets out the acts which constitute prostitution, it is usually sufficient for the indictment or information to charge the offense in the language,[3] or substantially in the language,[4] of the statute; but it seems that it is not sufficient simply to charge accused with being a common prostitute, the statutory acts constituting her such must be set out.[5] Although there are cases to the effect that it is sufficient merely to charge her with being a night-walker,[6] while there is authority to the contrary.[7]

Knowledge of character of woman on the part of the accused need not be alleged in those cases in which knowl-

1 See Abduction, supra, § 348; Adultery, supra, §§ 399-407; Disorderly Houses, supra, §§ 562-569; Fornication, supra, §§ 698-707; Lewdness, supra, §§ 890-903; Pandering, supra, §§ 1052, 1053; Pimping, supra, §§ 1116-1118; Seduction, infra, chapter LXXVII; Vagrancy, infra, chapter LXXXI; White Slave Act, infra, chapter LXXXII.

2 As to form and sufficiency of indictment, see Forms Nos. 751-756, 765, 766.

3 Stanton v. State, 27 Ind. App. 105, 60 N. E. 999.

4 State v. Dickerhoff, 127 Iowa 404, 103 N. W. 350.

5 Toney v. State, 60 Ala. 97; Delano v. State, 66 Ind. 348; People ex rel. Kingsley v. Pratt, 22 Hun (N. Y.) 300; State v. Bryant, 90 Wash. 20, 155 Pac. 420.

6 State v. Dowers, 45 N. H. 543; State v. Russell, 14 R. I. 506.

7 Thomas v. State, 55 Ala. 260.

edge is not made an essential element of the offense by the statute.[8]

§ 1129. —— ACCEPTING, WITHOUT CONSIDERATION, EARNINGS OF PROSTITUTE, ETC. An indictment or information charging accused with accepting, without consideration, the earnings of a prostitute, or with deriving support from the earnings of a prostitute, or charging in any other statutory phrase, should follow the words of the particular statute under which prosecution is had, although it is not essential to do so where words the equivalent of the statutory words are used.[1] The indictment or information need not state the specific earnings,[2] nor need it allege knowledge on the part of the accused that the earnings accepted were the proceeds of prostitution,[3] where it is charged that he accepted the earnings "wilfully, unlawfully, and feloniously."[4] And an indictment or information is not insufficient for failing to allege in express terms that the prostitute from whom the money was received was a woman.[5] The statutory offense of living with a prostitute is a continuing one and may be charged as such between certain dates, but it may also be charged upon a particular day.[6] An indictment or information charging the deriving support or maintenance from the earnings of a known prostitute may lay

8 State v. Zenner, 35 Wash. 249, 77 Pac. 191. See State v. Barker, 43 Wash. 69, 86 Pac. 387.

1 State v. Cavalluzzi, 113 Me. 41, 92 Atl. 937.

2 State v. Crane, 88 Wash. 210, 152 Pac. 989; State v. Schuman, 89 Wash. 9, 153 Pac. 1084.

An information charging that the defendants between specified dates unlawfully and feloniously accepted the earnings of a named woman, she being a common prostitute, charges the crime under the statute.—State v. Columbus, 74 Wash. 290, 133 Pac. 455.

3 State v. Schuman, 89 Wash. 9, 153 Pac. 1084.

4 State v. Schuman, 89 Wash. 9, 153 Pac. 1084.

5 State v. Cavalluzzi, 113 Me. 41, 92 Atl. 937.

6 State v. Thuna, 59 Wash. 689, 109 Pac. 331, 111 Pac. 768.

the time "during the three months next preceding this indictment."[7]

§ 1130. JOINDER AND DUPLICITY. The general rules governing criminal pleading apply to this offense, and where the statute enumerates several acts, either of which will constitute the accused a prostitute,[1] or will render accused liable to the penalty of the statute, all of such acts may be charged in one count conjunctively,[2]—e. g., a charge against a man of placing his wife in a house of prostitution, and of permitting her to remain in a house of prostitution.[3] And it has been said that the statutory offense of being a common prostitute and the common-law offense of keeping a bawdy-house are of the same family of crimes, and may be joined in different counts in the same indictment.[4]

Duplicity can not be objected against an indictment or information charging accused with placing his wife in a house of prostitution, and with allowing and permitting her to remain in a house of prostitution, knowing it to be such in each instance, because both these acts are enumerated in the statute and may be joined in the same count.[5] And where the charge is the offense of receiving, without consideration, the earnings of, or deriving support from the earnings of, a known prostitute, the indictment or information charges a continuous offense, which constitutes but a series of acts; the offense is single and individual, although alleged to cover a designated period before the finding of the indictment.[6]

7 Com. v. Peretz, 212 Mass. 253, Ann. Cas. 1913D, 484, 98 N. E. 1054.

1 Fahnestock v. State, 102 Ind. 156, 1 N. E. 372; State v. Stout, 112 Ind. 245, 13 N. E. 715.

2 State v. Ilomaki, 40 Wash. 629, 82 Pac. 873.

3 Id.

4 Wooster v. State, 55 Ala. 217.

5 State v. Ilomaki, 40 Wash. 629, 82 Pac. 873. See State v. Newton, 29 Wash. 373, 70 Pac. 31.

6 Com. v. Peretz, 212 Mass. 253, Ann. Cas. 1913D, 484, 98 N. E. 1054.

CHAPTER LXXII.

INDICTMENT—SPECIFIC CRIMES.

Rape.

§ 1131. Form and sufficiency of indictment—In general.
§ 1132. —— In language of statute.
§ 1133. —— —— Female under age of consent.
§ 1134. —— Allegation as to sex.
§ 1135. —— Allegation as to place of offense.
§ 1136. —— Allegation as to time of offense.
§ 1137. —— Allegation as to assault.
§ 1138. —— Negativing marriage.
§ 1139. —— Accessories.
§ 1140. —— Conclusion.
§ 1141. Intent.
§ 1142. Designation and description of accused—In general.
§ 1143. —— Alleging age of accused.
§ 1144. Designation and description of female—In general.
§ 1145. —— Alleging age of female—Carnal knowledge by force.
§ 1146. —— —— Carnal knowledge with consent.
§ 1147. Force.
§ 1148. Designation and description of offense—In general.
§ 1149. —— Appropriate technical allegations.
§ 1150. —— Female under age of consent.
§ 1151. Want of consent—Female over age of consent.
§ 1152. —— Female under age of consent.
§ 1153. —— Female otherwise incapable of consenting—By reason of imbecility or insanity.
§ 1154. —— —— By reason of being drugged, drunken, or otherwise unconscious.
§ 1155. —— Fraud and imposition, threats and fear.
§ 1156. Resistance of female.
§ 1157. Attempt to commit rape—Sufficiency of indictment.
§ 1158. —— Female under age of consent.
§ 1159. Assault with intent to rape—In general.
§ 1160. —— Intent.

§ 1161. —— Force—Sufficiency of allegation.
§ 1162. —— Want of consent.
§ 1163. —— Description of offense.
§ 1164. Joinder of parties—Separate trials.
§ 1165. Joinder of counts.

§ 1131. FORM AND SUFFICIENCY OF INDICTMENT[1]—IN GENERAL. The crime of rape was a statutory offense in England at the time of the separation of the colonies from the mother country,[2] and remains so today,[3] while with us the statute 2 Westminster, chapter 34, was adopted as a part of the common law, and with us the offense is a common-law offense; but statutes have been passed in all the jurisdictions defining and punishing the crime, and an indictment or information charging the offense is sufficient where it sets out, in proper technical language,[4] all the essential elements of the offense under the statute of the particular jurisdiction,[5] in such plain and intelligible language as will enable the accused (1) to know with what particular act he is charged and must prepare to defend against on the trial, and (2) to plead autrefois acquit or autrefois convict to a subsequent indictment and prosecution for the same offense.[6]

§ 1132. —— IN LANGUAGE OF STATUTE. An indictment or information charging accused with the crime of rape, drawn in the language of the statute under which the prosecution is had,[1] or substantially in the language of

1 As to forms of indictment for rape in the various phases of the offense, see Forms Nos. 1858-1917.

2 2 Westm., ch. 34, 13 Edw. I. See Russ. on Crimes, 9th ed., p. 904.

3 24 & 25 Vict., ch. 100. See 1 Russ. on Crimes, 9th ed., p. 904.

4 As to appropriate technical allegations, see, infra, § 1149.

5 Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264; State v. Laxton, 78 N. C. 564; Greenlee v. State, 4 Tex. App. 345; Mitchell v. Com., 89 Va. 826, 17 S. E. 480.

6 State v. Hanson, 23 Tex. 233; Alexander v. State, 29 Tex. 496; Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399; Greenlee v. State, 4 Tex. App. 345.

1 State v. Peak, 130 N. C. 711, 41 S. E. 887.

such statute,[2] will usually be sufficient,[3] where it sets out all the essential elements of the particular phase of the crime sought to be charged, and meets the requirements set out in the preceding section. In all those cases in which the statutes under which the prosecution is had do not describe the offense prohibited and punished in such words as convey a full and clear idea of everything essential to constitute the crime, an indictment or information following the language of the statute will be insufficient; it must further set out the facts respecting the act complained of in such a manner as to meet and satisfy the requirements in pleading all statutory offenses.[4]

2 CAL.—People v. Horvath, 23 Cal. App. 306, 137 Pac. 1069. IOWA—State v. Rohn, 140 Iowa 640, 119 N. W. 88 (where the word "violently" was held equivalent to the use of the word "forcibly"). KAN.—State v. Hart, 33 Kan. 218, 5 **Am. Cr. Rep.** 66 (attempt to rape). MO. — State v. Hall, 164 Mo. 528, 65 S. W. 248. R. I.—State v. Tourjee, 26 R. I. 234, 58 Atl. 767.

Language of statute had better be followed strictly, but substantial accuracy is sufficient.—Francis v. State, 21 Tex. 286; Williams v. State, 1 Tex. App. 90, 28 **Am. Rep.** 399.

3 ALA. — Jackson v. State, 50 Ala. 456; Bradford v. State, 54 Ala. 230; Beason v. State, 72 Ala. 191. ARK.—Pleasant v. State, 13 Ark. 360; Anderson v. State, 34 Ark. 257. CAL.—People v. Mills, 17 Cal. 276; People v. Burk, 34 Cal. 661; People v. Girr, 53 Cal. 629; People v. Rangod, 112 Cal. 669, 44 Pac. 1071. FLA.—Holton v. State, 28 Fla. 303, 9 So. 716. IND. — Weinzorpflin v. State, 7 Blackf. 186; Dooley v. State, 28 Ind. 239. KAN.—State v. Hart, 33 Kan. 218, 6 Pac. 288; State v. White, 44 Kan. 514, 25 Pac. 33. ME.—State v. Black, 63 Me. 210. MINN. — O'Connell v. State, 6 Minn. (Gil. 190) 279; State v. Ward, 35 Minn. 182, 28 N. W. 192. MO.—State v. Meinhart, 73 Mo. 562. N. Y.—People v. Flaherty, 79 Hun 48, 9 N. Y. Cr. Rep. 253, 29 N. Y. Supp. 641. N. C.—State v. Martin, 14 N. C. (3 Dev. L.) 329. ORE.—State v. Daly, 16 Ore. 240, 18 Pac. 357. TENN.—Jones v. State, 50 Tenn. (3 Heisk.) 445. TEX. — Smith v. State, 41 Tex. 352; Williams v. State, 1 Tex. App. 90, 28 **Am. Rep.** 399; Elschlep v. State, 11 Tex. App. 301. VT.—State v. Hanlon, 62 Vt. 334, 19 Atl. 773. VA.—Com. v. Bennet, 4 Va. (2 Va. Cas.) 235; Smith v. Com., 85 Va. 924, 9 S. E. 148. WIS.—State v. Mueller, 85 Wis. 203, 55 N. W. 165; Jackson v. State, 91 Wis. 253, 64 N. W. 838.

4 Hays v. State, 57 Miss. 783, following Jesse v. State, 28 Miss. 100.

§ 1133. ——— FEMALE UNDER AGE OF CONSENT.[1] In those cases in which the charge against the accused is that of rape of a female under the age of consent, the indictment or information may charge the offense in the language of the statute,[2] alleging the female was not the wife of the accused. It need not be averred that there was an assault,[3] or, it seems, that the prosecutrix was a human being;[4] neither need it be alleged that the offense was committed "with the consent" of the female,[5] nor set out want of consent on her part.[6] Where the statute so requires, it must be alleged that the accused "unlawfully" had carnal knowledge of a female under the age of consent.[7]

§ 1134. —— ALLEGATION AS TO SEX. The general rule is that an indictment or information charging the crime of rape in any of its phases, is not required to allege the accused is a "male" or a "man,"[1] or that the person

1 **As to form of indictment** for rape of a female under age of consent, see Forms Nos. 1896-1905.

2 Where instead of alleging in the language of the statute "did unlawfully know and abuse" it was charged "with force and against her will, did ravish and carnally know" the latter words may be treated as surplusage, when the real crime was rape upon a child under ten years.—State v. Erickson, 45 Wis. 86, 3 **Am. Cr. Rep.** 336.

3 Callaghan v. State, 17 Ariz. 433, 155 Pac. 308; State v. Keeler, 52 Mont. 205, **L. R. A.** 1916E, 472, 156 Pac. 1080.

4 State v. Keeler, 52 Mont. 205, **L. R. A.** 1916E, 472, 156 Pac. 1080. See People v. Gilbert, 199 N. Y. 10, 20 **Ann. Cas.** 769, 24 N. Y. Cr. Rep. 480, 92 N. E. 85, and note in 20 **Ann. Cas.** 775.

See, also, infra, § 1144, footnote 9.

5 Reinoehl v. State, 62 Neb. 619, 87 N. W. 355.

Use of the word "ravish" is equivalent to saying that the carnal knowledge was without her consent.—Fields v. State, 39 Tex. Cr. 488, 46 S. W. 814.

6 People v. Bailey, 142 Cal. 434, 76 Pac. 49.

Where the act is charged as "against the consent of the said," etc., prosecutrix it is mere surplusage.—State v. Jones, 32 Mont. 442, 80 Pac. 1095.

7 Moss v. Com., 138 Ky. 404, 128 S. W. 296.

1 ARK.—Warner v. State, 54 Ark. 660, 17 S. W. 6. CAL.—People v. Wessel, 98 Cal. 352, 33 Pac. 216. MISS.—Brown v. State, 72 Miss. 997, 17 So. 278. N. C.—State v. Tom, 74 N. C. 414. TEX.—

injured is a "female" or a "woman,"[2] or even that she is a human being,[3] although an early Iowa case[4]—and other courts also recommend it[5]—says that it would be better practice to allege the sex of the person injured, although it is not necessary to do so, notwithstanding the fact that the statute uses the words "male" and "female," or "man" and "woman." The general reasons given for the non-essentiality of averring sex of the parties in the charge of the crime of rape is the fact that (1) the use of the word "rape" imports that the parties involved are a man and a woman, and (2) that the court will recognize the sex of the parties from the names given[6] and the pronouns used.[7] Where the crime charged is

Greenlee v. State, 4 Tex. App. 345; Cornelius v. State, 13 Tex. App. 349; Taylor v. State, 50 Tex. Cr. Rep. 362, 123 Am. St. Rep. 844, 97 S. W. 94. UTAH—State v. Williamson, 22 Utah 248, 83 Am. St. Rep. 780, 62 Pac. 1022.

See, also, footnote 8, this section.

2 ARK.—Warner v. State, 54 Ark. 660, 17 S. W. 6. GA.—Joice v. State, 53 Ga. 50. IOWA—State v. Hussey, 7 Iowa 409. KAN.—Tillson v. State, 29 Kan. 452. MO.—State v. Warner, 74 Mo. 83; State v. Armstrong, 167 Mo. 257, 66 S. W. 961. N. C.—State v. Farmer, 26 N. C. (4 Ired. L.) 224. TENN.—Hill v. State, 50 Tenn. (3 Helsk.) 317. TEX.—Robertson v. State, 31 Tex. 36; Greenlee v. State, 4 Tex. App. 345; Battle v. State, 4 Tex. App. 595, 30 Am. Rep. 169; Word v. State, 12 Tex. App. 174. W. VA.—State v. Barrick, 60 W. Va. 576, 55 S. E. 652.

3 See, supra, § 1133, footnote 4.

4 State v. Hussey, 7 Iowa 409.

5 FLA.—Barker v. State, 40 Fla. 178, 24 So. 69. IND.—Mills v. State, 52 Ind. 187. MINN.—O'Connell v. State, 6 Minn. 279 (Gil. 190). MO.—State v. Armstrong, 167 Mo. 257, 66 S. W. 961. TEX.—Robertson v. State, 31 Tex. 36; Battle v. State, 4 Tex. App. 595, 30 Am. Rep. 169. VA.—Taylor v. Com., 61 Va. (20 Gratt.) 825.

6 State v. Farmer, 26 N. C. (4 Ired. L.) 224; Taylor v. Com., 61 Va. (20 Gratt.) 825.

Ellen Frances Davis, the party ravished, was not alleged in the indictment to be "a female," the court of appeals of Virginia held the indictment good, and further that both the names "Ellen" and "Frances" are names universally applied to females only, and that the personal pronoun of the feminine gender "her" being twice used in the indictment in relation to the person described as "Ellen Frances Davis," and nothing whatever appearing in the indictment tending to show that such person was not a female.—Taylor v. Com., 61 Va. (20 Gratt.) 825.

7 IOWA—State v. Hussey, 7 Iowa 409. MO.—State v. Ham-

such as a male only can consummate, the indictment or information need not state the sex of the accused.[8]

§ 1135. —— ALLEGATION AS TO PLACE OF OFFENSE. An indictment or information charging rape must show on its face that the act complained of was committed in the county where the indictment was found or information presented and within the jurisdiction of the trial court;[1] but it is not necessary to set out the particular place within the county named at which the act was committed.[2] In some jurisdictions, under special statutory provisions, the indictment may allege that it is presented by the grand jury of the county where the prosecution is instituted and that the crime was committed in another named county.[3]

§ 1136. —— ALLEGATION AS TO TIME OF OFFENSE. Time of the offense of rape not being an essential ingredient in crime, the indictment or information is not required to set out the precise date on which the alleged offense was committed, it being sufficient to aver that it occurred "on or about" a date named, which date is within the period of

mond, 77 Mo. 157. N. C.—State v. Terry, 20 N. C. (4 Dev. & B. L.) 152; State v. Farmer, 26 N. C. (4 Ired. L.) 224. PA.—Harman v. Com., 12 Serg. & R. 69. TENN.—Hill v. State, 50 Tenn. (3 Heisk.) 317. TEX.—Battle v. State, 4 Tex. App. 595, 30 Am. Rep. 169. VA.—Taylor v. Com., 61 Va. (20 Gratt.) 825.

Averment that prosecutrix was not defendant's wife and that he ravished her is sufficient.—Carter v. State, 78 Tex. Cr. Rep. 240, 181 S. W. 473.

Referring in the indictment repeatedly as "her" is sufficient without alleging her to be a woman.—Battle v. State, 4 Tex. App. 595, 30 Am. Rep. 169.

8 United States v. Cannon, 4 Utah 122, 7 Pac. 469; affirmed, 116 U. S. 55, 29 L. Ed. 561, 6 Sup. Ct. Rep. 278; State v. Williams, 22 Utah 248, 83 Am. St. Rep. 780, 62 Pac. 1022.

See, also, footnote 1, this section.

1 Sullivant v. State, 8 Ark. 400; People v. O'Neil, 48 Cal. 257.

2 O'Connell v. State, 6 Minn. (Gil. 190) 279.

3 Mischer v. State, 41 Tex. Cr. 212, 96 Am. St. Rep. 780, 53 S. W. 627.

Court will take judicial notice that the county where the prosecution was commenced was in the same judicial district as that where the crime was committed.—Mischer v. State, 41 Tex. Cr. 212, 96 Am. St. Rep. 780, 53 S. W. 627.

limitation for the prosecution of the offense, and before the finding of the indictment or presenting the information.[1] An impossible date,[2] and a defectively alleged date,[3] have both been held not to vitiate the indictment, but the rulings can scarcely be regarded as sound in principle.

§ 1137. —— ALLEGATION AS TO ASSAULT. In the charge of the crime of rape the indictment or information is not required to allege an assault,[1] where it is alleged that the accused violently and feloniously ravished and carnally knew the prosecutrix against her will,[2] although it is permissible to do so, and where so alleged but one offense is charged, because the minor offense of "assault"[3] is included in the major offense of "rape."[4] Where the charge is that the accused did rape and assault the prosecutrix, the indictment or information is not bad because the word "assault" follows the word rape."[5]

§ 1138. —— NEGATIVING MARRIAGE. In charging the crime of rape the fact of marriage between the accused

1 State v. Thompson, 10 Mont. 549, 27 Pac. 349; State v. Sysinger, 25 S. D. 110, Ann. Cas. 1912B, 997, 125 N. W. 879; Reed v. State (Tex.), 13 S. W. 865; State v. Myrberg, 56 Wash. 384, 105 Pac. 622.

Blank date. An indictment alleging the rape to have been committed on the .... day of January, 1903, is not subject to demurrer.—Cecil v. Territory, 16 Okla. 197, 8 Ann. Cas. 457, 82 Pac. 654.

2 McMath v. State, 55 Ga. 308.

3 State v. Gaston, 96 Iowa 505, 65 N. W. 415.

1 MASS.—Com. v. Scannel, 65 Mass. (11 Cush.) 547. MINN.—O'Connell v. State, 6 Minn (Gil. 190) 279. TEX.—Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399; Elschlep v. State, 11 Tex. App. 301. ENG.—R. v. Allen, 9 Car. & P. 521, 38 Eng. C. L. 206, 2 Moo. 179.

See, also, supra, § 1133, footnote 1.

2 Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264; Harman v. Com., 12 Serg. & R. 69; R. v. Allen, 9 Car. & P. 521, 38 Eng. C. L. 206, 2 Moo. 179.

3 As to assault with intent to rape, see, infra, §§ 1159 et seq.

4 Farrell v. State, 54 N. J. L. 416, 24 Atl. 723; State v. Elswood, 15 Wash. 453, 46 Pac. 727; R. v. Guthrie, L. R. 1 C. C. 241.

5 McLaughlin v. State, 117 Ark. 154, 174 S. W. 234.

and the prosecutrix need not be negatived,[1] except in those cases in which it is sought to convict the accused on the charge of adultery,[2] or the charge of fornication,[3] should the evidence on the trial fail to show accused used force to accomplish his purpose.[4] A different rule, however, prevails in some jurisdictions, due to the peculiar wording of the statute, the statutory definition including the words "not the wife of the defendant."[5] Thus, under

1 ARK.—Garner v. State, 73 Ark. 487, 84 S. W. 623; Hurst v. State, 77 Ark. 146, 91 S. W. 8; Beard v. State (dis. op.), 79 Ark. 293, 9 Ann. Cas. 409, 97 S. W. 667; Curtis v. State, 89 Ark. 394, 117 S. W. 521. CAL.—People v. Estrada, 53 Cal. 600. DAK. — Territory v. Keyes, 5 Dak. 244, 38 N. W. 440. ILL.—People v. Stowers, 254 Ill. 588, 98 N. E. 986. KAN.—State v. White, 44 Kan. 514, 25 Pac. 33. KY.—Com. v. Landis, 129 Ky. 445, 16 Ann. Cas. 901, 112 S. W. 581; MASS.—Com. v. Scannel, 65 Mass. (11 Cush.) 547; Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264; Com. v. Murphy, 84 Mass. (2 Allen) 163; Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531. MONT. — State v. Williams, 9 Mont. 179, 23 Pac. 335; State v. Morrison, 46 Mont. 84, 125 Pac. 649. OHIO — Williams v. State, 1 Wright 42. OKLA.—Parker v. Territory, 9 Okla. 109, 59 Pac. 9. S. C.—State v. Haddon, 49 S. C. 308, 27 S. E. 194. TEX.—Caidenas v. State, 40 S. W. 980; Belcher v. State, 39 Tex. Cr. Rep. 121, 44 S. W. 519. UTAH—State v. Williamson, 22 Utah 248, 83 Am. St. Rep. 780, 62 Pac. 1022. WASH.—State v. Halbert, 14 Wash. 306, 44 Pac. 538. WIS.—State v. Mueller, 85 Wis. 203, 55 N. W. 165.

"Nor was it necessary to allege that the prosecutrix was not the wife of the defendant. Such an averment has never been deemed essential in an indictment for rape, either in this country or in England." — Com v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264.

2 As to **adultery**, see, supra, §§ 399-407.

3 As to **fornication**, see, supra, §§ 698-707.

4 Com. v. Murphy, 84 Mass. (2 Allen) 163; Dudley v. State, 37 Tex. Cr. Rep. 543, 40 S. W. 269.

5 ARIZ.—Cutler v. State, 15 Ariz. 343, 138 Pac. 1048. CAL.—People v. Miles, 9 Cal. App. 312, 101 Pac. 525; People v. Everett, 10 Cal. App. 12, 101 Pac. 528. ILL.—People v. Stowers, 254 Ill. 588, 98 N. E. 986. OKLA.—Young v. Territory, 8 Okla. 525, 58 Pac. 724; Parker v. Territory, 9 Okla. 109, 59 Pac. 9. TEX.—Bice v. State, 37 Tex. Cr. Rep. 36, 38 S. W. 803; Edwards v. State, 37 Tex. Cr. Rep. 242, 38 S. W. 996, 39 S. W. 368; Dudley v. State, 37 Tex. Cr. Rep. 543, 40 S. W. 269.

Contra: State v. Williams, 9 Mont. 179, 23 Pac. 335.

Statutory rape, without force, charged, indictment or information failing to negative that prose-

the California statute,[6] and statutes similarly worded, it is held necessary to specifically allege that the prosecutrix "was not the wife of the accused."[7] This latter doctrine is based upon the well-known rule of criminal pleading that the indictment or information must cover every element included in the statutory definition of the crime, and exceptions therein must be negatived in order that the description of the crime charged may correspond in all respects with the statute denouncing and punishing it.[8]

§ 1139. —— Accessories. All persons concerned in the commission of the crime of rape may be indicted as principals in the first or second degree,[1] or all may

cutrix was the wife of the accused, held to be fatally defective on motion in arrest of judgment.—People v. Kingeannon, 276 Ill. 251, 114 N. E. 508.

6 See Kerr's Cyc. Cal. Pen. Code, § 261.

7 People v. Everett, 10 Cal. App. 12, 101 Pac. 528.

"'Feloniously did ravish and carnally know' only describes the manner by which the intercourse was accomplished and in no way aids in determining that the female was not the defendant's wife." — People v. Miles, 9 Cal. App. 312, 101 Pac. 525; approved in People v. Everett, 10 Cal. App. 12, 101 Pac. 528.

8 People v. Miles, 9 Cal. App. 312, 101 Pac. 525; R. v. Jarvis, 1 Burr. 148, 97 Eng. Repr. 239.

Material facts not presumed by the court where not stated in the indictment or information. All presumptions are in favor of innocence of the accused. If the matters and things set forth in the indictment or information may be true under certain circumstances, and the accused under such circumstances and conditions not guilty of any crime, the indictment or information will be insufficient.—People v. Miles, 9 Cal. App. 312, 101 Pac. 525.

"Other than the wife of" the accused occurring in the enacting clause or definition of the offense, and not in a proviso or distinct substantive clause of the statute, the indictment or information must negative the fact that the female was the wife of the accused.—Rico v. State, 37 Tex. Cr. Rep. 36, 38 S. W. 801, citing Bice v. State, 37 Tex. Cr. Rep. 36, 38 S. W. 803; Edwards v. State, 37 Tex. Cr. Rep. 242, 38 S. W. 996, 39 S. W. 368; Dudley v. State, 37 Tex. Cr. Rep. 543, 40 S. W. 269.

1 Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264; R. v. Crisham, 1 Car. & M. 187, 41 Eng. C. L. 106; R. v. Gray, 7 Car. & P. 164, 32 Eng. C. L. 553; R. v. Folkes, 1 Moo. 354.

In Arizona, by statute, all are principals, and must be so in-

be indicted as principals,[2] although the contrary has been held.[3] Thus, it has been said that a husband who assists in the commission of the crime of rape upon his wife may be indicted as a principal in the second degree,[4] and that a woman aiding and abetting an attempt to commit a rape is liable as a principal.[5]

§ 1140. —— CONCLUSION. When the indictment or information charges the crime of rape at common law it need not end, as in England, "against the form of the statute,"[1] because in England the crime is purely statutory, while in this country we have the common-law crime of rape, having adopted the English statute as a part of the common law of the country, as above pointed out.[2] Where such conclusion is unnecessarily inserted, it may be rejected as surplusage.[3] But the conclusion is generally regulated by constitutional or statutory provisions in the various jurisdictions.[4]

§ 1141. INTENT. As in the case of other common-law and statutory crimes, in rape the intent is an essential element in the crime, and must be alleged with due formality and proper technical phraseology.[1] An indictment or information which fails to allege that the act complained of was done with "felonious" intent is fa-

dicted. — Trimble v. Territory, 8 Ariz. 281, 71 Pac. 934.

2 State v. Comstock, 46 Iowa 265; Conkey v. People, 1 Abb. Ct. App. Dec. 418, 2 Cow. Cr. Rep. 58, 5 Park. Cr. Rep. 31.

See, also, authorities cited infra, § 1164, footnote 2.

3 Kessler v. Com., 75 Ky. (12 Bush) 18.

4 Com. v. Murphy, 84 Mass. (2 Allen) 163; State v. Dowell, 106 N. C. 722, 19 Am. St. Rep. 568, 8 L. R. A. 297, 8 Am. Cr. Rep. 681, 11 S. E. 525; People v. Chapman, 62 Mich. 280, 4 Am. St. Rep. 857, 7 Am. Cr. Rep. 568, 28 N. W. 896; R. v. Audley, 3 How. St. Tr. 401.

5 See 1 Kerr's Whart. Crim. Law, p. 861.

1 See O'Connell v. State, 6 Minn. 279 (Gil. 190).

2 See, supra, § 1131.

3 State v. Storkey, 63 N. C. 7.

4 See, supra, §§ 329 et seq.

1 As to appropriate technical allegations, see, infra, § 1149.

tally defective;[2] charging that the assault was felonious, is not sufficient.[3]

§ 1142. DESIGNATION AND DESCRIPTION OF ACCUSED—IN GENERAL. On a charge of rape, in any of its phases, the indictment or information must individuate and describe the accused within the general rule as to description of defendants in criminal cases. We have already seen that it is not necessary to allege his sex;[1] neither is it necessary to allege his age[2] or physical capacity to commit the crime,[3] want of age and want of capacity being defenses which it is not necessary to anticipate;[4] or that he was a white person, where the punishment against white persons is different from that against colored persons.[5]

§ 1143. —— ALLEGING AGE OF ACCUSED. We have already seen that an indictment or information charging rape need not set out the age of the accused,[1] and this rule prevails in those cases in which, by statute, it is made rape for a man of a specified age and upward to have intercourse with a female of a specified age and below

2 State v. Porter, 48 La. Ann. 1539, 21 So. 125.

3 Id.

1 People v. Wessel, 98 Cal. 352, 33 Pac. 216; Brown v. State, 72 Miss. 997, 17 So. 278; Word v. State, 12 Tex. App. 174.

See, supra, § 1134, footnote 1.

2 People v. Ah Yek, 29 Cal. 575; People v. Wessel, 98 Cal. 352, 33 Pac. 216; Cheek v. State, 171 Ind. 98, 85 N. E. 779; Com. v. Scannel, 65 Mass. (11 Cush.) 547; State v. Ward, 35 Minn. 182, 28 N. W. 192; Davis v. State, 42 Tex. 226.

3 People v. Wessel, 98 Cal. 352, 33 Pac. 216.

4 CAL.—People v. Ah Yek, 29 Cal. 575; People v. Wessel, 98 Cal. 352, 33 Pac. 216. ILL.—Sutton v. People, 145 Ill. 279, 34 N. E. 420; Johnson v. People, 202 Ill. 53, 66 N. E. 877. MINN.—State v. Ward, 35 Minn. 182, 28 N. W. 192. NEB.—Hall v. State, 40 Neb. 320, 58 N. W. 929. ORE.—State v. Knighten, 39 Ore. 63, 87 Am. St. Rep. 647, 64 Pac. 866. TEX.—Davis v. State, 42 Tex. 226; Word v. State, 12 Tex. App. 174. WASH.—State v. Dunlap, 25 Wash. 292, 65 Pac. 544.

5 Com. v. Bennet, 4 Va. (2 Va. Cas.) 235; Young v. Com., 4 Va. (2 Va. Cas.) 328.

1 See, supra, § 1142, footnote 2.

that age, irrespective of her consent, thereto,[2] although there are authorities to the contrary.[3]

§ 1144. DESIGNATION AND DESCRIPTION OF FEMALE—IN GENERAL. An indictment or information charging the crime of rape, in any of its phases, should specifically name the female upon whom the offense is alleged to have been committed,[1] and an error in this regard will be fatal; the same is true in regard to the affidavit upon which an information is based.[3] Where it is immaterial under the statute whether or not the woman is married or unmarried, the indictment or information need not allege that she was a married woman.[4] We have already seen that it is not necessary to allege that she was not the wife of the accused,[5] except in those jurisdictions in which the words "not being the wife of the accused" occur in the definition of the crime, or in the prohibitory clause;[6] neither is it necessary to allege as to her sex,[7] that she was a person in being,[8] or that she was a human being.[9]

§ 1145. —— ALLEGING AGE OF FEMALE—CARNAL KNOWLEDGE BY FORCE. In those cases in which the charge against the accused is carnal knowledge of a female forcibly and

2 People v. Wessel, 98 Cal. 353, 33 Pac. 216; State v. Knighten, 39 Ore. 63, 87 Am. St. Rep. 647, 64 Pac. 866; State v. Sullivan, 68 Vt. 540, 35 Atl. 479.

3 Wistrand v. People, 213 Ill. 72, 72 N. E. 748; Schramm v. People, 220 Ill. 16, 5 Ann. Cas. 111, 77 N. E. 117.

1 Com. v. Kennedy, 131 Mass. 584.

2 State v. Johnson, 67 N. C. 55. "Dellia Weavr" for "Della Weaver," held to be fatal in Vance v. State, 65 Ind. 465.

3 Strader v. State, 92 Ind. 376. But see Girous v. State, 29 Ind. 93.

4 State v. Haddon, 49 S. C. 308, 27 S. E. 194; State v. Hooks, 69 Wis. 182, 2 Am. St. Rep. 728, 23 N. W. 57.

5 See, supra, § 1138, footnote 1.

6 See, supra, § 1138, footnotes 5-7.

7 See, supra, § 1134, footnote 2.

8 Greenlee v. State, 4 Tex. App. 345.

9 Anderson v. State, 34 Ark. 257; State v. Ward, 35 Minn. 182, 28 N. W. 192; State v. Keeler, 52 Mont. 205, L. R. A. 1916E, 472, 156 Pac. 1080; State v. Tom, 87 N. C. 414.

See, supra, § 1133, footnote 4.

against her will and consent, the indictment or information is not required to set out her age, whether she is over or under the age of consent,[1] for the offense is rape in either case.

§ 1146. ———— CARNAL KNOWLEDGE WITH CONSENT. In those cases in which the charge against the accused is that of statutory rape, or carnal knowledge[1] of a female under the prohibited age with her consent,[2] the age of the female at the time when the act was committed being the fact upon which the criminality of the act depends, the indictment or information must distinctly state the age of the female at the time of the act complained of.[3]

1 ALA.—Vasser v. State, 55 Ala. 264. CONN. — State v. Gaul, 50 Conn. 578. DEL.—State v. Smith, 9 Houst. 588, 33 Atl. 441. KY.—Jones v. Com., 124 Ky. 26, 97 S. W. 1118; McLaughlin v. Com., 18 Ky. L. Rep. 205, 35 S. W. 1030; Jones v. Com., 30 Ky. L. Rep. 288, 97 S. W. 1118; Webb v. Com., 30 Ky. L. Rep. 841, 99 S. W. 909. MASS.—Com. v. Sugland, 70 Mass. (4 Gray) 7; Com. v. Sullivan, 72 Mass. (6 Gray) 477. MISS.—Mobley v. State, 46 Miss. 501; Bonner v. State, 65 Miss. 293, 3 So. 663. MO.—State v. Houx, 109 Mo. 654, 32 **Am. St. Rep.** 686, 19 S. W. 35. N. Y.—People v. Draper, 28 Hun 1, 1 N. Y. Cr. Rep. 138. N. C.—State v. Farmer, 26 N. C. (4 Ired. L.) 224; State v. Storkey, 63 N. C. 7. OHIO—Bowles v. State, 7 Ohio (pt. II) 243; O'Meara v. State, 17 Ohio St. 515. S. C.—State v. Haddon, 49 S. C. 308, 27 S. E. 194. TENN.—Hill v. State, 50 Tenn. (3 Helsk.) 317. TEX.—Davis v. State, 42 Tex. 226; Nicholas v. State, 23 Tex. App. 317, 5 S. W. 239. VT.—State v. Wheat, 63 Vt. 673, 22 Atl. 720; State v. Sullivan, 68 Vt. 540, 35 Atl. 479.

1 **Carnally to know** means the same as the statutory "sexual intercourse."—People v. Carroll, 1 Cal. App. 2, 81 Pac. 680; People v. Miles, 9 Cal. App. 312, 314, 101 Pac. 525.

2 GA.—Gosha v. State, 56 Ga. 36. IND.—Greer v. State, 50 Ind. 267, 19 **Am. Rep.** 709. MISS.—Williams v. State, 47 Miss. 609. N. Y.—Singer v. People, 13 Hun 418, 2 Cow. Cr. Rep. 547; affirmed, 75 N. Y. 608. TEX.—Davis v. State, 42 Tex. 226.

3 MISS. — Mobley v. State, 46 Miss. 501; Bonner v. State, 65 Miss. 293, 3 So. 663. MO.—State v. Houx, 109 Mo. 654, 32 **Am. St. Rep.** 686, 19 S. W. 35; State v. Hughes, 258 Mo. 264, 167 S. W. 529. N. H.—State v. Burt, 75 N. H. 64, **Ann. Cas.** 1912A, 232, 71 Atl. 30. N. J. — Farrell v. State, 54 N. J. L. 416, 24 Atl. 723. OHIO—O'Meara v. State, 17 Ohio St. 515. S. C.—State v. Haddon, 49 S. C. 308, 27 S. E. 194. TEX.—Mosley v. State, 9 Tex. App. 137; Nicholas v. State, 23 Tex. App. 317, 5 S. W.

§ 1147. FORCE. On the charge against the accused of rape or assault to rape,[1] where the female is over the age of consent,[2] the very essence of the crime is that it was done forcibly and against the will of the female on whom the crime was committed.[3] Where the charge is that of statutory rape the indictment or information need not allege force or violence, because force is not an essential element of such an offense;[4] and the same is true in case of rape by fraud[5] or where the female was incapable

239. VT.—State v. Wheat, 63 Vt. 673, 22 Atl. 720; State v. Sullivan, 68 Vt. 540, 35 Atl. 479.

An allegation that the female was "under the age of twelve, to-wit, 10 years of age," is a sufficient allegation as to her age.—Zoborosky v. State, 180 Ind. 187, 102 N. E. 825.

The indictment need not charge in the words of the statute that the woman was "under sixteen years of age." It is sufficiently definite where it gives positive information as to her age and that she was below the age of consent. —State v. Burt, 75 N. H. 64, Ann. Cas. 1912A, 232, 71 Atl. 30.

1 As to force in assault with intent to rape, see, infra, § 1161.

2 As to age of consent, see, supra, §§ 1145 and 1146.

3 Sullivant v. State, 8 Ark. 404.

4 CAL.—People v. Verdegreen, 106 Cal. 211, 46 Am. St. Rep. 234, 39 Pac. 607; People v. Rangod, 112 Cal. 669, 44 Pac. 1071; People v. Bailey, 142 Cal. 434, 76 Pac. 49. DAK.—Territory v. Keyes, 5 Dak. 244, 38 N. W. 440. FLA.—Holton v. State, 28 Fla. 303, 9 So. 716. ILL. — Porter v. People, 158 Ill. 370, 41 N. E. 886. IOWA—State v. Scroggs, 123 Iowa 649, 96 N. W. 723. KAN. — State v. Woods, 49 Kan. 237, 30 Pac. 520. KY.—Proctor v. Com., 14 Ky. L. Rep. 248, 20 S. W. 213. ME.—State v. Black, 63 Me. 210. MICH. — People v. McDonald, 9 Mich. 150; People v. Courier, 79 Mich. 366, 44 N. W. 571; People v. Ten Elshof, 92 Mich. 167, 52 N. W. 297. MO.—State v. Wray, 109 Mo. 594, 19 S. W. 86; State v. McCullough, 171 Mo. 571, 71 S. W. 1002. NEB.—Davis v. State, 31 Neb. 247, 47 N. W. 854. N. J.—Farrell v. State, 54 N. J. L. 416, 24 Atl. 723. TEX.—Davis v. State, 42 Tex. 226; Moore v. State, 20 Tex. App. 278; Nicholas v. State, 23 Tex. App. 317, 5 S. W. 239.

An allegation as to force having been used may be treated as surplusage. — State v. Scroggs, 123 Iowa 649, 96 N. W. 723.

Assault need not be alleged either.—State v. McCullough, 171 Mo. 571, 71 S. W. 1002.

See, also, supra, § 1137.

Chaste unmarried female between the ages of fourteen and eighteen being protected by the statute and her carnal knowledge punished as rape, force or violence need not be alleged.—State v. McCullough, 171 Mo. 571, 71 S. W. 1002.

5 As to carnal knowledge through fraud, see, post, § 1155.

of consenting[6] and the like; but wherever common-law rape is charged it is necessary to allege that the act complained of was accomplished by means of force,[7] although it is not necessary to so charge in terms, it being sufficient to allege that the assault was violent and felonious and that the act of carnal intercourse was felonious and against the will[8] of the female ravished,[9] is sufficient without the use of the word "forcibly."[10]

§ 1148. DESIGNATION AND DESCRIPTION OF OFFENSE—IN GENERAL. An indictment or information charging the crime of rape, in any of its phases, must allege every ele-

6 State v. Enright, 90 Iowa 520, 58 N. W. 901; Caruth v. State, (Tex.) 25 S. W. 778.

Drugged female, incapacity to consent. See, infra, § 1154.

Imbecility of female, incapacity to consent by reason of. See, infra, § 1154, footnote 7.

Insanity of female, incapacity to consent by reason of. See, infra, § 1154.

Slumbering female, incapacity to consent prohibited by. See, infra, § 1154, footnote 8.

7 Hubert v. State, 74 Neb. 220, 104 N. W. 276; State v. Marsh, 132 N. C. 1000, 43 S. E. 828; State v. Marsh, 134 N. C. 184, 67 L. R. A. 179, 47 S. E. 6.

"By force," or words of equal significance are essential to charge the crime of rape, and can not be dispensed with in an indictment. —State v. Blake, 39 Me. 322.

Charging assault on female, with intent to ravish and carnally know her, and alleging that "in the manner and by the means aforesaid, did have and obtain carnal knowledge of the said" female, is insufficient to charge rape by force, or a ravishment.—Elschlep v. State, 11 Tex. App. 301.

"Forcibly and against the will" are necessary.—State v. Jim, 12 N. S. (1 Dev. L.) 55.

"Violently and against her will feloniously did ravish and carnally know" the female, sufficiently states that the act was accomplished "by force."—Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264.

8 **"Against her will,"** or their equivalent, omitted from an indictment charging rape, renders it fatally defective.—State v. Marsh, 134 N. C. 184, 67 L. R. A. 179, 47 S. E. 6.

9 It is sufficient to charge that defendant feloniously did ravish and carnally know the prosecutrix.—State v. Heyer, 89 N. J. L. 187, 98 Atl. 413.

10 State v. Johnson, 67 N. C. 55.

"Violently" in lieu of the statutory "forcibly," has been said to be sufficient.—State v. Williams, 32 La. Ann. 335, 36 Am. Rep. 272; Gutierrez v. State, 44 Tex. 587; Walling v. State, 7 Tex. App. 625;

ment of the crime and every essential fact and circumstance necessary to constitute the offense charged,[1] and must so individuate the particular offense and the parties involved that the accused may (1) prepare his defense and (2) plead any judgment that might be rendered in bar of a subsequent prosecution for the same act and offense;[2] but it is usually sufficient to give the technical name of the act charged and allege that it was committed by force,[3] violence, and against the will of the female, without setting out under which of the circumstances enumerated in the statute it was accomplished,[4] or setting out the particular manner in which the unlawful act was accomplished,[5] or characterize the force used.[6]

§ 1149. —— APPROPRIATE TECHNICAL ALLEGATIONS. The act charged should be described with such appropriate technical allegations as the particular offense charged requires to set out fully and clearly all the elements thereof essential to be charged. *Force* being an essential element[1] must be charged in terms or in words of equivalent meaning.[2] The word *"ravish"* was essential at com-

1 ALA.—Sims v. State, 146 Ala. 109, 41 So. 413. ARIZ.—Trimble v. Territory, 8 Ariz. 281, 71 Pac. 934. LA.—State v. Porter, 48 La. Ann. 1539, 21 So. 125. MINN.—State v. Vorey, 41 Minn. 134, 43 N. W. 324. NEB.—Hubert v. State, 74 Neb. 220, 104 N. W. 276, 106 N. W. 774. N. C.—State v. Jim, 12 N. C. (1 Dev. L.) 142; State v. Marsh, 132 N. C. 1000, 67 L. R. A. 179, 43 S. E. 828. TEX.—Brinster v. State, 12 Tex. App. 612.

Charging assault, and aiding, abetting and assisting another to ravish and carnally know a female, without affirmatively alleging that such crime was actually committed by the person alleged to have been assisted by accused, fails to charge an offense.—Trimble v. Territory, 8 Ariz. 281, 71 Pac. 934.

2 See, supra, § 1131.

3 **As to the necessity of force,** see, supra, § 1147.

4 People v. Snyder, 75 Cal. 323, 17 Pac. 208.

5 McMath v. State, 55 Ga. 303; Cornelius v. State, 13 Tex. App. 349.

6 Cooper v. State, 22 Tex. App. 419, 3 S. W. 334.

1 See, supra, § 1147.

2 Id.

"Forcibly" omitted, not material where words of equivalent import are used.—State v. Johnson, 67 N. C. 55; State v. Marsh, 134 N. C. 184, 67 L. R. A. 179, 47 S. E. 6.

mon law, but is not required under our statutes,[3] unless it is a part of the definition of the crime in the statute under which prosecution is had;[4] but this word, which has a well-defined common-law meaning, is appropriate to be used, and where used it constitutes an averment (1) of the use of force by the accused in consummating the act complained of, and (2) of the want of consent[5] on the part of the female;[6] and as each of these facts constitutes an essential element of the crime of rape[7] that must in some appropriate manner be alleged in the description of the act complained of,[8] the careful pleader will not omit the word "ravish" from the indictment or information. Rape is a felony in probably all the jurisdictions in this country and it is essential that the act complained of was

3 FLA.—Barker v. State, 40 Fla. 178, 24 So. 69. IND.—Mills v. State, 52 Ind. 187. MINN.—O'Connell v. State, 6 Minn. 279 (Gil. 190). MO.—State v. Armstrong, 167 Mo. 257, 66 S. W. 961. TEX.—Robertson v. State, 31 Tex. 36; Battle v. State, 4 Tex. App. 595, 30 Am. Rep. 169. VA.—Taylor v. Com., 61 Va. (20 Gratt.) 825.

4 ARK.—State v. Peyton, 93 Ark. 406, 137 Am. St. Rep. 93, 125 S. W. 416. N. Y.—Gouglemann v. People, 3 Park. Cr. Rep. 15. N. C.—State v. Smith, 61 N. C. (1 Phill. L.) 302; State v. Marsh, 132 N. C. 1000, 67 L. R. A. 179, 43 S. E. 828. TEX.—Davis v. State, 42 Tex. 226; Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399; Elschlep v. State, 11 Tex. App. 301; Gibson v. State, 17 Tex. App. 574; Fields v. State, 39 Tex. Cr. Rep. 488, 46 S. W. 814. VA.—Christian v. Com., 64 Va. (23 Gratt.) 954. WYO.—Ross v. State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

"Ravish" is indispensable under the North Carolina statute, it seems.—State v. Marsh, 134 N. C. 184, 67 L. R. A. 179, 47 S. E. 6.

"Ravish" need not be used in the information when it was not used in the statute.—Tway v. State, 7 Wyo. 74, 50 Pac. 188.

5 As to want of consent on the part of the female, see, infra, §§ 1151 et seq.

6 Harman v. Com., 12 Serg. & R. (Pa.) 69; Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399; Elschlep v. State, 11 Tex. App. 301; Gibson v. State, 17 Tex. App. 574.

7 ARK.—Sullivant v. State, 8 Ark. 400. MINN.—O'Connell v. State, 6 Minn. 279. (Gil. 190). N. Y.—Gouglemann v. People, 3 Park. Cr. Rep. 15. PA.—Harman v. Com., 12 Serg. & R. 69. TEX.—Davis v. State, 42 Tex. 226; Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399; Gibson v. State, 17 Tex. App. 574. VA.—Christian v. Com., 64 Va. (23 Gratt.) 954.

8 As to force, see, supra, § 1147. As to want of consent, see, infra, §§ 1151 et seq.

"feloniously" done in some jurisdictions,[9] though this allegation is unnecessary in others;[10] it is thought to be permissible and prudent in all jurisdictions, because it includes the necessary elements of intent,[11] force[12] and want of consent[13] on the part of the female; for these elements being absent the act is neither criminal nor "felonious," except in the case of statutory rape by reason of the female being under the age of consent.[14] *"Did carnally know"* is prudent to be used whether regarded as essential or not, upon which question the authorities differ, because carnal knowledge is an essential element of the completed offense;[15] but a description of the carnal

9 KY.—Wilkey v. Com., 104 Ky. 325, 47 S. W. 219; Hall v. Com., 15 Ky. L. Rep. 856, 26 S. W. 8; Reed v. Com., 25 Ky. L. Rep. 1029, 76 S. W. 838. LA.—State v. Porter, 48 La. Ann. 1539, 21 So. 125. MISS. — Hays v. State, 57 Miss. 783. N. C.—State v. Marsh, 134 N. C. 184, 67 L. R. A. 179, 47 S. E. 6. PA.—Harman v. Com., 12 Serg. & R. 69; Mears v. Com., 2 Grant 385.

10 DAK.—Territory v. Godfrey, 6 Dak. 46, 50 N. W. 481. MASS.—Com. v. Scannel, 65 Mass. (11 Cush.) 547. OKLA.—Asher v. Territory, 7 Okla. 188, 54 Pac. 445. R. I.—State v. Tourjee, 26 R. I. 234, 58 Atl. 767. WIS.—Brown v. State, 127 Wis. 193, 7 Ann. Cas. 258, 106 N. W. 536.

11 See, supra, § 1141.

Felonious intent must be alleged in the description of the offense; it is not sufficient to charge simply that assault was felonious.—State v. Porter, 48 La. Ann. 1539, 21 So. 125.

12 See, supra, § 1147.

13 See, infra, §§ 1151 et seq.

"Feloniously did ravish and carnally know" is equivalent to an allegation that the offense was committed forcibly and against the will of the female.—Harman v. Com., 12 Serg. & R. (Pa.) 69; Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399; State v. Mueller, 85 Wis. 203, 55 N. W. 165.

14 See, supra, § 1146; infra, § 1150.

15 ARIZ.—Trimble v. Territory, 8 Ariz. 281, 71 Pac. 934. MO.—State v. Hunter, 171 Mo. 435, 71 S. W. 675. N. C.—State v. Jim, 12 N. C. (1 Dev. L.) 142; State v. Powell, 106 N. C. 635, 11 S. E. 191. OKLA.—Vickers v. United States, 1 Okla. Cr. 452, 98 Pac. 467. TEX.—Fields v. State, 39 Tex. Cr. Rep. 488, 46 S. W. 814.

"Carnal knowledge of a female forcibly and against her will" is essential to the crime of rape.—State v. Jim, 12 N. C. (1 Dev. L.) 142; State v. Powell, 106 N. C. 635, 11 S. E. 191.

"Ravish" equivalent to the statutory words "carnal knowledge."—Fields v. State, 30 Tex. Cr. Rep. 488, 46 S. W. 814. But see State v. Jim, 12 N. C. (1 Dev. L.) 142.

act itself is not required.[16] *"Against her will"*[17] or "without her consent"[18] is used in American statutes and one or the other of these terms is regarded as essential in the description of the offense, either phrase being sufficient whatever the exact phraseology of the statute under which the prosecution is had.[19] *"Violently,"* used in the description of the offense, is equivalent to saying that the act was done by force, threats or fraud;[20] and where the statute under the prosecution in defining the crime uses the word "forcibly" the word "violently" may be used in the indictment or information as a substitute therefor,[21] although there are authorities to the contrary.[22] *"Unlawfully,"* though commonly used in describing the offense, is never necessary, although used in the statute, where the act is alleged to have been "feloniously" done.[23]

§ 1150. —— FEMALE UNDER AGE OF CONSENT. In those cases in which the female involved was under the age of

16 McMath v. State, 55 Ga. 303; Com. v. Hackett, 170 Mass. 194, 48 N. E. 1087; State v. Cannon, 72 N. J. L. 46, 60 Atl. 177; State v. La Mont, 23 S. D. 174, 120 N. W. 1104.

17 State v. Powell, 106 N. C. 635, 11 S. E. 191; State v. Marsh, 132 N. C. 1000, 43 S. E. 838, 134 N. C. 184, 67 L. R. A. 179, 47 S. E. 6.

18 As to want of consent on the part of the female, see, infra, §§ 1151 et seq.

19 ARK.—State v. Peyton, 93 Ark. 406, 137 Am. St. Rep. 93, 125 S. W. 416. CAL.—People v. Sykes, 10 Cal. App. 67, 101 Pac. 20. LA.—State v. Jackson, 46 La. Ann. 547. N. C.—State v. Jim, 12 N. C. (1 Dev. L.) 142. PA.—Harman v. Com., 12 Serg. & R. 69. TEX.—Williams v. State, 1 Tex. App. 90, 28 Am. Rep. 399.

20 State v. Williams, 32 La. Ann. 335, 36 Am. Rep. 272; Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264; Gutierrez v. State, 44 Tex. 587; Walling v. State, 7 Tex. App. 625.

21 Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264; State v. Johnson, 67 N. C. 55.

22 State v. Blake, 39 Me. 322. See High v. Territory, 12 Ariz. 146, 100 Pac. 448; People v. Bailey, 142 Cal. 434, 76 Pac. 49; State v. Hann, 73 Minn. 140, 76 N. W. 33; Walling v. State, 7 Tex. App. 625.

23 Territory v. Godfrey, 6 Dak. 46, 50 N. W. 481; State v. Hoskinson, 78 Kan. 183, 96 Pac. 138; Com. v. Scannel, 65 Mass. (11 Cush.) 547; Asher v. Territory, 7 Okla. 188, 54 Pac. 445.

consent, the indictment or information, in describing the offense, may follow the language of the statute, or substantially the language of the statute,[1] setting out the age of the female; the technical description set out in the preceding section not being required;[2] although to charge that accused feloniously assaulted,[3] ravished,[4] etc., will not render the indictment or information bad.[5] It is unnecessary, in describing the act in such a case, to allege that it was with the consent of the female;[6] and want of consent need not be alleged.[7]

§ 1151. WANT OF CONSENT—FEMALE OVER THE AGE OF CONSENT. Where accused is charged with the crime of rape of a female over the age of consent, the indictment or information must specifically aver that the act complained of was consummated by force,[1] which implies that the act was against the will and without the consent of the female;[2] although it is usual to, and is thought

1 See, supra, § 1133.

2 ALA.—McGuff v. State, 88 Ala. 147, 16 Am. St. Rep. 25, 7 So. 35. CAL.—People v. Mills, 20 Cal. 276. DEL.—State v. Cook, 4 Penn. 31, 55 Atl. 1102. ME.—State v. Black, 63 Me. 210. MASS.—Com. v. Sugland, 70 Mass. (4 Gray) 7; Com. v. Sullivan, 72 Mass. (6 Gray) 477. MO.—State v. Hall, 164 Mo. 528, 65 S. W. 248; State v. Skillman, 228 Mo. 343, 128 S. W. 729. N. Y.—People v. Robertson, 88 App. Div. 198, 18 N. Y. Cr. Rep. 16, 84 N. Y. Supp. 401. N. C.—State v. Goings, 20 N. C. (4 Dev. & B. L.) 152; State v. Smith, 61 N. C. (1 Phill. L.) 302. ORE. — State v. Horne, 20 Ore. 485, 26 Pac. 665. TEX.—Alexander v. State, 58 Tex. Cr. Rep. 621, 127 S. W. 189; Cromeans v. State, 59 Tex. Cr. Rep. 611, 129 S. W. 1129. WIS.—Fizell v. State, 25 Wis. 364. ENG.—R. v. Guthrie, L. R. 1 C. C. 241, 11 Cox C. C. 522; R. v. Holland, 10 Cox C. C. 478.

3 People v. Ten Elshof, 92 Mich. 167, 52 N. W. 297.

4 People v. Mills, 94 Mich. 630, 54 N. W. 488.

5 McClure v. State, 116 Ind. 169, 18 N. E. 615; State v. Miller, 111 Mo. 542, 20 S. W. 243, following State v. Wray, 109 Mo. 594, 19 S. W. 86.

6 Reinoehl v. State, 62 Neb. 619, 87 N. W. 355.

Incapable of consent, is the presumption of the statute.—People v. Ten Elshof, 92 Mich. 167, 52 N. W. 297.

7 People v. Bailey, 142 Cal. 434, 76 Pac. 49; State v. Jones, 32 Mont. 442, 80 Pac. 1095; People v. Marks, 146 App. Div. 11, 26 N. Y. Cr. Rep. 259, 130 N. Y. Supp. 524.

1 See, supra, § 1147.

2 State v. Murphy, 6 Ala. 770. ARK.—Sullivant v. State, 8 Ark.

to be the better practice to, allege that the act complained of was committed "against the will," or "without the consent," of the female.[3]

§ 1152. —— FEMALE UNDER AGE OF CONSENT. Where the offense charged is that of statutory rape as distinguished from common-law rape, that is, carnal knowledge of a female under the age of consent,[1] the indictment or information is not required to allege that the act complained of was committed with force, against her will and without her consent,[2] it being sufficient to follow the language of the statute, or substantially the language of the statute,[3] stating the age of the alleged in-

400; State v. Peyton, 93 Ark. 406, 137 Am. St. Rep. 93, 125 S. W. 416. KAN.—State v. Hoskinson, 78 Kan. 183, 96 Pac. 138. MASS.—Com. v. Fogerty, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264. MICH.—Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283. N. Y.—People v. Maxon, 57 Hun 367, 10 N. Y. Supp. 593. N. C.—State v. Jim, 12 N. C. (1 Dev. L.) 142. TEX.—Elschlep v. State, 11 Tex. App. 301; Nicholas v. State, 23 Tex. App. 317, 5 S. W. 239.

3 State v. Peyton, 93 Ark. 406, 137 Am. St. Rep. 93, 125 S. W. 416; Hubert v. State, 74 Neb. 220, 104 N. W. 276; State v. Marsh, 134 N. C. 184, 67 L. R. A. 179, 47 S. E. 6.

An indictment omitting allegation was held good when questioned for the first time on appeal, although it was charged to have been "unlawfully, willfully, feloniously, forcibly and with malice" etc., and the court held that such an allegation would support a judgment of conviction when no question was raised until after appeal.—Beard v. State, 79 Ark. 293, 9 Ann. Cas. 409, 95 S. W. 995, 97 S. W. 667.

1 As to allegations where female under age of consent, see, supra, §§ 1133, 1146, 1150.

2 CAL. — People v. Verdegreen, 106 Cal. 211, 46 Am. St. Rep. 234, 39 Pac. 607; People v. Raugod, 112 Cal. 669, 44 Pac. 1071. DAK.—Territory v. Keyes, 5 Dak. 244, 38 N. W. 440. FLA.—Holton v. State, 28 Fla. 303, 9 So. 716. ILL.—Porter v. People, 158 Ill. 370, 41 N. E. 886. KAN. — State v. Woods, 49 Kan. 237, 30 Pac. 520. KY.—Proctor v. Com., 14 Ky. L. Rep. 248, 20 S. W. 213. ME.—State v. Black, 63 Me. 210. MICH.—People v. McDonald, 9 Mich. 150; People v. Courier, 79 Mich. 366, 44 N. W. 571; People v. Ten Elshof, 92 Mich. 167, 52 N. W. 297. MO.—State v. Wray, 109 Mo. 594, 19 S. W. 86. NEB.—Davis v. State, 31 Neb. 247, 47 N. W. 854. N. J.—Farrell v. State, 54 N. J. L. 416, 24 Atl. 723. TEX.—Davis v. State, 42 Tex. 226; Moore v. State, 20 Tex. App. 278; Nicholas v. State, 23 Tex. App. 317, 5 S. W. 239.

3 See, supra, § 1133.

jured female;[4] and where the act is alleged to have been accomplished forcibly and against her consent,—and the like technical averments,—it may be disregarded as surplusage.[5]

§ 1153. —— FEMALE OTHERWISE INCAPABLE OF CONSENTING—BY REASON OF IMBECILITY OR INSANITY.[1] Females of an imbecile or disordered mind[2] are under the protection of the law the same as females under the age of consent. An indictment or information charging accused with carnal knowledge of a female incapable of consenting to or resisting the act by reason of an imbecile mind,[3] or by reason of mental disorder,[4] or charging an assault with intent to rape or an attempted rape upon such a female,[5] may properly charge an assault;[6] but it is not necessary

4 See authorities, footnote 2, this section, and: KAN.—State v. White, 44 Kan. 514, 25 Pac. 33. MO.—State v. Dalton, 106 Mo. 463, 17 S. W. 700; State v. Hall, 164 Mo. 528, 65 S. W. 248. R. I.—State v. Tourjee, 26 R. I. 234, 58 Atl. 767. UTAH—State v. Williamson, 22 Utah 248, 83 Am. St. Rep. 780, 62 Pac. 1022. VA.—Smith v. Com., 85 Va. 924, 9 S. E. 148. WASH.—State v. Phelps, 22 Wash. 181, 60 Pac. 134.

5 See authorities, footnotes 2 and 4, this section, and: CAL.—People v. Bailey, 142 Cal. 434, 76 Pac. 49. IOWA—State v. Scroggs, 123 Iowa 649, 96 N. W. 723. MO.—State v. McCullough, 171 Mo. 571, 71 S. W. 1002. MONT.—State v. Jones, 32 Mont. 442, 80 Pac. 1095. N. J.—State v. Cannon, 72 N. J. L. 46, 60 Atl. 177. ORE.—State v. Horne, 20 Ore. 485, 26 Pac. 665. VA.—Com. v. Bennet, 4 Va. (2 Va. Cas.) 235. WASH.—State v. Fetterly, 33 Wash. 599, 74 Pac. 801.

1 **As to forms of indictment** for rape of female of unsound mind, see Forms Nos. 1891-1894.

2 See 1 Kerr's Whart. on Crim. Law, § 703.

3 State v. Crouch, 130 Iowa 478, 107 N. W. 173.

4 State v. Tarr, 28 Iowa 392; Gore v. State, 119 Ga. 418, 100 Am. St. Rep. 182, 46 S. E. 671.

Question of incapacitating character of disorder an important one on the trial; and it appears it must be alleged and proved that accused knew of her condition and incapacity. See 1 Kerr's Whart. Crim. Law, § 703; also, State v. Cunningham, 100 Mo. 382, 12 S. W. 376.

Sexual intercourse with demented woman who does not resist, and who apparently assents thereto, accused not having knowledge of her incapacity by reason of mental infirmity, said not to be rape in People v. Craswell, 13 Mich. 427, 87 Am. Dec. 774.

5 State v. Austin, 109 Iowa 118, 80 N. W. 303.

6 State v. Enright, 90 Iowa 520, 58 N. W. 901; State v. Crouch, 130

to allege that the act complained of was consummated by force and violence and without the consent of such female; and where such allegations are needlessly incorporated, they may be disregarded as surplusage.[7] In the case of mental derangement, however, the indictment or information should allege that the accused, knowing the female to be insane, took advantage of that fact to carnally know her, and that her mental powers were so far impaired that she was unconscious of the nature of the act, and was not a willing participator therein.[8]

§ 1154. ———— BY REASON OF BEING DRUGGED,[1] DRUNKEN OR OTHERWISE UNCONSCIOUS. A female temporarily unconscious and physically incapacitated, and incapable of consenting to or resisting the act of carnal intercourse with her, is within the protection of the law the same as a female incapacitated and incapable of consenting to or resisting such an act by reason of imbecility of mind or insanity, as pointed out in the last section. Where the statute under which the prosecution is had provides that any one who administers to another "any chloroform, ether, laudanum, or other narcotic, anæsthetic, or intoxicating agent, with intent," etc.,[2] an indictment or information alleging that accused wilfully and feloniously had intercourse with a female against her will or consent, while she was insensible or incapable of exercising her will, a drug having been administered to her, is not duplicitous;[3] and where it joins in the conjunctive form all the methods by which the female may be rendered incapa-

Iowa 478, 107 N. W. 173; Caruth v. State, (Tex.) 25 S. W. 778.

7 Id.; State v. Hann, 73 Minn. 140, 76 N. W. 33.

8 People v. Craswell, 13 Mich. 427, 87 Am. Dec. 774.

1 As to form of indictment for rape by use of drugs, see Form No. 1888.

2 As Kerr's Cyc. Cal. Pen. Code, § 222.

Attempt to administer cantharides to a woman for the purpose of having sexual intercourse with her, held not to be an attempt to commit rape in State v. Lung, 21 Nev. 209, 37 Am. St. Rep. 505, 28 Pac. 235.

3 Com. v. Lowe, 116 Ky. 335, 76 S. W. 119.

ble, which are enumerated in the statute in the disjunctive, the indictment or information will not be demurrable for uncertainty.[4] It need not be alleged that accused had knowledge that the female was incapable of giving consent by reason of the administration of a drug,[5] or set out the particular kind of drug used.[6] The same rule of law applies where the female is so paralyzed from the use of intoxicating liquors[7] as to be incapable of consenting to or of resisting the act, or is likewise incapacitated by reason of profound slumber.[8]

§ 1155. ——FRAUD[1] AND IMPOSITION,[2] THREATS[3] AND FEAR. In those cases in which opposition and resistance on the part of the female are overcome and passive acquiescence in, if not consent to, the sexual intercourse is secured through fraud,[4]—as the pretense of being the husband of

4 People v. O'Brien, 130 Cal. 1, 62 Pac. 297.

5 Com. v. Lowe, 116 Ky. 335, 76 S. W. 119.

6 People v. O'Brien, 130 Cal. 1, 62 Pac. 297.

7 Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531.

8 R. v. Young, 14 Cox C. C. 114, 38 L. T. N. S. 540. See R. v. Swenie, 8 Cox C. C. 223; R. v. Mayers, 12 Cox C. C. 311.

1 As to form of indictment for rape by fraud, see Form No. 1882.

2 As to form of indictment for rape by impersonating husband, see Forms Nos. 1882-1887.

3 As to form of indictment for rape by threats and coercion, see Form No. 1889.

4 At common law consent gained by fraud deprived carnal knowledge of the character of rape, because rape could be committed by force only.—Lewis v. State, 30 Ala. 56, 68 Am. Dec. 113 (personating woman's husband); Wyatt v. State, 32 Tenn. (2 Swan) 364; R. v. Jackson, 1 Rus. & Ry. C. C. 486; R. v. Clarke, 6 Cox C. C. 412, 29 Eng. L. & Eq. 542.

Prevailing rule in this country is that consent gained by fraud is equivalent to no consent, and does not deprive the act of carnal knowledge of the character of rape. Of the adverse doctrine Mr. Justice Cooley, in the Michigan case cited below, says: "The outrage upon the woman, and the injury to society, are just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any the less against the will of the woman, when her consent is obtained by fraud, than when it is extorted by threats and force."—State v. Shepard, 7 Conn. 54; Pomeroy v. State, 94 Ind. 96, 48 Am. Rep. 146; Craswell v. People, 13 Mich. 427, 87 Am. Dec. 774; People v. Metcalf, 1 Whart. Cr. Cas. 378.

the woman,[5] or pretense of the necessity for and the performance of a surgical operation,[6] by threats, and the like,—the carnal knowledge of the woman under such circumstances is rape, and an indictment or information charging carnal knowledge through either of these means sufficiently charges the crime of rape. But in those cases in which the fraud charged is the impersonation of the husband of the female, it must be alleged that the female was a married woman and not the wife of the accused, and that the stratagem[7] deceived and imposed upon her. Threats and coercion being charged as the means by which acquiescence and non-resistance, if not consent, was obtained, the indictment or information need not set out of what the threats consisted,[8] it being sufficient to allege that through fear of immediate great bodily harm the female's resistance was overcome.[9]

§ 1156. Resistance of female. An indictment or information charging rape of an adult mentally-sound woman must set out that she resisted the attack of the accused and that her resistance was overcome by violence, or by threats of great bodily harm accompanied by apparent power to execute them,[1] although it has been said that the charge that accused "ravished" the prosecutrix is equivalent to a statement of resistance over-

5 See 1 Kerr's Whart. Crim. Law, § 704.

Authorities not harmonious as to whether this kind of fraud in securing carnal knowledge constitutes rape, but the better opinion and the weight of authority are thought to be to the effect that it does. See 1 Kerr's Whart. Crim. Law, § 704 and notes.

6 Pomeroy v. State, 94 Ind. 96, 48 Am. Rep. 146; R. v. Flattery, L. R. 2 Q. B. Div. 410, 3 Am. Cr. Rep. 454.

Contra: Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283.

7 Payne v. State, 38 Tex. Cr. 494, 70 Am. St. Rep. 757, 43 S. W. 515.

8 Strang v. People, 24 Mich. 1; Cornelius v. State, 13 Tex. App. 349; Cooper v. State, 22 Tex. App. 419, 3 S. W. 334.

9 People v. Pacheco, 70 Cal. 473, 11 Pac. 761; Harmon v. Territory, 5 Okla. 368, 49 Pac. 55; State v. Delvecchio, 25 Utah 18, 69 Pac. 58.

1 People v. Pacheco, 70 Cal. 473, 11 Pac. 761; People v. Gailles, 143 Cal. 301, 79 Pac. 965.

come by violence.[2] In the case of carnal intercourse with a female under the age of consent charged, resistance need not be alleged;[3] and the same is true in the case of a female imbecile or one completely mentally deranged,[4] drugged or intoxicated to insensibility,[5] or where the act complained of was accomplished by fraud or imposition;[6] further, it is not necessary to allege that the resistance was overcome by such fraud and imposition.

§ 1157. ATTEMPT TO COMMIT RAPE—SUFFICIENCY OF INDICTMENT. On a charge that accused attempted to commit a rape, the indictment or information need state only facts sufficient to show that an attempt was made to carnally and unlawfully know the designated female, the word "rape" need not be used;[1] but an overt act toward the commission of the offense charged must be averred,[2] and all the necessary facts of the case and elements of the offense must be set out.[3] An intent to feloniously have sexual intercourse by committing a rape must be alleged.[4] Where an attempt to commit rape by threats alone is charged, there need be no averment that the threats were directed against the female upon whom the attempt was made.[5]

2 State v. Delvecchio, 25 Utah 18, 69 Pac. 58.

3 See, supra, §§ 1146, 1152.

4 See, supra, § 1153.

5 See, supra, § 1154.

6 See, supra, § 1155.

1 State v. Hart, 33 Kan. 218, 5 Am. Cr. Rep. 66, 6 Pac. 288.

2 Hogan v. State, 50 Fla. 86, 7 Ann. Cas. 139, 39 So. 464; Williams v. State, 10 Okla. Cr. 336, 136 Pac. 599; Bond v. State, (Okla. Cr.) 152 Pac. 809.

An overt act is sufficiently charged by alleging that the defendant attempted to carnally know a female child of thirteen by procuring her to get in bed with him and soliciting her to have intercourse with him.—State v. Pierpont, 38 Nev. 173, 147 Pac. 214.

3 State v. Frazier, 53 Kan. 87, 42 Am. St. Rep. 274, 36 Pac. 58; Bond v. State, (Okla. Cr.) 152 Pac. 809.

4 Williams v. State, 10 Okla. Cr. 336, 136 Pac. 599; Bond v. State, (Okla. Cr.) 152 Pac. 809.

5 Reagan v. State, 28 Tex. App. 227, 19 Am. St. Rep. 833, 12 S. W. 601.

§ 1158. —— FEMALE UNDER AGE OF CONSENT. In those cases in which the accused is charged with an attempt to commit a rape upon a female under the age of consent, the indictment or information need not allege that the assault was made upon the female with the intent to carnally know her forcibly and against her will,[1] because in such a case force is not an element of the offense.

§ 1159. ASSAULT WITH INTENT TO RAPE[1]—IN GENERAL. An indictment or information charging assault with intent to commit rape must (1) charge an assault,[2] (2) set out the name of the female assaulted,[3] (3) allege that such female was not the wife of the accused,[4] (4) allege the acts constituting the assault followed by an averment of an intent to rape,[5] (5) that the act was done unlawfully and feloniously,[6] and (6) charge the use of force

1 Gibbs v. People, 36 Colo. 452, 85 Pac. 425.

In Kansas, by statute, the information must allege the specific acts done toward the commission of the offense, so that the court may be informed and therefrom declare whether the law has been violated, and that the defendant may be advised of the nature and character of the acts relied upon. —State v. Russell, 64 Kan. 798, 68 Pac. 615.

1 As to form of indictments charging assault with intent to rape, see Forms Nos. 1906-1917.

2 ALA.—Bradford v. State, 54 Ala. 233. CAL.—People v. Estrada, 53 Cal. 600; People v. Girr, 53 Cal. 629. IND.—Greer v. State, 50 Ind. 267, 19 Am. Rep. 709, 1 Am. Cr. Rep. 643. MICH.—People v. McDonald, 9 Mich. 150. MO.—State v. Little, 76 Mo. 52. TENN.—Elijah v. State, 26 Tenn. (7 Humph.) 455. TEX.—Robertson v. State, 31 Tex. 36; Blackburn v. State, 39 Tex. 153; Greenlee v. State, 4 Tex. App. 345; Battle v. State, 4 Tex. App. 595, 30 Am. Rep. 169.

3 Nugent v. State, 19 Ala. 540; Bradford v. State, 54 Ala. 233; Com. v. Kennedy, 131 Mass. 584.

4 Young v. Territory, 8 Okla. 525, 58 Pac. 724.

5 State v. Holman, 90 Kan. 105, 132 Pac. 1175.

As to intent, see, infra, § 1160.

6 Greer v. State, 50 Ind. 267, 19 Am. Rep. 709, 1 Am. Cr. Rep. 643.

Information charging defendant with force and arms, unlawfully did make an assault upon the prosecutrix with intent her the said prosecutrix, then violently and against her will feloniously to ravish and carnally know, is sufficient.—State v. Langford, 45 La. Ann. 1147, 40 Am. St. Rep. 277, 14 So. 181.

to the person of the female,[7] except in those cases in which the female is below the age of consent,[8] in which case the element of force is not essential.[9] An indictment or information in the language of the statute under which the prosecution is brought,[10] or substantially in the language of that statute,[11] is sufficient.[12] It is not necessary to allege that the accused is a male person,[13] or that he had the present ability to consummate the alleged intended act.[14] The means used,[15] or the particular facts constituting the assault,[16] need not be set out. In the case of such an offense, what has heretofore been said regarding the appropriate technical terms in which to describe the offense,[17] do not apply; any words which, in their legal import, sufficiently describe and identify the offense sought to be charged will be sufficient.[18] The place of the offense,[19] and the time of the offense charged,[20] must be set out as heretofore indicated.

Unnecessary allegations in an indictment or information charging this offense, which allegations are calculated to prejudice the jury, will not render the instrument bad.[21]

7 See, infra, § 1161.

8 Witherby v. State, 39 Ala. 702; see R. v. Catherall, 13 Cox C. C. 109, 13 Moak's Eng. Repr. 455.

9 See, supra, § 1146.

10 See, supra, § 1132, footnote 1.

11 Id., footnote 2.

12 McGuff v. State, 88 Ala. 147, 16 Am. St. Rep. 25, 7 So. 35; Ross v. State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

See, supra, § 1132, footnote 3.

13 Taylor v. State, 50 Tex. Cr. 362, 123 Am. St. Rep. 844, 97 S. W. 477.

See, supra, § 1134.

14 State v. Dunlap, 25 Wash. 292, 65 Pac. 544.

15 State v. Hanlon, 62 Vt. 334, 19 Atl. 773.

16 Bradford v. State, 54 Ala. 233; State v. Neal, 178 Mo. 63, 76 S. W. 958; State v. Payne, 194 Mo. 442, 92 S. W. 461.

17 See, supra, § 1149.

18 ALA.—Witherby v. State, 39 Ala. 702. CAL.—People v. Brown, 47 Cal. 447. MICH.—People v. McDonald, 9 Mich. 150. MO.—State v. Meinhart, 73 Mo. 568. VA.—Christian v. Com., 64 Va. (23 Gratt.) 954.

19 See, supra, § 1135.

20 See, supra, § 1136

21 State v. Benson, 46 Utah 74; 148 Pac. 445.

§ 1160. —— INTENT. As in the case of other crimes the intent with which the alleged assault to rape was made must be adequately stated in the indictment or information,[1] and must be distinctly charged.[2] The charge of intent may be made in the language of the statute,[3] but the indictment or information need not follow strictly the words of the statute.[4] The usual, and sufficient, form of allegation is to charge that the accused made the alleged assault "with intent feloniously," etc.[5] The means intended to be used to accomplish the intent need not be set out.[6]

§ 1161. —— FORCE—SUFFICIENCY OF ALLEGATION. As in rape proper, so in assault with intent to commit rape, force[1] is the essential ingredient, which must be distinctly alleged; but it is usually sufficient to charge the accused with physical force upon the person of the female,[2] it not being necessary to aver that the force

1 **Charging feloniously assaulting** a female, by throwing her on her back, and attempting to have sexual intercourse with her, with intent to outrage her person, does not charge an assault with intent to commit rape; it merely charges a simple assault. — People v. O'Neil, 48 Cal. 257.

2 IND.—Dooley v. State, 28 Ind. 239. LA.—State v. Cutrer, 140 La. 34, 72 So. 800. N. C.—State v. Martin, 14 N. C. (3 Dev. L.) 329; State v. Tom, 47 N. C. (2 Jones L.) 414; State v. Moore, 82 N. C. 659; State v. Russell, 91 N. C. 624; State v. Goldston, 103 N. C. 323, 9 S. E. 580; State v. Powell, 106 N. C. 635, 11 S. E. 191.

3 Dooley v. State, 28 Ind. 239.

4 People v. Girr, 53 Cal. 629.

5 IND.—Dooley v. State, 28 Ind. 239; McGuire v. State, 50 Ind. 284. NEV.—State v. Lung, 21 Nev. 209, 28 Pac. 235. N. C.—State v. Goldston, 103 N. C. 323, 9 S. E. 580; State v. Powell, 106 N. C. 635, 11 S. E. 191.

6 Territory v. Keyes, 5 Dak. 244, 38 N. W. 440.

1 See, supra, § 1147.

2 State v. Wells, 31 Conn. 210; State v. Daly, 16 Ore. 240, 18 Pac. 357.

Actual violence need not be charged.—State v. Wells, 31 Conn. 210.

Felonious assault and attempt to rape charged necessarily implies that the act complained of was done forcibly and against the will of the female. — Jackson v. State, 114 Ga. 861, 40 S. E. 989.

"Feloniously," "forcibly" or "violently" not essential, if the indictment or information otherwise charges physical force used against the female. — State v.

and violence were against her resistance.[3] Where the charge is that of an assault with intent to commit rape upon a female under the age of consent, it is not necessary to allege that the accused used force upon her person,[4] force not being an element entering into the offense when the female is under the age of consent.[5]

§ 1162. —— WANT OF CONSENT. As in rape, in assault with intent to rape, want of consent[1] is a necessary element, and an indictment or information charging assault with intent to rape which fails to allege that the intent was to consummate the act against the will and without the consent of the female assaulted, will be insufficient.[2]

§ 1163. —— DESCRIPTION OF THE OFFENSE. An indictment or information charging an assault with intent to commit rape must allege such facts as will enable the court to see that if the acts alleged are established the crime charged will have been committed;[1] and to do this must clearly show (1) an overt act done, (2) the use of force,[2] (3) the failure of the overt act, and (4) allege

Langford, 45 La. Ann. 1177, 40 Am. St. Rep. 277, 14 So. 181; State v. Little, 67 Mo. 624.

"Forcibly" not essential in an indictment or information otherwise correctly and sufficiently charging an assault with intent to rape.—State v. Peak, 130 N. C. 711, 41 S. E. 887.

"Ill-treat," without charging battery, is insufficient. — Wilson v. State, 103 Tenn. 87, 52 S. W. 869.

3 People v. Brown, 47 Cal. 447; State v. Wray, 109 Mo. 594, 19 S. W. 860; Hardwick v. State, 74 Tenn. (6 Lea) 103.

4 Gibbs v. People, 36 Colo. 452; 85 Pac. 425; Porter v. People, 158 Ill. 370, 41 N. E. 886.

5 See, supra, § 1146.

1 See, supra, § 1151.

2 State v. Powell, 106 N. C. 635, 11 S. E. 191; Langan v. State, 27 Tex. App. 498, 11 S. W. 521.

1 See State v. Russell, 64 Kan. 798, 68 Pac. 615.

Charging entering the room of a sleeping girl, taking hold of her hand, drawing a pistol to induce her to submit to his desire for carnal intercourse, desisting from the attempt to induce her to have sexual intercourse with him, and again touching her person thereafter, held not to charge an assault with intent to rape.—Douglas v. State, 105 Ark. 218, 150 S. W. 860.

2 See, supra, § 1161.

felonious intent, when the female is over the age of consent.[3] The manner and details of the assault need not be set out, according to some of the cases;[4] while other cases hold that the specific acts done toward the consummation of the offense must be alleged in order that the court may know, as a matter of law, whether, if the alleged acts are established, the crime charged has been committed.[5] It is not necessary to use the words "with intent" if the indictment or information sets out facts and alleges a felonious assault, and feloniously attempting to ravish forcibly and against her will a named female;[6] and setting out facts and acts which constitute an assault upon a named female, with intent to rape, is sufficient without charging that the acts complained of did in fact constitute an assault.[7] Charging accused seized and assaulted a named female, with intent to have sexual intercourse with her, has been said to charge an assault to commit rape, because the offense was committed the moment the assault was made;[8] and charging accused with forcibly and unlawfully committing an act upon a named female under the age of consent, and attempting then and there to unlawfully and carnally know her, has been held sufficiently to charge an assault with intent to rape.[9]

3 Williams v. State, 10 Okla. Cr. 336, 136 Pac. 599.

4 State v. Neal, 178 Mo. 63, 76 S. W. 958; State v. Payne, 194 Mo. 442, 92 S. W. 461.

5 State v. Russell, 64 Kan. 798, 68 Pac. 615.

6 State v. Hewett, 158 N. C. 627, 74 S. E. 356.

"Attempt" in Texas statute is equivalent to the word intent.—Fowler v. State, 66 Tex. Cr. Rep. 500, 148 S. W. 576.

7 State v. Holman, 90 Kan. 105, 132 Pac. 1175.

Charging accused made an assault upon a named woman with intent by force, without her consent, to commit rape upon her by attempting to ravish her, charges assault with intent to commit rape; the unnecessary allegation of an attempt does not make the charge one of attempting to commit rape.—Shockley v. State, 71 Tex. Cr. Rep. 475, 160 S. W. 452.

8 Ross v. State, (Tex.) 132 S. W. 793.

9 Turner v. State, 66 Fla. 404, 63 So. 708.

§ 1164. JOINDER OF PARTIES—SEPARATE TRIALS. We have already seen that persons aiding and abetting in the commission of a rape may be charged with the offense as principals in the second degree,[1] and under some statutes all are principals in the first degree.[2] But where jointly indicted the accused will be entitled to separate trials, where they can show grounds for a severance.[3]

§ 1165. JOINDER OF COUNTS. The various phases of the crime of rape may be joined in the same indictment, in different counts, and the prosecutor will not be required to elect upon which count he will rely for a conviction,[1]—e. g., rape and assault with intent to commit rape;[2] assault with intent to commit rape and attempt

1 See, supra, § 1139.

2 ARK.—Dennis v. State, 5 Ark. 230. ARIZ.—Trimble v. Territory, 8 Ariz. 281, 71 Pac. 934. IOWA—State v. Comstock, 46 Iowa 265. KAN.—State v. Boyland, 24 Kan. 186. KY.—Kessler v. Com., 75 Ky. (12 Bush) 18. MASS. — Com. v. Dean, 109 Mass. 349; Com. v. McCarty, 165 Mass. 37, 42 N. E. 336. MICH.—Strang v. People, 24 Mich. 1; People v. Chapman, 62 Mich. 280, 4 Am. St. Rep. 857, 28 N. W. 896; People v. Flynn, 96 Mich. 276, 55 N. W. 834. N. Y.—People v. Batterson, 50 Hun 44, 6 N. Y. Cr. Rep. 173, 2 N. Y. Supp. 376. N. C.—State v. Jordan, 110 N. C. 491, 14 S. E. 752. OHIO—Howard v. State, 11 Ohio St. 238. ENG.—R. v. Hapgood, L. R. 1 C. C. 220; R. v. Crisham, 1 Car. & M. 187, 41 Eng. C. L. 106.

3 Dennis v. State, 5 Ark. 230.

1 ALA.—Beason v. State, 72 Ala. 191; Grimes v. State, 105 Ala. 86, 17 So. 184. IND.—Mills v. State, 52 Ind. 187. MD.—State v. Sutton, 4 Gill (Md.) 494. MASS.—Com. v. Drum, 36 Mass. (19 Pick.) 479; Com. v. McLaughlin, 66 Mass. (12 Cush.) 612; Com. v. Dean, 109 Mass. 349. MISS.—Bonner v. State, 65 Miss. 293, 3 So. 663. MO.—State v. Porter, 26 Mo. 206; State v. Houx, 109 Mo. 654, 32 Am. St. Rep. 686, 19 S. W. 35. N. Y.—People v. Rynders, 12 Wend. 425; People v. Satterlee, 5 Hun 167, 2 Cow. Cr. Rep. 438. TENN.—Wright v. State, 23 Tenn. (4 Humph.) 194. TEX.—Thompson v. State, 33 Tex. Cr. Rep. 472, 26 S. W. 987. WIS.—Porath v. State, 90 Wis. 527, 48 Am. St. Rep. 954, 63 N. W. 1061; Jackson v. State, 91 Wis. 253, 64 N. W. 838.

2 CAL.—People v. Tyler, 35 Cal. 553. ILL.—Prindeville v. People, 42 Ill. 217. IND.—Mills v. State, 52 Ind. 187; Polson v. State, 137 Ind. 519, 35 N. E. 907. MD. — State v. Sutton, 4 Gill 494; Burk v. State, 2 Har. & G. 426; Stevens v. State, 66 Md. 202, 7 Atl. 254. MASS.—Com. v. Thompson, 116 Mass. 346. N. J.—Cook v. State, 24 N. J. L. (4 Zab.) 843;

to commit rape;[3] non-consent and mental incapacity of female to consent;[4] a count charging carnally knowing a female under the age of consent and a count charging carnal knowledge of the same female by force, against her will and without her consent.[5]

State v. Johnson, 30 N. J. L. (1 Vr.) 185; Farrell v. State, 54 N. J. L. 416, 24 Atl. 723. N. Y.—People v. Satterlee, 5 Hun 167, 2 Cow. Cr. Rep. 438; People v. Draper, 28 Hun 1, 1 N. Y. Cr. Rep. 138.

3 Reagan v. State, 28 Tex. App. 227, 12 S. W. 601.

4 Thompson v. State, 33 Tex. Cr. Rep. 472, 26 S. W. 987.

5 Beason v. State, 72 Ala. 191; Grimes v. State, 105 Ala. 86, 17 So. 184; State v. Houx, 109 Mo. 654, 32 Am. St. Rep. 686, 19 S. W. 35; State v. Dalton, 106 Mo. 463, 17 S. W. 700; Wright v. State, 23 Tenn. (4 Humph.) 194.

CHAPTER LXXIII.

INDICTMENT—SPECIFIC CRIMES.

Receiving Stolen Goods.

§ 1166. Form and sufficiency of indictment—Language of statute.
§ 1167. Name of accused.
§ 1168. Name of thief.
§ 1169. Name of owner.
§ 1170. Description of the property stolen and received.
§ 1171. Time and place of larceny.
§ 1172. Facts of original taking.
§ 1173. Prior conviction of thief.
§ 1174. Receipt of the stolen property—Time and place.
§ 1175. Name of person from whom property received.
§ 1176. Guilty knowledge.
§ 1177. Wrongful intent.
§ 1178. Quantity of goods taken and received.
§ 1179. Value of goods taken and received.
§ 1180. Joinder of defendants.
§ 1181. Joinder of counts.

§ 1166. FORM AND SUFFICIENCY OF INDICTMENT[1]—LANGUAGE OF STATUTE. An indictment or information charging the offense of receiving stolen goods must set out the essential elements of that offense by charging that the accused (1) did receive certain property, (2) that it was stolen property, (3) that he had a felonious intent in so receiving the property, and (4) that he had knowledge that the property had been stolen.[2] Where the prosecu-

1 As to forms of indictment for receiving stolen property, see Forms Nos. 1552-1567.

2 ALA.—State v. Murphy, 6 Ala. 845; Huggins v. State, 41 Ala. 393; Sellers v. State, 49 Ala. 357. ARK.—Atchison v. State, 90 Ark. 457, 119 S. W. 651. CAL.—People v. Montejo, 18 Cal. 38. GA.—Edwards v. State, 80 Ga. 127, 4 S. E. 268. ILL.—Jupitz v. People, 34 Ill. 516; Williams v. People, 101

tion is for the statutory and not the common-law offense, an indictment or information following the language of the statute is sufficient.[3]

Conclusion, where prosecution for the statutory offense, should be "against the form of the statute," etc.[4]

§ 1167. Name of accused. It being essential to the crime of receiving stolen property that there shall be some one who shall receive the same with wrongful intent,[1] an indictment or information charging the crime of receiving stolen goods or other property must properly describe and individualize the accused, and this is usually done by giving his name; where there is more than one count in the indictment or information, the name of the accused must be properly set out in each count,[2] but it is not required to be set out more than once in the same count.[3]

Ill. 382. IND.—Holford v. State, 2 Blackf. (Ind.) 103; Keefer v. State, 4 Ind. 246; Kaufman v. State, 49 Ind. 248. IOWA—State v. Lane, 68 Iowa 384, 27 N. W. 266. KAN.—State v. McLaughlin, 35 Kan. 650, 12 Pac. 32. LA.—State v. Moultrie, 34 La. Ann. 489; State v. Hartleb, 35 La. Ann. 1180. MASS.—Dyer v. Com., 40 Mass. (23 Pick.) 402; O'Connell v. Com., 48 Mass. (7 Metc.) 460; Com. v. Lakeman, 71 Mass. (5 Gray) 82. N. Y.—People v. Stein, 1 Park Cr. Rep. 202; Cohen v. People, 5 Park. Cr. Rep. 330. N. C. — State v. Phelps, 65 N. C. 450. OHIO—Holtz v. State, 30 Ohio St. 486. S. C.—State v. Counsil, 1 Harp. L. 53. TENN.—Swaggerty v. State, 17 Tenn. (9 Yerg.) 338. TEX.—Parchman v. State, 2 Tex. App. 228, 28 Am. Rep. 345; Nourse v. State, 2 Tex. App. 304; Brothers v. State, 22 Tex. App. 447, 3 S. W. 737; Arrington v. State, 62 Tex. Cr. Rep. 357, 137 S. W. 669. VT.—State v. S. L., 2 Tyl. 249. VA.—Price v. Com., 62 Va. (21 Gratt.) 846. FED.—United States v. Montgomery, 3 Sawy. 544, Fed. Cas. No. 15800. ENG.—R. v. Craddock, 2 Den. C. C. 31; R. v. Baxter, 2 East P. C. 781, 2 Leach C. C. 578; R. v. Wilson, 2 Moo. 52; R. v. Goldsmith, L. R. 2 C. C. 74, 12 Cox C. C. 479; R. v. Goldsmith, L. R. 2 C. C. 225.

3 Sellers v. State, 49 Ala. 357; People v. Tilley, 135 Cal. 61, 67 Pac. 42; Licette v. State, 75 Ga. 253; State v. Koskey, 191 Mo. 1, 90 S. W. 454.

4 State v. Minton, 61 N. C. (1 Phill. L.) 169.

1 As to wrongful intent, see, infra, § 1177.

2 State v. Phelps, 65 N. C. 450.

3 State v. Coppenburg, 2 Strobh. L. (S. C.) 273.

§ 1168. NAME OF THIEF. Where the crime of receiving stolen goods or property is prosecuted as a substantive and not as an accessorial crime, the name of the thief is not either descriptive or identifying, and for that reason need not be set out in the indictment or information,[1] although there are cases to the contrary;[2] nor need it be alleged that he is unknown,[3] although there are some cases holding otherwise.[4] It is largely a matter of statutory provision, doubtless. However, the name of the

1 ALA.—State v. Murphy, 6 Ala. 845. CAL.—People v. Ribolsi, 89 Cal. 492, 26 Pac. 1082; People v. Clausen, 120 Cal. 381, 52 Pac. 658. FLA.—Anderson v. State, 38 Fla. 3, 20 So. 765. ILL.—People v. Israel, 269 Ill. 284, 109 N. E. 969. IND.—Semon v. State, 158 Ind. 55, 62 N. E. 625; Beuchert v. State, 165 Ind. 523, 6 Ann. Cas. 914, 76 N. E. 111. IOWA—State v. Feuerhaken, 96 Iowa 299, 65 N. W. 299. KY.—Allison v. Com., 83 Ky. 254; Newton v. Com., 158 Ky. 4, 164 S. W. 108. LA.—State v. Laqué, 37 La. Ann. 853. MASS.—Com. v. Slate, 77 Mass. (11 Gray) 60; Com. v. Hogan, 121 Mass. 373. MISS.—Campbell v. State, 17 So. 441. MO.—State v. Smith, 37 Mo. 58; State v. Guild, 149 Mo. 370, 73 Am. St. Rep. 395, 50 S. W. 909. MONT.—State v. Moxley, 41 Mont. 402, 110 Pac. 83. NEB.—Ream v. State, 52 Neb. 727, 73 N. W. 227. N. Y.—People v. Caswell, 21 Wend. 86; People v. Nussbaum, 87 Misc. 269, 150 N. Y. S. 605. OHIO—Schriedley v. State, 23 Ohio St. 130. OR.—State v. Hanna, 35 Ore. 195, 57 Pac. 629. R. I.—State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96. S. D.—State v. Pirkey, 22 S. D. 550, 18 Ann. Cas. 192, 118 N. W. 1042. TENN.—Swaggerty v. State, 17 Tenn. (9 Yerg.) 338. FED.—Kirby v. United States, 174 U. S. 47, 43 L. Ed. 890, 11 Am. Cr. Rep. 330, 19 Sup. Ct. Rep. 574. ENG.—R. v. Jervis, 6 Car. & P. 156, 25 Eng. C. L. 330; R. v. Thomas, 2 East P. C. 781; R. v. Baxter, 2 East P. C. 781, 2 Leach C. C. 578, 5 T. R. 83, 101 Eng. Rep. 48.

2 See, infra, § 1175.

3 COLO.—Curl v. People, 53 Colo. 578, Ann. Cas. 1914B, 171, 127 Pac. 951. ILL.—Huggins v. People, 135 Ill. 243, 25 Am. St. Rep. 357, 25 N. E. 1002. IND.—Beuchert v. State, 165 Ind. 523, 6 Ann. Cas. 914, 76 N. E. 111. MASS.—Com. v. Hogan, 121 Mass. 373. R. I.—State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96.

4 GA.—Licette v. State, 75 Ga. 253. N. C.—State v. Beatty, 61 N. C. 52. OKLA.—Hartgraves v. State, 5 Okla. Cr. 266, Ann. Cas. 1912D, 180, 33 L. R. A. (N. S.) 568, 114 Pac. 343. TEX.—State v. Perkins, 45 Tex. 10; Williams v. State, 69 Tex. Cr. Rep. 163, 153 S. W. 1136. WYO.—Curran v. State, 12 Wyo. 553, 76 Pac. 577.

Failure to allege the thief's name is not a fatal defect and may be remedied on amendment.—State v. Jenkins, 60 Wis. 599, 19 N. W. 406.

thief may be alleged where known, or may be alleged to be unknown;[5] in either instance the evidence must sustain the allegation, by the weight of authority,[6] although a different rule seems to prevail in some jurisdictions.[7]

§ 1169. NAME OF OWNER. As in the case of larceny,[1] so in the case of receiving stolen property, ownership of the stolen goods or property is essential and must be laid in some designated person[2] other than the accused, or in a person unknown,[3] and such ownership must be proved as laid.[4] The ownership being laid in a corporation, incorporation must be shown,[5] although there is authority

[5] Foster v. State, 106 Ind. 272, 6 N. E. 641.

[6] Com. v. King, 63 Mass. (9 Cush.) 284; Elsworthy's Case, 1 Lew. C. C. 117; R. v. Woolford, 1 Moo. & R. 384.

[7] COLO.—Sault v. People, 3 Colo. App. 502, 34 Pac. 263. GA.—Simmons v. State, 4 Ga. 465. S. C.—State v. Coppenburg, 2 Strobh. L. 273; State v. Teideman, 4 Strobh. L. 300. TEX.—State v. Perkins, 45 Tex. 10. ENG.—R. v. Messingham, 1 Moo. 257.

[1] See, supra, §§ 856 et seq.

[2] COLO.—Miller v. People, 13 Colo. 166, 21 Pac. 1025. ILL.—People v. Krittenbrink, 269 Ill. 244, 109 N. E. 1005; People v. Struble, 275 Ill. 162, 113 N. E. 938. ME.—State v. McAloon, 40 Me. 133. MASS.—Com. v. Finn, 108 Mass. 446; Com. v. McGuire, 108 Mass. 469. MO.—State v. Jacobs, 39 Mo. App. 122. MONT.—State v. Moxley, 41 Mont. 402, 110 Pac. 83. N. Y.—Cohen v. People, 5 Park. Cr. Rep. 330. ORE.—State v. Robinson, 74 Ore. 481, 145 Pac. 1057. PA.—Com. v. Bowers, 3 Brewst. 350. S. C.—State v. Williams, 2 Strobh. L. 229. FED.—Kasle v. United States, 147 C. C. A. 552, 233 Fed. 878.

Direct allegation not essential; where indictment otherwise sufficient, an allegation of ownership by implication is sufficient.—State v. McLaughlin, 35 Kan. 650, 12 Pac. 32.

Ownership sufficiently alleged where it was laid at the time the property was stolen without again laying it at the time the stolen goods were alleged to have been received.—Kirby v. United States, 174 U. S. 47, 43 L. Ed. 890, 11 Am. Cr. Rep. 330, 19 Sup. Ct. Rep. 574.

[3] See, supra, § 877.

[4] COLO.—Sault v. People, 3 Colo. App. 502, 34 Pac. 263. DEL.—State v. Wright, 2 Penn. 228, 45 Atl. 395. MASS.—Com. v. Billings, 167 Mass. 283, 45 N. E. 910. TENN.—Brooks v. State, 64 Tenn. (5 Baxt.) 607. TEX.—Bryan v. State, 54 Tex. Cr. Rep. 59, 111 S. W. 1035.

[5] Aldrich v. People, 225 Ill. 610, 80 N. E. 320; People v. Struble, 275 Ill. 162, 113 N. E. 938; State v. Suppe, 60 Kan. 566, 57 Pac. 106.

It must be shown whether the

to the contrary.[6] Ownership may be laid in a bailee or carrier,[7] such as a railroad,[8] or the lessee of the railroad.[9] In order to give a federal court jurisdiction, there must be an allegation that the property stolen was that of the United States.[10]

§ 1170. DESCRIPTION OF THE PROPERTY STOLEN AND RECEIVED. It is necessary that the indictment or information shall describe the articles stolen and received with sufficient certainty to apprise the accused of the exact charge he is expected to meet on the trial.[1] The goods or other property stolen and received must be described with the same definiteness that is required in an indictment for larceny.[2] A failure to describe the property accurately

company was a corporation, joint stock company, or partnership, or the indictment may be quashed.—State v. Suppe, 60 Kan. 566, 57 Pac. 106.

Where the property was alleged to have been in N., a corporation, no conviction can be had on proof that it belonged to N., an individual.—Aldrich v. People, 225 Ill. 610, 80 N. E. 320.

6 Kasle v. United States, 147 C. C. A. 552, 233 Fed. 878.

7 Kasle v. United States, 147 C. C. A. 552, 233 Fed. 878.

8 State v. Smith, 250 Mo. 350, 157 S. W. 319.

9 State v. Fox, 83 Conn. 286, 76 Atl. 302; State v. Suppe, 60 Kan. 566, 57 Pac. 106.

10 Naftzger v. United States, 118 C. C. A. 598, 200 Fed. 494.

1 Kasle v. United States, 147 C. C. A. 552, 233 Fed. 878.

Description as "1,200 cigars of the value of $42" is sufficient.—State v. Kosky, 191 Mo. 1, 90 S. W. 454.

A description of the stolen money as "one ten-dollar greenback bill, paper currency, lawful money of the United States" sufficiently identifies it and alleges its value.—Rowland v. State, 140 Ala. 142, 37 So. 245.

Where accused was charged with receiving stolen goods, in that after "a certain lot of brass, to wit, five thousand pounds" had been stolen, the accused received the same "to wit, certain lot of brass fittings, to wit, four hundred pounds of the value of three hundred dollars," the description of the articles stolen does not meet the requirements of the rule.—Brown v. State, 116 Ga. 559, 15 Am. Cr. Rep. 429, 42 S. E. 795.

2 ARK.—Atchison v. State, 90 Ark. 457, 119 S. W. 651. COLO.—Miller v. People, 13 Colo. 166, 21 Pac. 1025. FLA.—Gabriel v. State, 44 Fla. 57, 32 So. 779. GA.—Brown v. State, 116 Ga. 559, 42 S. E. 795. KAN.—State v. Suppe, 60 Kan. 566, 57 Pac. 106. KY.—Duncan v. Com., 165 Ky. 247, 176 S. W. 984; Stone v. Com., 24 Ky. L. Rep. 10, 67 S. W. 841. ME.—State v. Gerrish, 78 Me. 20, 6 Am. Cr. Rep.

will be fatal;[3] but any inaccuracies in the description may be prevented from rendering the indictment or information fatally defective by an allegation that a further or more particular description of such property is unknown to the grand jury or to the prosecutor.[4]

§ 1171. TIME AND PLACE OF LARCENY. An indictment or information charging receiving stolen goods or property, with wrongful intent,[1] is not required to allege either the time when or the place where the goods were stolen, or to prove it if alleged;[2] and where time and place are needlessly averred, a variance in the proof is not fatal.[3] But it may be necessary to allege the time of the receipt of stolen goods or property to show that the statute of limitations for the prosecution of the offense has not intervened.[4]

§ 1172. FACTS OF ORIGINAL TAKING. An indictment or information charging the crime of receiving stolen goods or property must allege that the goods or property had

397, 2 Atl. 129. MASS.—Com. v. Campbell, 103 Mass. 436. MISS.—Wells v. State, 90 Miss. 516, 43 So. 610. MO.—State v. Sakowski, 191 Mo. 635, 90 S. W. 435. MONT.—State v. Moxley, 41 Mont. 402, 110 Pac. 83. N. Y.—People v. Wiley, 3 Hill 194. N. C.—State v. Horan, 61 N. C. (1 Phill. L.) 571. ORE.—State v. Hanna, 35 Ore. 195, 57 Pac. 629. R. I.—State v. Nelson, 27 R. I. 31, 60 Atl. 589. ENG.—R. v. Cowell, 2 East P. C. 617; R. v. Robinson, 4 Fost. & F. 43.

3 Williams v. People, 101 Ill. 382; People v. Wiley, 3 Hill (N. Y.) 194.

4 Campbell v. State (Miss.), 17 So. 441.

1 As to wrongful intent in receipt of stolen property, see, infra, § 1177.

2 ALA.—State v. Murphy, 6 Ala. 845; Hester v. State, 103 Ala. 83, 15 So. 857. CAL.—People v. Avila, 43 Cal. 196. ILL.—People v. Israel, 269 Ill. 284, 109 N. E. 969. IND.—Holford v. State, 2 Blackf. 103; Kaufman v. State, 49 Ind. 248; Foster v. State, 106 Ind. 272, 6 N. E. 641. LA.—State v. Moultrie, 34 La. Ann. 489; State v. Laqué, 37 La. Ann. 853. MASS.—Com. v. Sullivan, 136 Mass. 170. MICH.—People v. Smith, 94 Mich. 644, 54 N. W. 487. S. C.—State v. Crawford, 39 S. C. 343, 17 S. E. 799. ENG.—R. v. Jervis, 6 Car. & P. 156, 25 Eng. C. L. 330.

3 Foster v. State, 106 Ind. 272, 6 N. E. 641.

4 As to necessity for alleging the time of receipt of stolen goods or property, see, infra, § 1174.

been stolen,[1] but all the facts of the original taking need not be alleged,[2] the general rule being that it is not necessary to set out all the elements of the larceny,[3] although a different rule prevails in some jurisdictions.[4] Thus, it is not necessary to allege that the stolen property was taken and carried away, although it is proper to so allege;[5] or that the goods retained the character of stolen property when received by the accused;[6] or that they were stolen from a person other than the accused.[7]

§ 1173. PRIOR CONVICTION OF THIEF. In those cases in which the offense of receiving stolen goods or property is a substantive and not an accessorial crime,[1] it is not necessary that the indictment or information shall allege that the thief who stole the property has been convicted of the

1 ALA.—Sellers v. State, 49 Ala. 357. ARK.—Atchison v. State, 90 Ark. 457, 119 S. W. 651. FLA.—Anderson v. State, 38 Fla. 3, 20 So. 765; Sweeting v. State, 67 Fla. 290, 64 So. 946. IND.—Semon v. State, 158 Ind. 55, 62 N. E. 625. LA.—State v. Allemand, 25 La. Ann. 525. VT.—State v. Bannister, 79 Vt. 524, 65 Atl. 586. WASH.—State v. Druxinman, 34 Wash. 257, 78 Pac. 814.

2 Id. McGill v. State, 6 Okla. Cr. 512, 120 Pac. 297; Zweig v. State (Tex. Cr.) 171 S. W. 747; State v. Ketterman, 89 Wash. 264, 154 Pac. 182.

3 People v. Caulkins, 67 Mich. 488, 35 N. W. 90; Swaggerty v. State, 17 Tenn. (9 Yerg.) 338; Brothers v. State, 22 Tex. App. 447, 3 S. W. 737.

4 State v. Smith, 250 Mo. 350, 157 S. W. 319.

5 State v. Moultrie, 34 La. Ann. 489; Com. v. Lakeman, 71 Mass. (5 Gray) 82.

6 Semon v. State, 158 Ind. 55, 62 N. E. 625.

7 State v. McLaughlin, 35 Kan. 650, 12 Pac. 32.

1 Crime substantive offense in most, if not all, the states. See: ALA.—Sellers v. State, 49 Ala. 357. CONN.—State v. Weston, 9 Conn. 527, 25 Am. Dec. 46; State v. Ward, 49 Conn. 429; State v. Kalpan, 72 Conn. 635, 45 Atl. 1018. FLA.—Anderson v. State, 38 Fla. 3, 20 So. 765. GA.—Bieber v. State, 45 Ga. 569; Wright v. State, 1 Ga. App. 158, 57 S. E. 1050. ILL.—Watts v. People, 204 Ill. 233, 68 N. E. 563. IND.—Reilley v. State, 14 Ind. 217; Kaufman v. State, 49 Ind. 248. KY.—Allison v. Com., 83 Ky. 254. MD.—Kearney v. State, 48 Md. 16. MASS.—Com. v. Barry, 116 Mass. 1. NEB.—Engster v. State, 11 Neb. 539, 10 N. W. 453. N. J.—State v. Calvin, 22 N. J. L. (2 Zab.) 207. OHIO—Hall v. State, 3 Ohio St. 575. TENN.—Swaggerty v. State, 17 Tenn. (9 Yerg.) 338. TEX.—Street v. State, 39 Tex. Cr. Rep. 134, 45 S. W. 577.

theft;[2] where the offense is merely accessorial, however, the rule is different.[3]

§ 1174. RECEIPT OF THE STOLEN PROPERTY—TIME AND PLACE. The fact that the accused received, secreted or concealed, or aided in secreting or concealing, the stolen property must be directly averred in the indictment or information; this fact may be alleged in the language of the statute,[1] and where the charge is that of aiding in concealing the property, it seems that the language of the statute under which the prosecution is had must be used.[2] The allegation as to receipt of the property will be sufficient where it is set out that the accused "did buy and receive,"[3] or "did buy, receive, and aid in concealing,"[4] or simply "did receive." Consideration paid by accused for the property, if any, need not be alleged.[5]

Time and place of receiving the property are required to be alleged; the time, to show that the period within which prosecution may be instituted and carried on has not elapsed;[6] and the receipt of the stolen goods must be charged to have been in the county where the indictment was found or information presented and the prosecution is had,[7] although the property may have been stolen in another county or another state and brought within the county.[8]

2 Swaggerty v. State, 17 Tenn. (9 Yerg.) 338.

3 Swaggerty v. State, 17 Tenn. (9 Yerg.) 338; State v. S. L., 2 Tyl. (Vt.) 249.

1 See, supra, § 1166.

2 State v. Murphy, 6 Ala. 845; Holtz v. State, 30 Ohio St. 486.

3 People v. Montejo, 18 Cal. 38.

4 Bradley v. State, 20 Fla. 738; State v. Feuerhaken, 96 Iowa 299, 65 N. W. 299.

5 Hopkins v. People, 12 Wend. (N. Y.) 76.

6 People v. Montejo, 18 Cal. 38; Jones v. State, 14 Ind. 346.

7 Licette v. State, 75 Ga. 253; Allison v. Com., 83 Ky. 254; Ex parte Sullivan, 84 Neb. 493, 28 L. R. A. (N. S.) 750, 121 N. W. 456.

8 KAN.—State v. Suppe, 60 Kan. 566, 57 Pac. 106. ME.—State v. Stimson, 45 Me. 608. MASS.—Com. v. Andrews, 2 Mass. 14, 3 Am. Dec. 17. NEB.—Ex parte Sullivan, 84 Neb. 493, 28 L. R. A. (N. S.) 750, 121 N. W. 456. WYO.—Curran v. State, 12 Wyo. 553, 76 Pac.

§ 1175. NAME OF PERSON FROM WHOM PROPERTY RECEIVED. We have already seen that it is not usually required that the name of the thief who stole the property shall be set out in an indictment or information charging the crime of receiving stolen property;[1] for a like reason it is generally held not to be necessary to set out the name of the party from whom the accused received the goods, allege his name to be unknown, or state whether he was the original thief;[2] although in some of the states the name of the person from whom accused received the property is required to be set out, where known.[3]

§ 1176. GUILTY KNOWLEDGE. In the crime of receiving stolen goods the gist of the offense consists in the knowledge on the part of the accused that the goods had been stolen; consequently an indictment or information charging the offense of receiving stolen goods must allege that the accused received the goods knowing them to have

577. FED.—United States v. Mortimer, 1 Hayw. & H. 215, Fed. Cas. No. 821.

1 See, supra, § 1168.

2 ALA.—State v. Murphy, 6 Ala. 845. COLO.—Curl v. People, 53 Colo. 578, Ann. Cas. 1914B, 171, 127 Pac. 951. DEL.—State v. Wright, 2 Penn. 228, 45 Atl. 395. FLA.—Anderson v. State, 38 Fla. 3, 20 So. 765. ILL.—Jupitz v. People, 34 Ill. 516; Huggins v. People, 135 Ill. 243, 25 Am. St. Rep. 357, 25 N. E. 1002. IND.—Semon v. State, 158 Ind. 55, 62 N. E. 625; Buechert v. State, 165 Ind. 623, 76 N. E. 111. MASS.—Com. v. Lakeman, 71 Mass. (5 Gray) 82. MO.—State v. Guild, 149 Mo. 370, 50 S. W. 909. NEB.—Ream v. State, 52 Neb. 727, 73 N. W. 227; Ex parte Sullivan, 84 Neb. 493, 28 L. R. A. (N. S.) 750, 121 N. W. 456. N. Y.—Cohen v. People, 5 Park. Cr. Rep. 330. ORE.—State v. Hanna, 35 Ore. 195, 57 Pac. 629. R. I.—State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96. WYO.—Curran v. State, 12 Wyo. 553, 76 Pac. 577. FED.—Kirby v. United States, 174 U. S. 47, 43 L. Ed. 890, 11 Am. Cr. Rep. 330, 19 Sup. Ct. Rep. 574; Naftzger v. United States, 118 C. C. A. 598, 200 Fed. 494. ENG.—R. v. Goldsmith, L. R. 2 C. C. 74.

3 COLO. — Sault v. People, 3 Colo. App. 502, 34 Pac. 263. GA.—Simmons v. State, 4 Ga. 465 MO. — State v. Edwards, 36 Mo. 394. N. C.—State v. Ives, 35 N. C. (13 Ired. L.) 338; State v. Beatty, 61 N. C. (1 Phill. L.) 52. S. C.—State v. Teideman, 4 Strobh. L. 300. TEX.—State v. Perkins, 45 Tex. 10. FED.—United States v. De Bare, 6 Biss. 358, Fed. Cas. No. 14935.

been stolen,[1] although there are cases seemingly to the contrary.[2]

§ 1177. WRONGFUL INTENT. In those cases where the statute under which the prosecution is had makes it an element of the offense that the accused shall have received the goods with the intent to defraud the owner out of the goods, or of the value thereof, the indictment or information must allege, in addition to guilty knowledge on the part of the accused,[1] wrongful intent on his part;[2] but it is otherwise in the absence of such a statutory requirement.[3]

§ 1178. QUANTITY OF GOODS TAKEN AND RECEIVED. Inasmuch as the quantity of the goods stolen or received does not enter into the element of the offense of receiving stolen goods, the failure of the indictment or information

1 ALA.—Huggins v. State, 41 Ala. 393; Anderson v. State, 130 Ala. 126, 30 So. 375. ARK.—Blackshare v. State, 94 Ark. 548, 128 S. W. 549. GA.—Stripling v. State, 114 Ga. 843, 40 S. E. 993. IND.—Semon v. State, 158 Ind. 55, 62 N. E. 625. LA.—State v. Allemand, 25 La. Ann. 525. MASS.—Com. v. Cohen, 120 Mass. 198. MO.—State v. Mayer, 209 Mo. 391, 107 S. W. 1085. N. Y.—People v. Hartwell, 166 N. Y. 361, 15 N. Y. Cr. Rep. 377, 59 N. E. 929; People v. Rosenthal, 197 N. Y. 394, 46 L. R. A. (N. S.) 31, 24 N. Y. Cr. Rep. 319, 90 N. E. 991; affirmed, 226 U. S. 260, 57 L. Ed. 212, 13 Sup. Ct. Rep. 27. S. C.—State v. Crawford, 39 S. C. 343, 17 S. E. 799; State v. Winter, 83 S. C. 25, 65 S. E. 209. VT.—State v. Bannister, 79 Vt. 524, 65 Atl. 586. ENG.—R. v. Larkin, 1 Dears. 365, 26 Eng. L. & Eq. 572; R. v. Larkin, 18 Jur. 539; R. v. Wilson, 2 Moo. C. C. 52; R. v. Kernon, 2 Russ. C. & M. 436.

2 See Anderson v. State, 130 Ala. 126, 30 So. 375; State v. Sakowski, 191 Mo. 635, 90 S. W. 435.

1 See, supra, § 1176.

2 Sellers v. State, 49 Ala. 357; Holt v. State, 86 Ala. 599, 5 So. 793; Pelts v. State, 3 Blackf. (Ind.) 28; Darrah v. State, 65 Neb. 201, 90 N. W. 1123; Hurell v. State, 24 Tenn. (5 Humph.) 68.

3 CAL.—People v. Avila, 43 Cal. 196. IND.—Gandolpho v. State, 33 Ind. 439. IOWA—State v. Turner, 19 Iowa 144. LA.—State v. Moultrie, 34 La. Ann. 489; State v. Hartleb, 35 La. Ann. 1180. MD.—State v. Hodges, 55 Md. 127. MO.—State v. Richmond, 186 Mo. 71, 84 S. W. 880; State v. Sakowski, 191 Mo. 635, 90 S. W. 435. N. Y.—People v. Weldon, 111 N. Y. 569, 19 N. E. 279; Chatterton v. People, 15 Abb. Pr. 147. TEX.—Nourse v. State, 2 Tex. App. 305.

to specify the quantity of goods taken does not render the indictment insufficient.[1]

§ 1179. VALUE OF GOODS TAKEN AND RECEIVED. Although the value of the goods alleged to have been stolen is usually averred in an indictment charging the receiving of stolen goods, such an allegation is not essential,[1] or that the goods were of any value,[2] except in those cases in which the punishment to be inflicted upon conviction depends upon the value of the goods received, in which case value, of course, must be stated, the rule in this regard being the same as it is in larceny.[3] In some jurisdictions, however, it is held that the value of the goods must be alleged and proved.[4] Where several articles are included in the indictment or information, it is not necessary to specify the value of each article, if a gross valuation is named and the specified articles each have some value and the value assigned could attach to each.[5]

§ 1180. JOINDER OF DEFENDANTS. Two or more persons may be joined as defendants in an indictment or information charging receiving stolen goods, and one may be convicted and the other acquitted,[1] but both can not be

1 State v. Moore, 129 N. C. 494, 55 L. R. A. 96, 39 S. E. 626.

1 People v. Rice, 73 Cal. 220, 14 Pac. 851; People v. Fitzpatrick, 80 Cal. 538, 22 Pac. 215. ILL.—Sawyer v. People, 8 Ill. 53. MASS.—O'Connell v. Com., 48 Mass. (7 Metc.) 460. MONT.—State v. Moxley, 41 Mont. 402, 110 Pac. 83. NEB.—Engster v. State, 11 Neb. 539, 10 N. W. 453. N. C.—State v. Moore, 129 N. C. 494, 55 L. R. A. 96, 39 S. E. 626. R. I.—State v. Watson, 3 R. I. 114. S. C.—State v. Crawford, 39 S. C. 343, 17 S. E. 799. WIS.—State v. Lyon, 17 Wis. 237.

2 State v. Gargare, 88 N. J. L. 389, 95 Atl. 625.

3 See, supra, § 854.

4 Sands v. State, 30 Tex. App. 578.

5 State v. Gerrish, 78 Me. 20, 6 Am. Cr. Rep. 397, 2 Atl. 129; State v. Moore, 129 N. C. 494, 55 L. R. A. 96, 39 S. E. 626.

See, supra, § 855.

1 MASS. — Com. v. Slate, 77 Mass. (11 Gray) 60. MO.—State v. Smith, 37 Mo. 58; State v. Sartino, 216 Mo. 408, 115 S. W. 1015. ENG. — R. v. Matthews, 1 Den. C. C. 596, 4 Cox C. C. 214; R. v. Messingham, 1 Moo. C. C. 257; R. v. Dann, 1 Moo. C. C. 424; R. v. Hayes, 2 Moo. & R. 155.

convicted, unless there is a charge and a showing that the receiving was joint,[2] except where the charge in the indictment is under what was known at the common law as a "separaliter,"—separately, a charge of separate acting,—in which case, it seems, a verdict may be rendered against the defendant who first received in the order of time.[3] Where the offense of receiving stolen goods is prosecuted as an accessorial offense, joining the thief and the receiver as defendants, an indictment or information alleging that the defendant who was the thief, "feloniously did take, steal and carry," and that the defendant who was the receiver of the goods, "did receive them knowing them to have been feloniously stolen, taken and carried away as aforesaid," is insufficient because of the omission of the word "away" in the portion charging the thief, and neither defendant can be convicted.[4]

§ 1181. Joinder of counts. In those cases in which several different articles are stolen at different times, and from different owners, where all the articles thus stolen are received at one and the same time by the accused, such receiving of stolen property may be charged in one count of an indictment or information;[1] but it is otherwise where the articles were received at different times.[2] It has been said that a count charging receiving of stolen goods may be joined with a count charging concealing and receiving stolen goods,[3] although it is held otherwise in some jurisdictions;[4] that a count charging larceny may be joined with a count charging receiving stolen

[2] R. v. Messingham, 1 Moo. C. C. 257.

Rule changed by statute in England.—R. v. Reardon, L. R. 1 C. C. 31.

[3] R. v. Dring, 1 Dears. & B. 329; R. v. Matthews, 1 Den. C. C. 596, 4 Cox C. C. 214; R. v. Dovey, 2 Den. C. C. 86, 2 Eng. L. & Eq. 532.

[4] Com. v. Adams, 73 Mass. (7 Gray) 43.

[1] People v. Willard, 92 Cal. 482, 28 Pac. 585; People v. Hartwell, 166 N. Y. 361, 15 N. Y. Cr. Rep. 377, 59 N. E. 929; Smith v. State, 59 Ohio St. 350, 52 N. E. 826.

[2] Smith v. State, 59 Ohio St. 350, 52 N. E. 826.

[3] Bradley v. State, 20 Fla. 738; Keefer v. State, 4 Ind. 247.

[4] Barber v. State, 34 Ala. 213.

goods,[5] and so also may a count charging burglary.[6] The rule governing the joinder of counts, on the charge of receiving stolen goods, is governed by the same rules as apply in the crime of larceny.[7]

5 IND.—Kennegar v. State, 120 Ind. 176, 21 N. E. 917. KY.—Sanderson v. Com., (Ky.) 12 S. W. 136; Upton v. Com., 14 Ky. L. Rep. 165, 19 S. W. 744. LA.—State v. Laqué, 37 La. Ann. 853. ME.—State v. Stimson, 45 Me. 608. MASS.—Com. v. Adams, 73 Mass. (7 Gray) 43; Com. v. Cohen, 120 Mass. 198. N. Y.—People v. Wilson, 151 N. Y. 403, 12 N. Y. Cr. Rep. 116, 45 N. E. 862.

6 Parker v. People, 13 Colo. 155, 4 L. R. A. 803, 21 Pac. 1120; Com. v. Darling, 129 Mass. 112.

7 See, supra, §§ 887 et seq.

CHAPTER LXXIV.

INDICTMENT—SPECIFIC CRIMES.

Rescue.

§ 1182. Form and sufficiency of indictment—Rescue of prisoner.
§ 1183. —— Rescue of property.

§ 1182. FORM AND SUFFICIENCY OF INDICTMENT—RESCUE OF PRISONER.[1] An indictment or information charging the rescue of a person apprehended or imprisoned, as to its form and sufficiency, is ruled by the general principles governing indictments in other forms of escape.[2] It must be shown by what authority the prisoner rescued was held in custody,[3] and also that the accused had knowledge that the prisoner was in lawful custody[4] and that he did by force rescue him.[5] It is necessary to allege and prove that the person rescued was lawfully under apprehension or imprisoned,[6] but there need be no statement as to the process on which he was in custody.[7] The nature and cause of the imprisonment of the person alleged to have been rescued must be stated,[8] and also whether the person from whom the rescue was made was a public officer or a private person.[9] An indictment or information charging aiding a person in an intent to escape need only allege lawful detention in a stated place of confinement;[10] and

1 As to form of indictment for rescue of prisoners, see Forms Nos. 1920, 1921.

2 See, supra, §§ 603 et seq.

3 Com. v. Lee, 107 Mass. 207; State v. Hilton, 26 Mo. 199; Hart's Case, Cro. Jac. 472, 79 Eng. Repr. 403.

4 R. v. Young (Trin. Term 1801), 1 Russ. on Crimes (9th ed.), 604; R. v. Shaw, 1 Russ. & R. 526.

5 Hart's Case, Cro. Jac. 472, 79 Eng. Repr. 403; Foxe's Case, 2 Dyer 164b, 73 Eng. Repr. 359; R. v. Burridge, 3 Pr. Wms. 439, 484, 24 Eng. Repr. 1133, 1149.

6 State v. Dunn, 25 N. J. L. (1 Dutch.) 214.

7 Com. v. Lee, 107 Mass. 207.

8 State v. Hilton, 26 Mo. 199.

9 Id.

10 State v. Daly, 41 Ore. 515, 70 Pac. 706.

charging breaking into a jail for the purpose of rescuing prisoners, it need not be alleged that the offense was done wilfully or by force,[11]—although it has been said that it is not necessary to specifically charge the rescue was by force—that is to say, vi et armis—for the reason that the word "rescue" imports force.[12] It is usually sufficient, in charging the offense of rescue, to follow the language of the statute prohibiting and punishing the offense.[13]

§ 1183. —— RESCUE OF PROPERTY.[1] An indictment or information charging taking from the custody of an officer certain goods and chattels, the ownership of the property may be laid in the officer;[2] and an indictment or information charging rescuing cattle while being driven to a pound, must state all the facts, and set forth with particularity the legal grounds of distress of the animals.[3]

11 Loggins v. State, 32 Tex. Cr. 358, 24 S. W. 408.

See authorities, footnote 5, this section.

12 R. v. Cramlington, 2 Bulst. 208, 80 Eng. Repr. 1072.

13 State v. Sutton, 170 Ind. 473, 84 N. E. 824.

1 As to form of indictment for rescuing property, see Form No. 1922.

2 State v. Clapper, 59 Iowa 279, 13 N. W. 294.

3 State v. Barrett, 42 N. H. 466.

CHAPTER LXXV.

INDICTMENT—SPECIFIC CRIMES.

Riot, Rout and Unlawful Assembly.

§ 1184. Form and sufficiency of indictment—In general.
§ 1185. —— Facts and acts constituting the riot.
§ 1186. —— Time and place.
§ 1187. —— Attempts.
§ 1188. —— Surplusage.
§ 1189. —— Conclusion—In terrorem populi.
§ 1190. —— —— Contra formam statuti.
§ 1191. Designation and description of rioters.
§ 1192. Unlawful assembly—In general.
§ 1193. —— Intent and purpose of assembly.
§ 1194. —— Acts done pursuant to assembly.
§ 1195. Inciting to riot.
§ 1196. Joinder of defendants.
§ 1197. Joinder of riot and other offenses.
§ 1198. —— Duplicity.

§ 1184. FORM AND SUFFICIENCY OF INDICTMENT[1]—IN GENERAL. Riot is an offense both at common law and under statute. Where an indictment or information charges the common-law offense of riot, it must sufficiently set forth all the elements of the common-law crime with the required formalities and technicalities.[2] Where the statutory offense is charged, the indictment or information must set forth all the facts and circumstances which constitute the essential elements of the offense of riot, or rout, or unlawful assembly, as the case may be, under the statutory definition and prohibition, in such a manner as (1) to bring the accused within the provisions of

1 As to forms of indictment for riot, rout and unlawful assembly, see Forms Nos. 1923-1936.

2 State v. Brazil, 1 Rice L. (S. C.) 257; State v. Connolly, 3 Rich. L. (S. C.) 337, 45 Am. Dec. 766; Mackaboy v. Com., 4 Va. (2 Va. Cas.) 268.

the statute; (2) to notify the accused, with reasonable precision and certainty, of the particular acts and offense with which they are charged; and (3) charge the intent on the part of the accused was the intent specified in the statute.[3] The allegations must further show (1) an unlawful assemblage,[4] (2) consisting of three or more persons, and (3) some overt act or course of conduct calculated to terrify the public.[5] The crime of riot, being an offense at common law, it is not necessary that the indictment or information shall allege a proclamation requiring the accused to disperse, and charge that they failed to obey such proclamation.[6]

Following the language of the statute is thought to be generally insufficient to charge the offense of riot; the facts and circumstances, and the particular acts done, must be set out;[7] although the contrary has been held.[8]

§ 1185. ——FACTS AND ACTS CONSTITUTING THE RIOT. At common law the facts constituting the riot should be

3 State v. Boies, 34 Me. 235; Martin v. State, 9 Mo. 286; McWaters v. State, 10 Mo. 167; In re North Liberty Hose Co., 13 Pa. St. 193.

Allegation that the defendant and others, being assembled, did in a violent, tumultuous and riotous manner, perform a described unlawful act, to the terror and disturbance of the people, is a sufficient charge of riot. — State v. Boies, 34 Me. 235.

4 See, infra, § 1192.

5 Prince v. State, 30 Ga. 27; Dixon v. State, 105 Ga. 787, 31 S. E. 750; Tripp v. State, 109 Ga. 489, 34 S. E. 1021; Coney v. State, 113 Ga. 1060, 39 S. E. 425; Turner v. State, 120 Ga. 850, 48 S. E. 312; Turpin v. State, 4 Blackf. (Ind.) 72; Simmons v. Territory, 11 Okla. 574, 69 Pac. 787; State v. Mizis, 48 Ore. 165 85 Pac. 611, 861; State v. Allison, 11 Tenn. (3 Yerg.) 428.

6 State v. Russell, 45 N. H. 83.

7 See, infra, § 1185.

Alleging defendant "did then and there with other persons, actually do an unlawful act with force and violence against the person of Charles Roller" is insufficient to charge the statutory offense of riot, although in the language of the statute, because it neither describes the act constituting the offense nor designates it by any term whereby the nature of the act may be understood with reasonable certainty.— People v. Crilly, 185 Ill. App. 160.

8 Adell v. State, 34 Ind. 543; State v. Kutter, 59 Ind. 572.

See, also, supra, §§ 269 et seq.

clearly set forth in the indictment.[1] In an indictment or information charging the statutory offense, in any of its phases, the facts and acts constituting the alleged offense must be clearly stated.[2] No technical words are usually necessary, all that is required being that it should be made to appear that such force and violence were used as amount to a breach of the peace, and that the facts and acts as stated shall show a breach of the peace and not merely a civil trespass.[3] Where it is alleged that the accused "fought together and with each other," if that allegation is essential to the sufficiency of the description of the act and offense charged, it must be further averred that they did so "riotously";[4] but where the statute under which prosecution is had makes it an offense for three or more persons to "assemble in a violent and tumultuous manner to do an unlawful act," the indictment or information is not required to specify the unlawful acts constituting the offense.[5] Unlawful acts charged to have been done in a violent and tumultuous

1 Whitesides v. People, 1 Ill. 21; R. v. Gulston, 2 Ld. Raym. 1210, 92 Eng. Repr. 298.

2 Whitesides v. People, 1 Ill. 21.

Allegation that five named defendants "did commit an unlawful act of violence, to wit, did then and there, acting with a common intent, make an unlawful assault on one U. S. West and one L. S. Williams, and did then and there attempt to commit a personal injury" upon them sufficiently describes the offense of riot as defined in Ga. Penal Code, 1895, § 354.—Lock v. State, 122 Ga. 730, 50 S. E. 932.

An indictment charging that eight named defendants "did then and there, acting with a common intent, make an unlawful assault on one Janie Jones, and did then and there attempt a personal injury on the said Janie Jones, by throwing certain rocks at said Janie Jones" sufficiently describes the offense of riot as defined in Ga. Penal Code, 1895, § 354.—Carter v. State, 12 Ga. App. 44, 65 S. E. 1072.

Charging act was done in a violent and tumultuous manner is sufficient as against demurrer.—Green v. State, 109 Ga. 536, 12 Am. Cr. Rep. 542, 355 S. E. 97.

3 State v. Russell, 45 N. H. 83; State v. Langford, 10 N. C. (3 Hawks) 381.

4 State v. Dillard, 5 Blackf. (Ind.) 365, 35 Am. Dec. 128.

See, also, footnotes 11 and 12, this section.

5 Bonneville v. State, 53 Wis. 680, 11 N. W. 427.

manner, the circumstances constituting the violence and tumult are not required to be stated,[6] a description of the violence and of the tumult being sufficient where shown to be connected with the acts complained of.[7] The act charged being that of obstructing and breaking up a justices' court, it is not necessary either to allege or prove that the person holding the justices' court was duly commissioned;[8] but where the act charged is that of pulling down and destroying a dwelling-house, the ownership of the dwelling-house must be set out.[9] Noise and disturbance being the act complained of, the indictment or information must set out the manner in which the noise and disturbance were made, it not being sufficient simply to charge the accused with making a noise and disturbance.[10] Charging the accused with having assembled with force and arms, and being so assembled, did commit the act complained of, the words "with force and arms" in the first part of the indictment apply to any subsequent allegation therein;[11] and where the word "riotously"[12] is used in the indictment or information, this term implies violence, and the phrase "with force and arms" need not be used.[13]

§ 1186. —— TIME AND PLACE. Under the general rules of criminal pleading, it is essential that an indictment or information charging riot, in any of its phases, shall set out the time when the alleged riot, etc., occurred, and

6 GA.—Green v. State, 109 Ga. 536, 35 S. E. 97; Baptist v. State, 109 Ga. 546, 35 S. E. 658; Lock v. State, 122 Ga. 730, 50 S. E. 932. ILL.—Lambert v. People, 34 Ill. App. 637. IND.—State v. Scaggs, 6 Blackf. 37; State v. Acra, 2 Ind. App. 384, 28 N. E. 570. WIS.—State v. Dean, 71 Wis. 678, 38 N. W. 341.

7 Kiphart v. State, 42 Ind. 273; State v. Hathcock, 29 N. C. 52.

8 State v. Boies, 34 Me. 235.

9 State v. Martin, 7 N. C. (3 Murph. L.) 533.

Ownership can not be alleged in wife where she was married, but must be alleged in her husband.—State v. Martin, 7 N. C. (3 Murph. L.) 533.

10 Whitesides v. People, 1 Ill. 21.

11 Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148.

12 See footnote 5, this section.

13 R. v. Wynd, 2 Str. 834, 93 Eng. Repr. 881.

the place where it transpired, with reasonable particularity and certainty,[1] so as to show (1) that the offense complained of occurred within the time in which a prosecution therefor may be maintained, and (2) to show that the court has jurisdiction to try the cause; but it is not necessary to allege or prove that the riot occurred in a public place.[2]

§ 1187. —— ATTEMPTS. It is not essential to the validity of an indictment or information charging riot that it shall show the commission or completion of the act charged, it being sufficient if it is made to appear that there was an attempt to commit the act.[1]

§ 1188. —— SURPLUSAGE. Where an indictment or information incorporates therein unnecessary words or averments, if there are sufficient allegations, without such words and phrases, to properly charge the offense alleged, such words and averments will not vitiate the instrument; they may be rejected as surplusage.[1]

§ 1189. —— CONCLUSION—IN TERROREM POPULI. In those cases in which the gist of the offense consists in going about armed, without committing any overt unlawful act, or in otherwise terrifying the public, the words "in terrorem populi," or their English equivalent, "to the terror of the people," should be employed;[1] but in

[1] Lambert v. People, 34 Ill. App. 637; Mackaboy v. Com., 4 Va. (2 Va. Cas.) 268.

Charging defendants "on the first day of September, 1888, at and within the county of Pope, then and there, being together, did riotously and with force and violence assault, beat, wound and illtreat Philip Meler," it was held that the indictment sufficiently averred when and where the riot occurred and that the words "then and there" should be read "then and there, being together, did."—Lambert v. People, 34 Ill. App. 637.

[2] Carmody v. State, 178 Ind. 158, 98 N. E. 870.

[1] State v. York, 70 N. C. 66; Blackwell v. State, 30 Tex. App. 672; United States v. Fenwick, 4 Cr. 675, Fed. Cas. No. 15086.

[1] Thayer v. State, 11 Ind. 287; State v. Acra, 2 Ind. App. 384, 28 N. E. 570; State v. Russell, 45 N. H. 83; R. v. Harris, 8 Mod. 327, 88 Eng. Repr. 234.

[1] IND.—Thayer v. State, 11 Ind.

those cases in which an unlawful overt act is charged to have been committed, these words are unnecessary, they being required in those cases, only, in which the gist of the offense is the terror inspired in the public by the conduct of the accused.[2]

§ 1190. ——— CONTRA FORMAM STATUTI. Where the offense charged is one denounced by statute, the indictment or information should conclude against the form of the statute; a general conclusion, contra formam statuti, is, however, sufficient.[1]

§ 1191. DESIGNATION AND DESCRIPTION OF RIOTERS. At common law an indictment or information charging a riot must aver the common action of at least three alleged rioters,[1] and where the prosecution is under statute, the act complained of must be charged to have been the joint action of at least the number of persons necessary to constitute the offense alleged as specified in the statute under which the prosecution is had,[2] which is usually the common-law number of three or more.[3] It has been

287. MASS.—Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148. N. Y.—Marshall v. Buffalo (City of), 50 App. Div. 149, 64 N. Y. Supp. 411. S. C.—State v. Brazil, 1 Rice L. 257; State v. Sims, 16 S. C. 486. TENN. — State v. Whitesides, 31 Tenn. (1 Swan) 88. ENG.—R. v. Hughes, 4 Car. & P. 373, 19 Eng. C. L. 560; R. v. Cox, 4 Car. & P. 538, 19 Eng. C. L. 516; R. v. James, 5 Car. & P. 153, 24 Eng. C. L. 251; R. v. Birt, 5 Car. & P. 154, 24 Eng. C. L. 252; R. v. Woolcock, 5 Car. & P. 516, 24 Eng. C. L. 434; R. v. Soley, 11 Mod. 115, 88 Eng. Repr. 935, 2 Salk. 594, 91 Eng. Repr. 503; R. v. Penn, 6 How. St. Tr. 951; R. v. Sacheverell, 10 How. St. Tr. 30; R. v. Haigh, 31 How. St. Tr. 1092.

2 IND.—Hardebeck v. State, 10 Ind. 459; Thayer v. State, 11 Ind. 287. ME.—State v. Boies, 34 Me. 235. MASS.—Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148. N. C.—State v. Baldwin, 18 N. C. (1 Dev. & B. L.) 195. S. C.—State v. Alexander, 7 Rich. L. 5; State v. Sims, 16 S. C. 486. TENN. — State v. Whitesides, 31 Tenn. (1 Swan) 88. ENG.—R. v. Hughes, 4 Car. & P. 373, 19 Eng. C. L. 560; R. v. Soley, 11 Mod. 115, 88 Eng. Repr. 951, 2 Salk. 594, 91 Eng. Repr. 503.

1 R. v. Pugh, 6 Mod. 140, 87 Eng. Repr. 900.

1 See Kerr's Whart. Crim. Law, § 1861.

2 McPherson v. State, 22 Ga. 478; Prince v. State, 30 Ga. 27; Dougherty v. People, 5 Ill. 179.

3 See, supra, § 1184, footnote 5.

said that one person may be charged, in connection with many others, to have committed the riot complained of, and that this will be sufficient;[4] but the general practice is to set forth the names of the persons engaged in the riot, or if their names are unknown,[5] to allege that fact as an excuse for not setting them out,[6] the requirement being that where the names are known, they must be set out;[7] and where the Christian name of one of the accused is unknown, that fact must be stated, or the indictment will be dismissed as to him.[8]

Prosecutor will succeed though he prove the charge against three only, however numerous the defendants may be who are joined in the same indictment; and the joinder of the innocent will not at all affect the conviction of the guilty.—2 Chit. Crim. L. (5th Am. from 2d Lond. ed.) 489.

"Three persons and more, to wit," naming twenty-one, committed the acts charged, it was held sufficient.—Thayer v. State, 11 Ind. 287.

4 Anonymous, 3 Salk. 317, 91 Eng. Repr. 846.

More prudent course to charge defendants to have been guilty together "with other persons unknown," for if all are acquitted but one of two, who are found guilty, the latter may receive judgment, since they will be presumed to be united with those who are yet undiscovered; whereas otherwise it is impossible that any sentence could be passed against them for an offense which they could not have committed alone.—R. v. Scott, 1 W. Bl. 350, 96 Eng. Repr. 195; R. v. Heaps, 2 Salk. 593, 91 Eng. Repr. 502; Anonymous, 3 Salk. 317, 91 Eng. Repr. 846.

5 **Persons unknown** may be alleged to be the persons with whom accused committed the offense.—R. v. Scott, 1 W. B. 350, 91 Eng. Repr. 502; Anonymous, 3 Salk. 317, 91 Eng. Repr. 846.

Charging two defendants named "with divers other persons to the jurors unknown, to the number of ten or more," is sufficient.—State v. Brazil, 1 Rice L. (S. C.) 257.

6 Martin v. State, 115 Ga. 255, 12 **Am. Cr. Rep.** 553, 41 S. E. 576; Turpin v. State, 4 Blackf. (Ind.) 72; Hardebeck v. State, 10 Ind. 459; State v. O'Donald, 1 McC. L. (S. C.) 532; State v. Calder, 2 McC. L. (S. C.) 462.

7 State v. Calder, 2 McC. L. (S. C.) 462.

Charging defendant and two other named, "together with divers other persons, to wit, to the number of five," without alleging that the five others were unknown, or setting out their names, and the grand jury found a true bill against the defendant and one other, to which the defendant pleaded guilty, the judgment was arrested. — State v. O'Donald, 1 McC. L. (S. C.) 532.

8 State v. Kutter, 59 Ind. 572.

§ 1192. UNLAWFUL ASSEMBLY—IN GENERAL. At common law an essential element of riot was an unlawful assembly, and in the absence of statutory provisions dispensing with this common-law element of the offense, an unlawful assembling of the accused must be charged in the indictment or information,[1] and the charge must be that there were assembled a sufficient number of persons to constitute the offense of riot;[2] but this is sufficiently done by alleging that the accused assembled "with force and arms," and being so assembled did commit the acts of violence complained of, without repeating the phrase "with force and arms."[3] An indictment or information alleging riot is not required to charge, in terms, that the accused assembled unlawfully, and being thus assembled unlawfully did the act complained of, but only to set forth circumstances which show that the accused did in fact unlawfully assemble and do an unlawful act.[4] The averments as to unlawful assembly, where made, must be established by direct proof, or by the proof of facts from which the illegality of such assembly will be inferred.[5]

§ 1193. —— INTENT AND PURPOSE OF ASSEMBLY. An indictment or information charging riot must show the purpose for which the rioters assembled[1] and the illegal act

1 MASS.—Com. v. Gibney, 84 Mass. (2 Allen) 150. MO.—McWaters v. State, 10 Mo. 167. N. C.—State v. Stalcup, 23 N. C. (1 Ired. L.) 30, 35 Am. Dec. 732; State v. Hughes, 72 N. C. 25. TEX.—Blackwell v. State, 30 Tex. App. 672, 18 S. W. 676. ENG.—R. v. Soley, 11 Mod. 115, 88 Eng. Repr. 935, 2 Salk. 594, 91 Eng. Repr. 503.

In Illinois, the unlawful assembly of the defendants need not be alleged.—Dougherty v. People, 5 Ill. 179.

In Missouri, it is held that an indictment charging that the defendants "assembled and agreed" is sufficient.—State v. Berry, 21 Mo. 504.

2 Id.

3 Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148.

4 McWaters v. State, 10 Mo. 167.

5 See State v. Kuhlmann, 5 Mo. App. 588.

1 Martin v. State, 9 Mo. 286; McWaters v. State, 10 Mo. 167; Blackwell v. State, 30 Tex. App. 672, 9 Am. Cr. Rep. 582, 18 S. W. 676; R. v. Gulston, 2 Ld. Raym. 1210, 92 Eng. Repr. 298; R. v.

which was the object of the meeting.[2] In some jurisdictions no other unlawful purpose need be alleged than that of disturbing the peace.[3] The unlawful act intended to be done need not be specified;[4] but where the indictment or information alleges "an intent to make an assault," it must be further charged to have been "with force and violence."[5]

§ 1194. —— ACTS DONE PURSUANT TO ASSEMBLY. An indictment or information charging riot must allege that the unlawful assemblage was completed by the commission of an unlawful act, or by a lawful act in an unlawful manner;[1] but it is not necessary to allege that the unlawful act actually committed was the one contemplated,[2] all that is required to be alleged being that an "unlawful act was done," without alleging that the accused assembled unlawfully, or unlawfully did the act set out.[3] It has been said that the indictment or information must specifically allege that an unlawful act was done,[4] but the

Soley, 11 Mod. 115, 88 Eng. Repr. 951, 2 Salk. 594, 91 Eng. Repr. 503.

2 Blackwell v. State, 30 Tex. App. 672, 9 Am. Cr. Rep. 582, 18 S. W. 676.

Object of assemblage to assist each other in the execution of an act of a private nature, or that they executed the act for which they had assembled, need not be alleged.—State v. Russell, 45 N. H. 83.

3 State v. Renton, 15 N. H. 169.

4 Bonneville v. State, 53 Wis. 680, 11 N. W. 427.

In an indictment for a riot it is sufficient to state that the defendants assembled to disturb the peace, and being so assembled did such and such unlawful acts.—United States v. Fenwick, 5 Cr. 562, Fed. Cas. No. 15086.

5 Martin v. State, 9 Mo. 286 (it being insufficient to charge it to have been "with force and arms").

1 Blackwell v. State, 30 Tex. App. 672, 9 Am. Cr. Rep. 582, 18 S. W. 676; United States v. Fenwick, 4 Cr. 675, Fed. Cas. No. 15086; R. v. Soley, 11 Mod. 115, 88 Eng. Repr. 951, 2 Salk. 594, 91 Eng. Repr. 503.

Organized conspiracy to commit criminal acts, without more, does not constitute a "civil tumult" or "rioting."—London & M. Plate Glass Co. v. Heath, [1913] 3 K. B. 411, Ann. Cas. 1915B, 187.

2 Com. v. Jenkins, Thatch. Cr. Cas. (Mass.) 118; State v. Russell, 45 N. H. 83; State v. Blair, 13 Rich. L. (S. C.) 93; United States v. Fenwick, 4 Cr. 675, Fed. Cas. No. 15086.

3 McWaters v. State, 10 Mo. 167.

4 Id.

weight of authority seems to be to the contrary,[5] the better doctrine being that it is not necessary to charge in terms that accused unlawfully committed the acts alleged against them, where the circumstances are set forth and show that the accused did in fact the unlawful acts charged;[6] and neither is it essential that there shall be an allegation that the acts were unlawful, where, as set out,[7] they are manifestly illegal.[8]

Violence and tumultuousness[9] or turbulence must be shown by the indictment or information to have accompanied the doing of the unlawful acts complained of;[10] but no technical or arbitrary words, no set form of allegation, is required to make this fact manifest; it need not be charged in terms; it is sufficient if the facts are set forth in language showing that the unlawful acts charged were committed in a violent and tumultuous manner.[11] The word "violently" need not be employed where the allegations clearly show that the acts complained of were violently done;[12] the words "riotously and tumultuously" are substantially equivalent to the word "violently."[13]

In Illinois, it is sufficient if the indictment avers that the defendants committed an unlawful act against the person or injured property with violence.—Dougherty v. People, 5 Ill. 179.

In Missouri, the indictment need not charge that the defendants assembled unlawfully or unlawfully committed the acts complained of, and it is sufficient if the indictment shows that an unlawful act was committed. — McWaters v. State, 10 Mo. 167.

5 Carnes v. State, 28 Ga. 192; Kiphart v. State, 42 Ind. 273; State v. Baldwin, 18 N. C. (1 Dev. & B. L.) 195.

6 McWaters v. State, 10 Mo. 167.

7 See, supra, § 1185.

8 Cro. Car. Railway 43.

9 **"Violent" and "tumultuous"** are substantially synonymous, so that an allegation that the acts were committed in a "violent or tumultuous" manner, is sufficient. —Bonneville v. State, 53 Wis. 680, 11 N. W. 427.

10 McWaters v. State, 10 Mo. 167; Smith v. State, 14 Mo. 147.

Allegation acts were committed in a "violent and tumultuous" manner, it was held unnecessary to allege that the acts done were unlawful. — Kiphart v. State, 42 Ind. 273.

11 Hardebeck v. State, 10 Ind. 459; Thayer v. State, 11 Ind. 287.

12 Kiphart v. State, 42 Ind. 273.

13 State v. Kutter, 59 Ind. 572.

§ 1195. INCITING TO RIOT. At common law it is an indictable offense to incite others to riot, but the indictment or information charging an attempt to incite others to riot need not allege that a riot was thereby incited,[1] it being sufficient to allege that the accused "did unlawfully, wickedly and maliciously incite, encourage," etc., to a disturbance of the peace; or to a forcible trespass upon land; or to a riotous assault upon an individual, and the like, fully specifying the particular acts sought to be incited to be done.[2]

§ 1196. JOINDER OF DEFENDANTS. In an indictment or information charging riot, all or any of the persons alleged to have participated therein may be joined; even one may be proceeded against alone; where less than all are joined, any one may be convicted and the others discharged;[1] but where the proceeding is against one only, or less than all are joined, it must be charged (1) that three or more persons were engaged in the doing of the unlawful acts complained of,[2] and (2) that they acted in concert.[3]

§ 1197. JOINDER OF RIOT AND OTHER OFFENSES. In those cases in which the unlawful act complained of as having been done by the rioters constitutes a distinct substantive offense,—e. g., where such act consists of an assault upon and the beating of a person, or the tearing down of a house,[1] or forcible trespass upon land,[2]—the two of-

"Defendant did riotously and with force and violence assault, beat, wound and ill treat," sufficiently charges the act to be unlawful.—Lambert v. People, 34 Ill. App. 637. See Hobbs v. State, 133 Ind. 404, 18 L. R. A. 774, 32 N. E. 1019.

1 United States v. Fenwick, 4 Cr. 675, Fed. Cas. No. 15086.

2 McRea v. State, 71 Ga. 96.

1 Moore v. State, 115 Ga. 259, 41 S. E. 578; Simmons v. Territory, 11 Okla. 574, 69 Pac. 787.

2 3 Kerr's Whart. Crim. Law, § 1861.

3 Martin v. State, 115 Ga. 255, 41 S. E. 576; Moore v. State, 115 Ga. 259, 41 S. E. 578; Com. v. Berry, 71 Mass. (5 Gray) 93; State v. Blair, 13 Rich. L. (S. C.) 93.

See, supra, § 1184.

1 R. v. Casey, Ir. R. 8 C. L. 408.

2 Forcible trespass upon land

fenses may be joined in the indictment in separate counts,[3] and there is authority to the effect that they may be joined in the same count;[4] but where riot and a riotous assault are charged in the same count, the assault must be proved as laid.[5] It has been said that where the riotous act complained of is an assault upon an individual, it is always advisable to add a count charging a common assault; if the charge of riot fails, there may be a conviction of the lesser offense.[6]

§ 1198. —— DUPLICITY. In those jurisdictions in which it is permissible to plead in the same count a riotous assembly and an act of violence which of itself might constitute a distinct offense,[1] an indictment so charging is not bad for the reason that it charges, in one count, two distinct offenses;[2] and where the charge is of two unlawful acts, both of which are made crimes by the same section of the statute, and these separate offenses are charged in the same count, the indictment or information will not be bad for duplicity.[3]

being charged, the indictment must further allege the land was in possession of the complainant and not in the possession of a tenant of such person.—State v. Wilson, 23 N. C. (1 Ired. L.) 32.

3 Perkins v. State, 78 Ga. 316; Com. v. Kinney, 4 Va. (2 Va. Cas.) 139; United States v. McFarlane, 1 Cr. 163, Fed. Cas. No. 15675; R. v. Sudbury, 12 Mod. 262, 88 Eng. Repr. 1309, 1 Ld. Raym. 484, 91 Eng. Repr. 1222, 2 Salk. 593, 91 Eng. Repr. 502.

4 State v. Russell, 45 N. H. 83. See Hobbs v. State, 133 Ind. 404, 18 L. R. A. 774, 32 N. E. 1019.

5 Com. v. Berry, 71 Mass. (5 Gray) 93.

6 R. v. Fieldhouse, 1 Cowp. 325, 98 Eng. Repr. 1111.

See 2 Chit. Crim. L. (5th Am. from 2d Lond. ed.) 490a.

Included crimes embraced in riot, and of lesser degree, conviction may be had for. See 3 Kerr's Whart. Crim. Law, § 1866.

1 See, supra, § 1197, footnote 4.

2 State v. Russell, 45 N. H. 83; R. v. Sudbury, 12 Mod. 262, 88 Eng. Repr. 1309, 2 Salk. 593, 91 Eng. Repr. 502.

3 Hobbs v. State, 133 Ind. 404, 18 L. R. A. 774, 32 N. E. 1019.

CHAPTER LXXVI.

INDICTMENT—SPECIFIC CRIMES.

Robbery.

§ 1199. Form and sufficiency of indictment—In general.
§ 1200. —— At common law—Common-law form.
§ 1201. —— Statutory robbery—Highway robbery.
§ 1202. —— Statutory language.
§ 1203. —— Charging in conjunctive.
§ 1204. —— Time and place of offense.
§ 1205. —— Assault.
§ 1206. —— Felonious intent.
§ 1207. —— Person injured.
§ 1208. Description of property—In general.
§ 1209. —— Of money.
§ 1210. Value of property taken.
§ 1211. Ownership and possession.
§ 1212. Taking and asportation—In general.
§ 1213. —— Through force or violence.
§ 1214. —— —— By snatching, as force or violence.
§ 1215. —— Through putting in fear.
§ 1216. —— Taking from person or presence.
§ 1217. —— Taking without consent and against will.
§ 1218. Attempts, and assaults, to commit robbery.
§ 1219. Joinder of defendants.
§ 1220. Joinder of counts and of offenses.
§ 1221. Duplicity.

§ 1199. FORM AND SUFFICIENCY OF INDICTMENT[1]—IN GENERAL. An indictment or information charging accused with the crime of robbery, must aver all the necessary elements of that offense by alleging (1) a larceny, (2) asportation from the person of another, (3) who was the owner thereof, (4) from his possession or presence, (5) by force and fear, and (6) without his consent and against

[1] As to forms of indictment for robbery, see Forms Nos. 399-403, 1938-1966.

the will of such owner;[2] that is to say, should allege a simple larceny,[3] as in larceny,[4] setting out the value of the property taken,[5] and adding the facts which constitute the taking and asportation robbery.[6] The indictment or information need not charge circumstances of aggravation[7] which affect only the measure of the punishment.[8] Where the act is alleged to have been committed feloniously, it is not necessary to aver that the property was taken with intent to commit a larceny.[9] The technical words "rob,"[10] and "steal,"[11] are not essential in an indictment or information otherwise sufficient.

Certainty and precision as to all facts necessary to constitute the offense are essential, and must be set out by express averment, nothing must be left to intendment;[12]

2 Com. v. Brooks, 62 Ky. (1 Duv.) 150; Houston v. Com., 87 Va. 257.

3 Keeton v. State, 70 Ark. 163, 66 S. W. 645; Rains v. State, 137 Ind. 83, 36 N. E. 532.

4 See, supra, §§ 808 et seq.

5 ALA.—Wesley v. State, 61 Ala. 282. IND.—Arnold v. State, 52 Ind. 281, 21 Am. Rep. 175. MASS.—Com. v. Cahill, 94 Mass. (12 Allen) 540; Com. v. Green, 122 Mass. 333. WIS.—McEntee v. State, 24 Wis. 43.

As to alleging value of the property taken, see, infra, § 1210.

6 CAL.—People v. Jones, 53 Cal. 58; People v. Nelson, 56 Cal. 77. IND.—Terry v. State, 13 Ind. 70. MASS.—Com. v. Clifford, 62 Mass. (8 Cush.) 215; Com. v. Cahill, 94 Mass. (12 Allen) 540. TENN.—McTigue v. State, 63 Tenn. (4 Baxt.) 313. TEX.—Thompson v. State, 35 Tex. Cr. Rep. 511, 43 S. W. 629.

7 **As to allegation of circumstances of aggravation, see, infra, § 1201.**

8 State v. Poe, 123 Iowa 118, 101 Am. St. Rep. 307, 98 N. W. 587.

9 State v. Switzer, 38 Nev. 108, 145 Pac. 925.

10 **"Rob" omitted from an indictment or information which alleges all the facts necessary to constitute the crime charged, will not be allowed to affect the validity of the instrument.**—State v. Ready, 44 Kan. 697, 26 Pac. 58; State v. Robinson, 29 La. Ann. 364; Acker v. Com., 94 Pa. St. 284.

The word "rob" in an indictment for robbery charges, by implication, a taking from the person of the prosecutor and against his will, and therefore when this word is employed it is unnecessary expressly to aver these facts.—Acker v. Com., 94 Pa. St. 284.

11 **"Steal" is not essential in an indictment for robbery, where there are other words to indicate clearly a taking and carrying away.**—State v. Brown, 113 N. C. 645, 18 S. E. 51.

12 Kit v. State, 30 Tenn. (11

the indictment or information must be so explicit as (1) to enable the court to see that, admitting the facts, it had jurisdiction; (2) to apprise the accused of the nature of the offense charged, so as to give him an opportunity to make his defense, and (3) to make the judgment certain and available as a bar to any subsequent prosecution for the same offense.[13]

§ 1200. —— AT COMMON LAW—COMMON-LAW FORM.[1] At common law, an indictment or information charging accused with the crime of robbery was required to allege (1) the felonious taking of personal property of another, (2) from his person or in his presence, (3) by force or intimidation, and (4) against his will.[2] In some of the jurisdictions a common-law indictment charging robbery is held to be sufficient, notwithstanding the fact that the offense is made a crime and punishable by statute.[3]

§ 1201. —— STATUTORY ROBBERY—HIGHWAY ROBBERY. A statutory robbery being charged, the indictment or information must set out all the elements of the offense in the statute under which the prosecution is had, together with any aggravating circumstances[1] attending the act complained of,—e. g., being committed in a dwelling-house,[2] or on or near a public highway,[3] while being

Humph.) 167; Trimble v. State, 16 Tex. App. 115.

13 State v. Segermond, 40 Kan. 107, 10 Am. St. Rep. 169, 19 Pac. 370.

1 As to common-law form of indictment for robbery, see Form No. 1957.

2 CAL.—People v. Jones, 53 Cal. 58; People v. Nelson, 56 Cal. 77. KY.—Com. v. Brooks, 62 Ky. (1 Duv.) 150. MASS.—Com. v. Cahill, 94 Mass. (12 Allen) 540. VA.—Houston v. Com., 87 Va. 257.

3 ARK.—Clary v. State, 33 Ark. 561. LA.—State v. Cook, 20 La. Ann. 145; State v. Patterson, 42 La. Ann. 934, 8 So. 529. TEX.—Bell v. State, 1 Tex. App. 598; Reardon v. State, 4 Tex. App. 602; Burns v. State, 12 Tex. App. 269; Trimble v. State, 16 Tex. App. 115. VA.—Houston v. Com., 87 Va. 257.

1 Aggravating circumstances affecting the punishment only, need not he alleged. See, supra, § 1199, footnote 8.

2 As to form of indictment for robbery in a dwelling-house, see Form No. 1961.

3 As to form of indictment for

armed with a dangerous weapon,[4] and the like,—where the offense is aggravated by either.[5] Where the offense charged occurred upon a public highway, or near a public highway, it is sufficient to allege that it occurred "in (or near, as the case may be) a common highway of the state," without further designation or description of the particular public highway.[6]

§ 1202. —— STATUTORY LANGUAGE. Where the crime of robbery is made an offense by statute in the jurisdiction where prosecution is had, the indictment or information charging accused is generally required to be framed under the statute, although in a few states the common-law form of indictment is held to be sufficient, as we

robbery on or near a highway, see Form No. 1965.

4 As to form of indictment for robbery, being armed with a dangerous weapon, see Forms Nos. 1954-1959.

5 See: ALA.—Wesley v. State, 61 Ala. 282; Chappell v. State, 52 Ala. 359. ARK.—Clary v. State, 33 Ark. 561. CAL.—People v. Hicks, 66 Cal. 103, 4 Pac. 1093; People v. Ah Sing, 95 Cal. 654, 30 Pac. 796; People v. Boyd, 16 Cal. App. 130, 116 Pac. 323. GA.—Harris v. State, 1 Ga. App. 136, 57 S. E. 937. ILL.—Collins v. People, 39 Ill. 233. IND.—Anderson v. State, 28 Ind. 22. IOWA—State v. Brewer, 53 Iowa 735, 6 N. W. 62; State v. Leighton, 56 Iowa 595, 9 N. W. 896. KAN.—State v. Segermond, 40 Kan. 107, 10 Am. St. Rep. 169, 19 Pac. 370; State v. Ready, 44 Kan. 697, 26 Pac. 58. MASS.—Com. v. Clifford, 62 Mass. (8 Cush.) 215; Com. v. Mowry, 93 Mass. (11 Allen) 20; Com. v. Griffiths, 126 Mass. 562. MICH.—People v. Calvin, 60 Mich. 113, 26 N. W. 851. MO.—State v. Scott, 39 Mo. 424; State v. Howerton, 59 Mo. 91; State v. Burnett, 81 Mo. 119. N. Y.—People v. Loop, 3 Park. Cr. Rep. 559; Quinlan v. People, 6 Park. Cr. Rep. 9. N. C.—State v. Burke, 73 N. C. 83; State v. Brown, 113 N. C. 645, 18 S. E. 51. PA.—Acker v. Com., 94 Pa. St. 284. TENN.—State v. Swafford, 71 Tenn. (3 Lea) 162. TEX.—Wilson v. State, 3 Tex. App. 63; Reardon v. State, 4 Tex. App. 602; Williams v. State, 10 Tex. App. 8; Trimble v State, 16 Tex. App. 115; Burns v. State, 23 Tex. App. 641, 5 N. W. 140. W. VA.—State v. Jackson, 26 W. Va. 250. FED.—United States v. Mills, 32 U. S. (7 Pet.) 138, 8 L. Ed. 636. ENG.—R. v. Norton, 8 Car. & P. 671, 34 Eng. C. L. 954.

6 State v. Anthony, 29 N. C. (7 Ired. L.) 234; State v. Cowan, 29 N. C. (7 Ired. L.) 239; State v. Wilson, 67 N. C. 456.

See, also, infra, § 1204, footnotes 8-12.

have already seen.[1] An indictment or information charging robbery in the language of the statute,[2] or in words of substantially equivalent import,[3] is usually regarded as sufficient, provided all the necessary elements of the crime of robbery are expressed in the statute.[4] However, the courts in some jurisdictions hold that an indictment or information in the language of the statute is not sufficient to charge either the crime of larceny,[5] or the crime of robbery,[6] for the reason that an indictment so drawn does not usually set out all the essential elements of the offense which must be included in an indictment charging robbery, as above pointed out.[7] But where the indictment or information is not in the language of the statute under which it is drawn, so much of the substan-

1 See, supra, § 1200, footnote 2.

2 CAL.—People v. Colburn, 105 Cal. 648, 38 Pac. 1105. KAN.—State v. Ready, 44 Kan. 697, 26 Pac. 58. KY.—Com. v. Tanner, 68 Ky. (5 Bush) 316. LA.—State v. Henry, 47 La. Ann. 1587, 18 So. 638. MINN.—State v. Howard, 66 Minn. 309, 61 Am. St. Rep. 403, 34 L. R. A. 178, 68 N. W. 1096; State v. O'Neil, 71 Minn. 399, 73 N. W. 1091. NEV.—State v. Switzer, 38 Nev. 108, 145 Pac. 925. PA.—Acker v. Com., 94 Pa. St. 284. TENN.—State v. Swafford, 71 Tenn. (3 Lea) 162. TEX.—Williams v. State, 10 Tex. App. 8. WASH.—State v. Baker, 69 Wash. 389, 125 Pac. 1016.

3 IND.—Buntin v. State, 68 Ind. 38. KAN. — State v. Barnett, 3 Kan. 250. KY.—Taylor v. Com., 66 Ky. (3 Bush.) 508. MO.—State v. Davidson, 38 Mo. 374. WASH.—State v. Bohn, 19 Wash. 36, 52 Pac. 325.

4 CAL.—People v. Ah Sing, 95 Cal. 654, 30 Pac. 796; People v. Colburn, 105 Cal. 648, 38 Pac. 1105. IND.—Anderson v. State, 28 Ind. 22. KAN. — State v. Barnett, 3 Kan. 244; State v. Ready, 44 Kan. 697, 26 Pac. 58. KY.—Com. v. Tanner, 68 Ky. (5 Bush) 316. LA.—State v. Henry, 47 La. Ann. 1587, 18 So. 638; State v. Devine, 51 La. Ann. 1296, 26 So. 105. ME.—State v. Perley, 86 Me. 427, 41 Am. St. Rep. 564, 30 Atl. 74. MINN.—State v. O'Nell, 71 Minn. 399, 73 N. W. 1091. MO.—State v. Davidson, 38 Mo. 374. PA.—Acker v. Com., 94 Pa. St. 284. TENN.—State v. Swafford, 71 Tenn. (3 Lea) 162; Clemons v. State, 92 Tenn. 282, 21 S. W. 525. TEX.—Williams v. State, 10 Tex. App. 8. WASH.—State v. Bohn, 19 Wash. 36, 52 Pac. 325.

5 See, supra, § 810.

6 People v. Ho Sing, 6 Cal. App. 752, 93 Pac. 204; State v. Dengel, 24 Wash. 49, 63 Pac. 1104; State v. Morgan, 31 Wash. 226, 71 Pac. 723. State v. Hall, 54 Wash. 142, 102 Pac. 888.

See, infra, § 1211.

7 See, supra, § 1199.

tial language of the statute must be employed as will enable the court readily to see under what particular statute the instrument is framed.[8] Words other than those found in the statute, which are necessary to a complete description of the offense charged, may be employed.[9]

Statute providing punishment for the crime of robbery, without defining that crime or setting out the essential elements requisite to constitute the offense, an indictment or information in the language of the statute will be insufficient; it must contain all the clauses usually found in a common-law indictment charging robbery.[10]

§ 1203. —— CHARGING IN CONJUNCTIVE. In those cases where the statute under which the prosecution is had enumerates several acts disjunctively, or several modes disjunctively, which separately or together may constitute the offense of robbery, an indictment or information charging two or more of the acts or modes must do so in the conjunctive and not in the disjunctive form in which the enumeration occurs in the statute, or it will be bad.[1] This is the general rule governing the pleading of statutory crimes where the statute enumerates, in the disjunctive, a series of things or acts which may constitute the crime denounced.

§ 1204. —— TIME AND PLACE OF OFFENSE. The time of the robbery should be stated within the rule requiring that it must appear from the face of the indictment or information that the offense charged took place, and the act complained of was done, before the commencement of the prosecution,[1] and within the time during which prosecution may be maintained;[2] and while the

[8] United States v. Mays, 1 Ida. 763.

[9] Id.

[10] Boles v. State, 58 Ark. 35.

[1] Slover v. Territory, 5 Okla. 506, 49 Pac. 1009.

[1] Clerical errors disregarded where they are manifestly such, as where an indictment returned in May lays the time of the robbery in December of the same year. — State v. Burnett, 81 Mo. 119.

[2] State v. Barnett, 3 Kan. 250.

time should be laid accurately, yet, time not being considered of the essence of the offense of robbery, it is not deemed essential that the indictment or information should lay the precise time; it is enough for it to show that the time was before the finding of the indictment and within the limitation prescribed by statute, as above pointed out.[3] Where the time of an assault is given, and it is alleged that by means of such assault the accused "then and there stole and carried away," etc., the time of the offense is sufficiently laid.[4] There are cases to the effect that where an indictment or information is otherwise sufficient, it will not be bad by reason of its failure to allege the time when the act complained of was done.[5] Where there was no law punishing the offense charged at the time on which it is alleged to have been committed, the indictment or information must be dismissed.[6]

Place of commission of offense should be charged in the indictment or information for the purpose of showing that the court has jurisdiction to try the cause.[7] In those cases in which the offense of highway robbery[8] is charged, the particular place of the doing of the act complained of,—that is, on or near a public highway,—is an essential element of the offense charged, and must be expressly alleged,[9] and proved as alleged;[10] but it is sufficient to aver that the act occurred in or near "the com-

3 State v. Barnett, 3 Kan. 244; State v. Wilcoxen, 38 Mo. 370.

Sufficient to allege that accused, "at the county of Shawnee aforesaid, and within the jurisdiction of this court, on the ...... day of ......, A. D. 1864," committed robbery, it was held that the time of the commission of the offense was sufficiently averred.—State v. Barnett, 3 Kan. 244.

4 State v. Gill, 21 Mont. 151, 53 Pac. 184.

5 State v. Wilcoxen, 38 Mo. 370.

6 People v. Williams, 1 Idaho 85.

7 Clary v. State, 33 Ark. 561; Sweat v. State, 90 Ga. 315, 17 S. E. 273.

8 As to highway robbery, see, also, supra, § 1201.

9 Buntin v. State, 68 Ind. 38; State v. Anthony, 29 N. C. (7 Ired. L.) 234; State v. Cowan, 29 N. C. (7 Ired. L.) 239; State v. Wilson, 67 N. C. 456.

10 State v. Cowan, 29 N. C. (7 Ired. L.) 239.

mon highway" or "the public highway,"[11] it not being necessary to specify the particular highway,[12] or to set out to what points it leads.[13]

§ 1205. —— ASSAULT. An assault is a necessary incident in the offense of robbery. At common law, an indictment or information charging robbery was required to allege an assault, feloniously made by the accused;[1] but under statute, it is not necessary to charge an assault in the commission of a robbery alleged, in those cases where the statute under which the prosecution is had, in defining and describing the crime of robbery, does not refer to an assault;[2] and under such a statute, an indictment or information which properly charges the commission of robbery as unlawful and felonious, is not affected by its failure to qualify as felonious the assault attendant upon the robbery.[3] In some states, however, as in Texas, the indictment or information must charge that an assault or violence was made use of upon the person alleged to have been robbed.[4]

§ 1206. —— FELONIOUS INTENT. At common law, as above seen,[1] it was absolutely necessary to allege a felonious intent on the part of the accused, in charging robbery; and in most of the states an indictment under statute must aver a felonious intent[2] on the part of the

11 State v. Wilson, 67 N. C. 456; State v. Burke, 73 N. C. 83.

12 State v. Wilson, 67 N. C. 456.

13 State v. Burke, 73 N. C. 83.

1 GA.—Sledge v. State, 99 Ga. 684, 26 S. E. 756. KY.—Ward v. Com., 77 Ky. (14 Bush) 233. LA.—State v. Patterson, 42 La. Ann. 934, 8 So. 529. PA.—Randolph v. Com., 6 Serg. & R. 398. VA.—Hardy v. Com., 58 Va. (17 Gratt.) 592. W. VA.—Houston v. Com., 87 Va. 257. ENG.—R. v. Philipps, 6 East 464, 8 Rev. Rep. 511, 102 Eng. Repr. 1365, 2 Smith 550.

2 Anderson v. State, 28 Ind. 22; State v. Brewer, 53 Iowa 735, 6 N. W. 62.

3 State v. Kegan, 62 Iowa 106, 17 N. W. 179.

4 Smedly v. State, 30 Tex. 214; Parker v. State, 9 Tex. App. 351.

1 See, supra, § 1205.

2 ALA. — Chappell v. State, 52 Ala. 359. ARK.—Brown v. State, 28 Ark. 126; Keeton v. State, 70 Ark. 163, 63 S. W. 645. CAL.—People v. Keefer, 65 Cal. 232, 3 Pac. 818; People v. White, 5 Cal. App. 329, 90 Pac. 471. GA.—Craw-

accused to appropriate the property to his own use,[3] and a failure to charge an intent to steal is fatal,[4] although it has been said that a charge that accused did the act

ford v. State, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628; Sledge v. State, 99 Ga. 684, 26 S. E. 756. IOWA — State v. Hollyway, 41 Iowa 200, 20 Am. Rep. 586; State v. Wasson, 126 Iowa 320, 101 N. W. 1125. KY.—Ward v. Com., 77 Ky. (14 Bush) 233; Keeton v. Com., 92 Ky. 522, 18 S. W. 359; Triplett v. Com., 122 Ky. 35, 91 S. W. 281; Sikes v. Com., 34 S. W. 902. LA.—State v. Cook, 20 La. Ann. 145; State v. Durbin, 20 La. Ann. 408. MISS.—Woods v. State, 67 Miss. 575, 7 So. 495. See, also, unreported case in 6 So. 207. MO.—State v. Brown, 104 Mo. 365, 16 S. W. 406; State v. O'Connor, 105 Mo. 121, 16 S. W. 510; State v. Woodward, 131 Mo. 369, 33 S. W. 14; State v. McLain, 159 Mo. 340, 60 S. W. 736; State v, Smith, 174 Mo. 586, 74 S. W. 624; State v. Graves, 185 Mo. 713, 84 S. W. 904. MONT. — State v. Oliver, 20 Mont. 318, 50 Pac. 1018. NEB.—Latimer v. State, 55 Neb. 609, 70 Am. St. Rep. 408, 76 N. W. 207. N. Y.—Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460. N. C.—State v. Cowan, 29 N. C. (7 Ired. L.) 239; State v. Sowls, 61 N. C. (1 Phill. L.) 151; State v. Deal, 64 N. C. 270; State v. Curtis, 71 N. C. 56. N. D.—State v. Fordham, 13 N. D. 494, 101 N. W. 888; State v. O'Malley, 14 N. D. 200, 103 N. W. 421. OHIO—Matthews v. State, 4 Ohio St. 539; Boose v. State, 10 Ohio St. 575; State v. Carman, 1 Tapp. 97. PA.—Com. v. White, 133 Pa. St. 182, 19 Am. St. Rep. 628, 19 Atl. 350. S. C.—State v. Whittle, 59 S. C. 297, 37 S. E. 923. TENN.—Hammond v. State, 43 Tenn. (3 Coldw.) 129. TEX.—Morris v. State, 13 Tex. App. 65; Glenn v. State, 49 Tex. Cr. Rep. 349, 13 Ann. Cas. 774, 29 S. W. 406. UTAH — People v. Hughes, 11 Utah 100, 39 Pac. 492. VA.—Jordan v. Com., 66 Va. (25 Gratt.) 943. W. VA.—State v. McCoy, 63 W. Va. 69, 59 S. E. 758. FED.—In re Lewis, 83 Fed. 159. ENG.—R. v. Boden, 1 Car. & K. 395, 47 Eng. C. L. 395; R. v. Hall, 3 Car. & P. 409, 14 Eng. C. L. 373.

"To constitute robbery the property must be taken from the person, by force or putting in fear, against the will of the owner, with the intent to deprive the owner of it and without any honest claim on the part of the taker."—State v. O'Connor, 105 Mo. 121, 16 S. W. 510.

3 Ward v. Com., 68 Ky. (14 Bush) 233; Morris v. State, 13 Tex. App. 65; Atkinson v. State, 34 Tex. Cr. Rep. 424, 30 S. W. 1064.

4 Voluntary taking personal property of another from his person and against his will, by violence and putting in fear of immediate injury being charged, without an averment of a felonious intent to steal, the indictment is fatally defective. — Jones v. State, 95 Miss. 121, 21 Ann. Cas. 1137, 48 So. 407.

"With intent to steal," or "with intent to rob," held necessary to be alleged in Ohio.—Matthews v. State, 4 Ohio St. 539; Boose v. State, 10 Ohio St. 575.

complained of "with intent to deprive the owner thereof," is sufficiently descriptive of the felonious intent.[5] Robbery, being a felony, it is said that the act must be charged to have been done with "felonious" intent;[6] and robbery, being an aggravated form of larceny, requires the same allegations and proof as to felonious intent as is required in the crime of larceny.[7] Yet, a recent case holds that an indictment or information charging an attempt to rob, alleging violence in the attempted perpetration of the offense against the will of the person upon whom the assault was made, is not insufficient because it fails to allege an intent to deprive the person assaulted of his property "without his consent."[8]

§ 1207. —— PERSON INJURED. An indictment or information charging accused with the crime of robbery must distinctly specify the person assaulted and injured.[1] Where it was charged that the accused made a felonious assault upon one J. B. Jones, and then alleged that accused robbed John B. Jones, it was held that the indictment was sufficiently certain to a common intent.[2] In those cases in which an assault is made upon different individuals at the same time, and different and separate articles of property taken from each, it is per-

5 State v. Gill, 21 Mont. 151, 53 Pac. 184.

6 Triplett v. Com., 122 Ky. 35, 91 S. W. 281.

7 ALA.—Chappell v. State, 52 Ala. 359; Henderson v. State, 1 Ala. App. 154, 55 So. 816. ARK.—Keeton v. State, 70 Ark. 163, 66 S. W. 645. IOWA—State v. Hollyway, 41 Iowa 200, 20 Am. Rep. 586; State v. Kegan, 62 Iowa 106, 17 N. W. 179; State v. Wasson, 126 Iowa 320, 101 N. W. 200. KY.—Triplett v. Com., 122 Ky. 35, 91 S. W. 281. MONT.—State v. Gill, 21 Mont. 151, 53 Pac. 184. NEB.—Smith v. State, 72 Neb. 345, 100 N. W. 806. N. C.—State v. Sowls, 61 N. C. (1 Phill. L.) 151. N. D.—State v. Fordham, 13 N. D. 494, 101 N. W. 888. PA.—Com. v. White, 133 Pa. St. 182, 19 Am. St. Rep. 628, 19 Atl. 350. TEX.—Glenn v. State, 49 Tex. Cr. Rep. 349, 13 Ann. Cas. 774, 92 S. W. 806. ENG.—R. v. Hemmings, 4 Fost. & F. 50.

8 State v. Carroll, 214 Mo. 392, 21 L. R. A. (N. S.) 311, 113 S. W. 1051.

1 Smedly v. State, 30 Tex. 214; Parker v. State, 9 Tex. App. 351.

2 State v. Wall, 39 Mo. 532.

missible for the indictment or information to charge the assault upon and robbery of all the individuals in one count in the indictment, where the assaults upon and acts of robbery from the different persons were embraced in one and the same transaction.[3]

§ 1208. DESCRIPTION OF PROPERTY—IN GENERAL. An indictment or information charging accused with robbery must describe the property taken from the victim with certainty,[1] and such particularity as (1) to enable the jury to identify the property alleged to have been stolen with that referred to in the indictment,[2] (2) such as will enable the court to know judicially that the articles alleged to have been taken were the subject-matter of robbery,[3] and (3) to enable the accused to know what he is charged with having stolen and to make his defense;[4] but it is not necessary to describe the property with any greater particularity and certainty than is required on a charge of larceny,[5] although there is authority to the

3 Clark v. State, 28 Tex. App. 189, 19 Am. St. Rep. 817, 12 S. W. 729; Gregg v. State, (Tex. App.) 12 S. W. 732.

1 State v. Segermond, 40 Kan. 107, 10 Am. St. Rep. 169, 19 Pac. 370; Territory v. Bell, 5 Mont. 562, 6 Pac. 60.

2 People v. Nolan, 250 Ill. 351, Ann. Cas. 1912B, 401, 34 L. R. A. (N. S.) 301, 95 N. E. 140; State v. Sanders, 14 N. D. 203, 103 N. W. 419.

3 CAL. — People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080. ILL.—People v. Nolan, 250 Ill. 351, Ann. Cas. 1912B, 401, 34 L. R. A. (N. S.) 301, 95 N. E. 140. IND.—Terry v. State, 13 Ind. 70; Brennon v. State, 25 Ind. 403. N. Y.—People v. Loop, 3 Park. Cr. Rep. 559. N. C. — State v. Burke, 73 N. C. 83. N. D.—State v. Sanders, 14 N. D. 203, 103 N. W. 419. WASH. — State v. Johnson, 19 Wash. 410, 53 Pac. 667. W. VA.—State v. McCoy, 63 W. Va. 69, 59 S. E. 758.

4 State v. Segermond, 40 Kan. 107, 10 Am. St. Rep. 169, 19 Pac. 370; Territory v. Bell, 5 Mont. 565, 6 Pac. 60.

5 CAL.—People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080. IND.—Terry v. State, 13 Ind. 70; Brennon v. State, 25 Ind. 403; Arnold v. State, 52 Ind. 281, 21 Am. Rep. 175. OHIO—Turner v. State, 1 Ohio St. 422. TEX.—Winston v. State, 9 Tex. App. 143. WASH. — State v. Johnson, 19 Wash. 410, 53 Pac. 667. W. VA.—State v. Jackson, 26 W. Va. 250. WIS.—McEntee v. State, 24 Wis. 43. ENG.—R. v. Sharp, 2 Cox C. C. 181.

effect that the description of the property in an indictment for robbery may be sufficient, though the same description would be insufficient in an indictment for larceny.[6] The gist of the offense in robbery being force or intimidation, if the forcible taking is alleged sufficiently, a detailed description of the property taken from the victim is not required,[7] it not being material to describe accurately or to prove the particular identity or value of the property taken, further than to show that it was the property of the person assaulted or in his possession and care, and had a value.[8] Where the description of the property is unknown to the grand jurors, or to the prosecutor, an averment of such fact is sufficient as an excuse for failure to give a particular description.[9] Thus, it has been held sufficient to describe the property taken as "a knife of the value of seventy-five cents";[10] "a leather pocket-book, one small gold-framed photograph, picture of said John Sandberg, one hunting-knife";[11] "certain silver coin, to-wit, three silver dollars in coin, of the value of three dollars, one fifty-cent piece in coin, of the value of fifty cents, and one ten-cent piece in coin, of the value of ten cents, and one nickel in coin, of the value of five cents";[12] "one promissory note, of the value of

As to necessary description of property in larceny, see, supra, §§ 825 et seq.

6 People v. Loop, 3 Park. Cr. Rep. (N. Y.) 559.

7 Burke v. People, 148 Ill. 70, 35 N. E. 376; McQueen v. State, 82 Ind. 72; State v. Burke, 73 N. C. 83.

8 Burke v. People, 148 Ill. 70, 35 N. E. 376; Schroeder v. People, 196 Ill. 211, 63 N. E. 678; People v. Nolan, 250 Ill. 351, Ann. Cas. 1912B, 401, 34 L. R. A. (N. S.) 301, 95 N. E. 140.

9 ALA. — Owens v. State, 104 Ala. 18, 16 So. 575; James v. State, 115 Ala. 83, 22 So. 565. DEL.—State v. Stewart, 1 Penn. 433, 42 Atl. 624. IND.—McQueen v. State, 82 Ind. 72; Riggs v. State, 104 Ind. 261, 3 N. E. 886; Graves v. State, 121 Ind. 357, 23 N. E. 155. KAN.—State v. Ready, 44 Kan. 697, 24 Pac. 66. MONT.—Territory v. Bell, 5 Mont. 562, 6 Pac. 60. N. Y.—Quinlan v. People, 6 Park. Cr. Rep. 9.

10 Nevill v. State, 133 Ala. 99, 32 So. 596.

11 State v. Sanders, 14 N. D. 203, 103 N. W. 419.

12 Kirk v. State, 35 Tex. Cr. Rep. 224, 32 S. W. 1045.

fifty dollars and eighty-five cents, one purse, of the value of twenty-five cents, and one time-check, of the value of fifty cents";[13] "one pin, of the value of" a sum designated";[14] "one certain sheep";[15] "one wallet, of the value of seventy-five cents,"[16] and the like.

§ 1209. —— OF MONEY. In those cases in which the property taken from the victim is money, greater accuracy in describing such property taken is required, in some jurisdictions,[1] but the general rule seems to be that an allegation that the property taken was current money of the United States, of a stated aggregate value, will be sufficient,[2] without stating the number of pieces taken, the

13 State v. McCoy, 63 W. Va. 69, 59 S. E. 758.

14 People v. Nolan, 250 Ill. 351, **Ann. Cas.** 1912B, 401, 34 **L. R. A.** (N. S.) 301, 95 N. E. 140.

15 Williams v. State, 10 Tex. App. 8.

16 McEntee v. State, 24 Wis. 43.

1 Croker v. State, 47 Ala. 53; Terry v. State, 13 Ind. 70; State v. Segermond, 40 Kan. 107, 10 **Am. St. Rep.** 169, 19 Pac. 370; R. v. Sharp, 2 Cox C. C. 181.

Insufficient description to allege property taken, "one currency note of the value and denomination of ten dollars, a further and more particular description of which is to the grand jury unknown."—Winston v. State, 9 Tex. App. 143. But this case has been said not to be good law as to the particularity of description necessary, in Kirk v. State, 35 Tex. Cr. Rep. 224, 32 S. W. 1045.

2 CAL.—People v. Richards, 136 Cal. 127, 68 Pac. 477; People v. Stevens, 141 Cal. 488, 75 Pac. 62; Boyd v. State, 153 Ala. 41, 45 So. 591; People v. Peltin, 1 Cal. App. 613, 82 Pac. 981; People v. Howard, 3 Cal. App. 36, 84 Pac. 462. GA.—Humphries v. State, 100 Ga. 260, 28 S. E. 25. LA.—State v. Devine, 51 La. Ann. 1296, 26 So. 105. ME.—State v. Perley, 86 Me. 427, 41 **Am. St. Rep.** 564, 9 **Am. Cr. Rep.** 504, 30 Atl. 74. MASS.—Com. v. Griffiths, 126 Mass. 252. MO.—State v. Burnett, 81 Mo. 119; State v. Rush, 95 Mo. 199, 8 S. W. 221; State v. Calvert, 209 Mo. 280, 107 S. W. 1078. TEX.—Thompson v. State, 35 Tex. Cr. Rep. 511, 34 S. W. 629; Colter v. State, 37 Tex. Cr. Rep. 284, 39 S. W. 576; White v. State, 57 S. W. 100; Parrent v. State, 76 S. W. 474. UTAH—State v. La Chall, 28 Utah 80, 77 Pac. 3.

Allegation of value is unnecessary and immaterial; felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear, is robbery, irrespective of the value of the property taken.—People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080; People v. Richards, 136 Cal.

denomination of the pieces,[3] whether bank-bills or bank-notes or coin;[4] and if bank-bills or bank-notes, need not give the number upon each bill or note;[5] and especially is this true where a more definite description is to the grand jury, or to the prosecutor, unknown, and that fact is set out as an excuse for the want of a fuller description.[6] The reason for this rule is the fact that it would be unreasonable to expect one who is robbed of money, or of its representative, to give an accurate description of it.[7] Where the money taken is stated in the indictment to have been the money or coin of a foreign country, it must be described like other property.[8] It has been said that in alleging the value of separate pieces of money, where value is given, it should be alleged that the pieces were "of the denomination of," giving the specified value.[9]

127, 68 Pac. 477; People v. Stevens, 141 Cal. 488, 75 Pac. 62.

3 Contrary held in some cases, requiring that the denomination shall be alleged. See footnote 9, this section.

4 Maxwell v. State, 9 Ga. App. 875, 72 S. E. 445; Campbell v. State, (Tex. Cr.) 148 S. W. 580; Bracher v. State, 72 Tex. Cr. Rep. 198, 161 S. W. 124.

Description as "fifty dollars in money, of the value of fifty dollars," is a sufficient description.—Maxwell v. State, 9 Ga. App. 875, 72 S. E. 445.

An allegation that the money taken was silver coin of the value of $1.50 sufficiently describes the property. — Compton v. State, (Tex. Cr.) 148 S. W. 580.

5 See cases in footnote 2, this section, and Jackson v. State, 69 Ala. 249; State v. Gorham, 55 N. H. 152; People v. Loop, 3 Park. Cr. Rep. 559; Quinlan v. People, 6 Park. Cr. Rep. 9; McEntee v. State, 24 Wis. 43.

6 ALA. — Owens v. State, 104 Ala. 18, 16 So. 575; Brown v. State, 120 Ala. 342, 25 So. 182. DEL.—State v. Stewart, 1 Penn. 433, 42 Atl. 624. IND.—McQueen v. State, 82 Ind. 72. MONT.—Territory v. Bell, 5 Mont. 562, 6 Pac. 60. N. Y.—Quinlan v. People, 6 Park. Cr. Rep. 9. TEX.—Winston v. State, 9 Tex. App. 143; Wade v. State, 35 Tex. Cr. Rep. 170, 60 Am. St. Rep. 31, 32 S. W. 772.

See notes, 70 Am. Dec. 190; 10 Am. St. Rep. 174; Ann. Cas. 1912B, 402; 34 L. R. A. (N. S.) 301.

7 McQueen v. State, 82 Ind. 72.

8 Wade v. State, 35 Tex. Cr. Rep. 170, 60 Am. St. Rep. 31, 32 S. W. 772.

9 Arnold v. State, 52 Ind. 281, 21 Am. Rep. 175.

§ 1210. VALUE OF PROPERTY TAKEN. At common law it was necessary that an article must have some intrinsic value to be the subject-matter of either larceny[1] or robbery, and an indictment or information charging the accused with robbery was required to allege that the article taken was of some value;[2] particularity and precision as to value, however, were not required at common law and are not required under statute.[3] Under the statutes in the various jurisdictions, where value of the article taken does not affect the punishment to be inflicted upon conviction,[4] value of the article taken is not of the gist of the offense, and a specific value is not required to be either alleged or proved;[5] yet under the statutes in some states the rule is as at common law, i. e., that it must be alleged that the property taken was of some intrinsic value, even though it is unnecessary to allege the value of the property taken, it being sufficient to show on the trial that it

1 See, supra, §§ 854, 855.

2 Jackson v. State, 69 Ala. 249; State v. Segermond, 40 Kan. 107, 10 Am. St. Rep. 169, 18 Pac. 370.

Value immaterial, so long as there was a value; and where the property was described as "one piece of writing paper of the value of one penny, one other piece of writing paper of the value of one penny, and one written memorandum of the value of one penny," the allegation as to value was held to be sufficient.—R. v. Bingley, 5 Car. & P. 602, 24 Eng. C. L. 474.

3 Jackson v. State, 69 Ala. 249; State v. Perley, 86 Me. 427, 41 Am. St. Rep. 564, 9 Am. Cr. Rep. 504, 30 Atl. 74; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176.

4 Burke v. People, 148 Ill. 70, 35 N. E. 376.

5 People v. Townsley, 39 Cal. 405; People v. Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080; People v. Stevens, 141 Cal. 488, 75 Pac. 62. ILL.—Burke v. People, 148 Ill. 70, 35 N. E. 376. IND.—Buntin v. State, 68 Ind. 38. KY.—Baldwin v. Com., 2 Ky. L. Rep. 439. ME.—State v. Perley, 86 Me. 427, 41 Am. St. Rep. 564, 30 Atl. 74. MO.—State v. Howerton, 58 Mo. 518. N. Y.—People v. Loop, 3 Park. Cr. Rep. 559. N. C.—State v. Brown, 113 N. C. 645, 9 Am. Cr. Rep. 310, 18 S. E. 51. PA.—Com. v. White, 133 Pa. St. 182, 19 Am. St. Rep. 628, 19 Atl. 350. TEX.—Williams v. State, 10 Tex. App. 18; Williams v. State, 34 Tex. Cr. Rep. 523, 31 S. W. 405. UTAH—State v. La Chall, 28 Utah 80, 77 Pac. 3. WASH.—State v. Brache, 63 Wash. 396, 115 Pac. 853; State v. Rowan, 84 Wash. 158, 146 Pac. 374. ENG.—R. v. Bingley, 5 Car. & P. 602, 24 Eng. C. L. 474.

had some value,[6] while in other states, it is held necessary that a specific value shall be alleged, or an excuse given for the want of a more particular description and designation as to value.[7]

§ 1211. OWNERSHIP AND POSSESSION. In an indictment or information charging robbery, the ownership of the property must be alleged[1] to have been in the person charged to have been robbed,[2] and these allegations must be supported by the proof,[3] the same as in a charge of larceny;[4] although by statute in some of the states owner-

6 People v. Stevens, 141 Cal. 488, 75 Pac. 62.

7 State v. Segermond, 40 Kan. 107, 10 Am. St. Rep. 169, 19 Pac. 370.

1 ALA. — State v. Absence, 4 Port. 397; Dorsey v. State, 134 Ala. 553, 33 So. 350; Montgomery v. State, 169 Ala. 12, 53 So. 991 (ownership may be laid in a minor). ARK.—Boles v. State, 58 Ark. 35, 22 S. W. 887. CAL.—People v. Vice, 21 Cal. 344; People v. Hicks, 66 Cal. 103, 4 Pac. 1093; People v. Ammerman, 118 Cal. 23, 50 Pac. 15. IOWA—State v. Wasson, 126 Iowa 320, 101 N. W. 1125. MASS.—Com. v. Clifford, 62 Mass. (8 Cush.) 215. TEX.—Smedly v. State, 30 Tex. 214; Thompson v. State, 35 Tex. Cr. Rep. 511, 34 S. W. 629; Colter v. State, 37 Tex. Cr. Rep. 284, 39 S. W. 576; Higgins v. State, 19 S. W. 503; White v. State, 57 S. W. 100. UTAH—State v. La Chall, 28 Utah 80, 77 Pac. 3. WASH.—State v. Dengel, 24 Wash. 49, 63 Pac. 1104; State v. Morgan, 31 Wash. 226, 14 Am. Cr. Rep. 618, 71 Pac. 723. WYO.—McGinnis v. State, 16 Wyo. 72, 91 Pac. 936. FED.—United States v. McMemara, 2 Cr. 45, Fed. Cas. No. 15701. ENG.—R. v. Ruddick, 8 Car. & P. 237, 34 Eng. C. L. 368.

Name of the person from whom the property was taken must be alleged.—Smedly v. State, 30 Tex. 214.

2 State v. Lawler, 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 979.

Charging that the property taken "was the personal property in the possession of one Frederick Schwartz, and that it was taken from the person and against the will of him the said Schwartz," is a sufficient averment of ownership and of the taking. — People v. Hicks, 66 Cal. 103, 4 Pac. 1093.

3 CAL.—People v. Vice, 21 Cal. 344; People v. Nelson, 56 Cal. 77. NEV.—State v. Ah Loi, 5 Nev. 99; State v. Nelson, 11 Nev. 334. N. Y.—Brooks v. People, 49 N. Y. 436, 10 Am. Rep. 398, 1 Cow. Cr. Rep. 503. TENN.—Crews v. State, 43 Tenn. (3 Coldw.) 350. TEX.—Smedly v. State, 30 Tex. 214; Clark v. State, 28 Tex. App. 189, 19 Am. St. Rep. 817, 12 S. W. 729. WYO. — McGinnis v. State, 16 Wyo. 72, 91 Pac. 936.

4 See, supra, §§ 856 et seq.

ship of the property is not required to be alleged,[5] or the ownership by the accused negatived.[6] Precise legal ownership of property not being the gist of the offense, an indictment or information may charge the property to have been taken from one in the rightful possession thereof,[7] and name him as the owner,[8] or it may name a third person as the true owner;[9] and an erroneous alle-

5 State v. Dilley, 15 Ore. 70, 13 Pac. 648; Clemons v. State, 92 Tenn. 282, 21 S. W. 525.

6 State v. Dilley, 15 Ore. 70, 13 Pac. 648.

7 **Bailee** may be laid as owner. —People v. Shuler, 28 Cal. 490; State v. Lawler, 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 797; State v. Ah Loi, 5 Nev. 99; State v. Nelson, 11 Nev. 334; State v. Gorham, 55 N. H. 152.

See, also, supra, § 862.

—Precise nature of the bailment need not be alleged.—People v. Shuler, 28 Cal. 490; State v. Ah Loi, 5 Nev. 99; State v. Gorham, 55 N. H. 152.

Servant or agent from whom property taken may be laid as the owner, or the true owner may be named.—State v. Adams, 58 Kan. 365, 49 Pac. 81.

Otherwise in larceny, as to servant. See, supra, § 871.

8 **Clerk in store has possession of the money in a cash-drawer,** with the right to make change therefrom and place receipt from sales therein, where a person in the absence of the proprietor, by exhibiting a deadly weapon, compels such clerk to permit him to take the money from the drawer, an indictment or information charging robbery may lay the ownership of the money in such clerk, notwithstanding the fact that the clerk claims no personal interest in the money, and is not held accountable for its loss, in all those jurisdictions in which the statutes permit an indictment for robbery for taking money from a clerk or agent.—State v. Montgomery, 181 Mo. 19, 67 L. R. A. 343, 19 S. W. 693.

9 ALA.—James v. State, 53 Ala. 380. CAL.—People v. Vice, 21 Cal. 344; People v. Clark, 106 Cal. 32, 39 Pac. 53. KAN.—State v. Adams, 58 Kan. 365, 49 Pac. 81. MASS.—Com. v. Clifford, 62 Mass. (8 Cush.) 215. NEV.—State v. Ah Loi, 5 Nev. 99; State v. Nelson, 11 Nev. 334. N. Y.—Brooks v. People, 49 N. Y. 436, 10 Am. Rep. 398, 1 Cow. Cr. Rep. 503. TEX.—Barnes v. State, 9 Tex. App. 128.

Robbery from stage coach, property actually belonging to an express company may be described as belonging to the driver of the stage, upon whom the robbery was committed.—State v. Nelson, 11 Nev. 334.

Under Missouri statute, defining a robbery in the first degree as taking the property of another from his person or in his presence or against his will by violence, etc., an indictment alleging B to be the owner of the property, and that it was taken in the presence of and against the will of C, is

gation as to ownership will not render the indictment or information defective,[10] so long as it shows that the ownership or rightful possession of the property was in some person other than the accused.[11] Thus, where a person is robbed of funds belonging to a partnership of which he is a member, an indictment or information which lays the ownership of the property in the partner from whom the property was taken will not be defective.[12]

§ 1212. TAKING AND ASPORTATION—IN GENERAL. As in the crime of larceny,[1] (1) the taking and (2) the asportation of the property are essential elements to the crime of robbery.[2] These must both be made to appear from the face of the indictment or information, although it is not necessary to allege them in terms, where the allegations are otherwise sufficient to show these facts without a specific allegation; but the proof must show both a taking[3] and an asportation,[4] or the prosecution will fail.

bad.—State v. Lawler, 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 797.

10 People v. Anderson, 80 Cal. 205, 22 Pac. 139; State v. Carr, 43 Iowa 418.

11 People v. Vice, 21 Cal. 344; Smedly v. State, 30 Tex. 214; Barnes v. State, 9 Tex. App. 128.

12 State v. Lamb, 141 Mo. 298, 42 S. W. 827.

1 See, supra, §§ 813 et seq.

2 Com. v. Clifford, 62 Mass. (8 Cush.) 215; State v. Love, 19 N. C. (2 Dev. & B. L.) 267; State v. John, 50 N. C. (5 Jones L.) 163, 69 Am. Dec. 177; State v. Curtis, 71 N. C. 56; Jordan v. Com., 66 Va. (25 Gratt.) 943; R. v. Farrell, 1 Leach C. C. 322.

3 **Taking for any length of time,** however short, has been said to be sufficient.—People v. Campbell, 234 Ill. 391, 123 Am. St. Rep. 107, 17 Ann. Cas. 186, 84 N. E. 1035.

Falling to ground, during the assault and resultant struggle, of the property sought to be taken by the would-be robber, if the latter fails to pick up the property, there will be no taking.—3 Co. Inst. 69; 1 Hale P. C. 533.

—Applying this principle, it has been held that where the victim, on command of the would-be robber, drops to the ground the property sought to be taken, and the accused does not pick it up, there is no taking, and consequently no robbery.—R. v. Farrell, 1 Leach C. C. 322.

4 **However short the distance of removal,** such removal constitutes such an asportation and constitutes the act of robbery. Thus, where a would-be thief snatched an ear-ring from the ear of a woman, tearing the lobe of the ear, and carrying it as far as a lock of her hair, where it became entangled and his hold on it re-

It is not necessary to allege that the accused "stole the property," it being sufficient to allege that he feloniously did take and carry away;[5] and there need be no charge of "carrying away," where it is alleged that the property was taken from the prosecutor,[6] although there is authority to the contrary.[7]

§ 1213. —— THROUGH FORCE OR VIOLENCE. A taking (1) by force or violence, or (2) through putting in fear,[1] is the very gist of the offense of robbery, and an indictment or information charging that offense must allege that the taking was (1) by force or violence, or (2) by means of putting in fear,[2] and such force and violence or

leased, the ornament lodging in the hair, this was held to constitute asportation and the act robbery.—R. v. Lopier, 1 Leach C. C. 320.

Picking up article dropped by owner and refusal to surrender it to owner, whereupon a struggle ensues for the possession, resulting in accused keeping and carrying away the article, this constitutes a forcible taking and asportation, and makes the act robbery. —State v. Trexler, 4 N. C. (2 Car. L. Rep.) 90, 6 Am. Dec. 558.

5 State v. Brown, 113 N. C. 645, 9 Am. Cr. Rep. 310, 18 S. E. 51.

6 CAL. — People v. Walbridge, 123 Cal. 273, 55 Pac. 902. IND.—Terry v. State, 13 Ind. 70. PA.—Acker v. Com., 94 Pa. St. 284. TEX.—Thompson v. State, 35 Tex. Cr. Rep. 511, 34 S. W. 629. WASH.—State v. Smith, 40 Wash. 615, 5 Ann. Cas. 686, 82 Pac. 918.

7 Com. v. Clifford, 62 Mass. (8 Cush.) 215.

1 See, infra, § 1215.

2 ARK.—Young v. State, 50 Ark. 501, 8 S. W. 828. GA.—Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628. ILL.—Collins v. People, 39 Ill. 233; People v. Nolan, 250 Ill. 351, Ann. Cas. 1912B, 401, 34 L. R. A. (N. S.) 301, 95 N. E. 140. IND.—Brennon v. State, 25 Ind. 403; Craig v. State, 157 Ind. 574, 62 N. E. 5. IOWA—State v. Brewer, 53 Iowa 735, 6 N. W. 62. LA.—State v. Cook, 20 La. Ann. 145. ME.—State v. Perley, 86 Me. 427, 41 Am. St. Rep. 564, 9 Am. Cr. Rep. 504, 30 Atl. 74. MASS. — Com. v. Humphries, 7 Mass. 242. MISS.—State v. Presley, 91 Miss. 377, 44 So. 827. MO.—State v. Montgomery, 109 Mo. 645, 32 Am. St. Rep. 684, 19 S. W. 221; State v. Calvert, 209 Mo. 280, 107 S. W. 1078. MONT. — State v. Bloor, 20 Mont. 574, 52 Pac. 611; State v. Gill, 21 Mont. 151, 53 Pac. 184. N. C.—State v. Cowan, 29 N. C. (7 Ired. L.) 239; State v. Brown, 113 N. C. 645, 9 Am. Cr. Rep. 310, 18 S. E. 51. ORE.—State v. Lawrence, 20 Ore. 236. TENN. — McTigue v. State, 63 Tenn. (4 Baxt.) 313. TEX.—Trimble v. State, 16 Tex. App. 115; Wiley v. State, 43 S. W. 995. UTAH—State v. Davis, 28 Utah

putting in fear must be for the purpose of obtaining possession of the property, and not for the purpose of being able to get away with it;[3] but the degree of force need not be stated,[4] and neither need the means by which the victim was put in fear be alleged.[5] Force or violence and putting in fear[6] are alternative methods by which the crime of robbery may be committed,[7] and it is not essential that both methods be set out in the indictment or information,[8] although it is not duplicitous to charge in

10, 76 Pac. 705; followed in State v. Waldron, 28 Utah 14, 76 Pac. 1135. WIS.—Gilloti v. State, 135 Wis. 634, 116 N. W. 252.

3 Jackson v. State, 114 Ga. 826, 88 Am. St. Rep. 60, 40 S. E. 1001; State v. Fallon, 2 N. D. 510, 52 N. W. 381; R. v. Harman, 2 East P. C. 736 (where accused picked pocket of victim by stealth, and on demand of property back, menaced victim, and went away).

Employed as means of escape, force or violence, or the putting in fear, will not constitute the offense of robbery.—State v. Fallon, 2 N. D. 510, 52 N. W. 318.

4 State v. Paisley, 36 Mont. 237, 92 Pac. 566.

Use of such force only as is necessary to take the money without resistance by the victim, is insufficient to constitute robbery. —State v. Paisley, 36 Mont. 237, 92 Pac. 566.

See discussion and authorities, infra, § 1214.

5 State v. Moore, 203 Mo. 624, 102 S. W. 537.

6 **As to robbery by putting in fear,** see, infra, § 1215.

7 Henderson v. State, 1 Ala. App. 154, 55 So. 816; Pendy v. State, 34 Tex. Cr. Rep. 643, 31 S. W. 647.

8 ALA. — Chappell v. State, 52 Ala. 359. ARK.—Clary v. State, 33 Ark. 561; Young v. State, 50 Ark. 501, 8 S. W. 828; Traver v. State, 72 Ark. 524, 81 S. W. 615. CAL.—People v. Howard, 3 Cal. App. 36, 84 Pac. 462. IOWA — State v. Brewer, 53 Iowa 735, 6 N. W. 62. KY.—Blanton v. Com., 22 Ky. L. Rep. 515, 58 S. W. 422. LA.—State v. Durbin, 20 La. Ann. 408; State v. Patterson, 42 La. Ann. 934, 8 So. 529. MASS.—Com. v. Humphries, 7 Mass. 242. MINN. — State v. O'Neil, 71 Minn. 399, 73 N. W. 1091. MISS. — Cunningham v. State, 28 So. 750. MO.—State v. Stinson, 124 Mo. 447, 27 S. W. 1098; State v. Lawler, 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 979. MONT.—State v. Clancy, 20 Mont. 498, 52 Pac. 267; State v. Paisley, 36 Mont. 237, 92 Pac. 566. N. C.—State v. Cowan, 29 N. C. (7 Ired. L.) 239. TENN.—Hammond v. State, 43 Tenn. (3 Coldw.) 129. TEX.—Burns v. State, 70 S. W. 24. UTAH—State v. Davis, 28 Utah 10, 76 Pac. 705. ENG.—R. v. Pelfryman, 2 Leach C. C. 563.

Force is alleged, fear need not be alleged.—Young v. State, 50 Ark. 501, 8 S. W. 828; Com. v. Humphries, 7 Mass. 242.

Texas rule under the code requires that the taking shall be by assault, or by violence and

one count that the robbery was committed by force and violence and by putting in fear;[9] in fact, the better practice is thought to be to allege by force and violence and putting in fear.[10] The fact of force and violence, or the fact of putting in fear, must be specifically charged;[11] and where not so charged in terms, the use of the words "with force and arms" will not supply the defect, because this phrase does not sufficiently set out the essential elements of force, either actual or constructive.[12] It is usual to charge that the act complained of was "violently" done;[13] in some states the word is held to be indispensable;[14] and where the statute under which the indictment or information is drawn uses the word "forcibly" in describing the manner in which the act must be done to constitute robbery, the use of the word "violently" will be sufficient,[15]—although the careful

putting in fear of life and bodily injury. — Williams v. State, 12 Tex. App. 240; Kimble v. State, 12 Tex. App. 420.

9 As to duplicity, see, infra, § 1221.

10 CAL. — People v. Riley, 75 Cal. 98, 7 Am. Cr. Rep. 60, 16 Pac. 544. ILL.—Collins v. People, 39 Ill. 233. LA.—State v. Cook, 20 La. Ann. 145. TENN. — Kit v. State, 30 Tenn. (11 Humph.) 167. TEX. — Parker v. State, 9 Tex. App. 351. ENG.—R. v. Jones, 1 Leach C. C. 139; R. v. Donnally, 2 East P. C. 715, 1 Leach C. C. 193; R. v. Heckman, 1 Leach C. C. 278; McDaniel's Case, 1 Fost. 121, 128.

11 Charging accused made an assault "and did then and there, fraudulently and without the consent of the said W, take from the person and possession of him" certain designated personal property, sufficiently charges, in connection with the assault, force and violence in the taking of the property. — Wiley v. State, (Tex. Cr.) 43 S. W. 995.

12 Com. v. Mills, 3 Pa. Sup. Ct. Rep. 161.

13 State v. Brewer, 53 Iowa 735, 6 N. W. 62; State v. Kegan, 62 Iowa 106, 17 N. W. Rep. 179; Com. v. Mowry, 93 Mass. (11 Allen) 20; State v. Brown, 113 N. C. 645.

14 State v. Durbin, 20 La. Ann. 408.

15 IOWA—State v. Brewer, 53 Iowa 735, 6 N. W. 62; State v. Kegan, 62 Iowa 106, 17 N. W. 179. MASS.—Com. v. Mowry, 93 Mass. (11 Allen) 20. N. C. — State v. Brown, 113 N. C. 645, 9 Am. Cr. Rep. 310, 18 S. E. 51. TENN.—McTigue v. State, 63 Tenn. (4 Baxt.) 313. ENG.—Smith's Case, 2 East P. C. 784; Lennox's Case, 2 Lew. C. C. 268.

Louisiana rule requires the use

pleader will use the statutory phrase,—because the word "violently" means "with force" or "forcibly,"[16] although there are cases holding that "violently" is not the equivalent of the statutory term "by force."[17]

§ 1214. ——— BY SNATCHING, AS FORCE OR VIOLENCE. The general rule is that the mere snatching or otherwise taking an article from the hand, or from the person, of another, without any struggle or resistance by such other, or any further force and violence on the part of the accused than the simple act of thus taking, does not constitute such force and violence as to render the act of taking robbery;[1] although it has been said that thus snatching an article requires some degree of force and violence, and the victim may not have resisted because he was put in some fear, and both may be present in sufficient quanti-

of the word "violently."—State v. Durbin, 20 La. Ann. 408.

16 See State v. Williams, 32 La. Ann. 335, 33 Am. Rep. 272; Walling v. State, 7 Tex. App. 625.

17 State v. Blake, 39 Me. 322.

1 ALA. — Jackson v. State, 69 Ala. 249. ARK.—Routt v. State, 61 Ark. 594, 34 S. W. 262. GA.—Fanning v. State, 66 Ga. 167; Doyle v. State, 77 Ga. 513; Jackson v. State, 114 Ga. 826, 88 Am. St. Rep. 60, 40 S. E. 1001. IND.—Bonsall v. State, 35 Ind. 460; Shinn v. State, 64 Ind. 13, 31 Am. Rep. 110. MASS.—Com. v. Ordway, 66 Mass. (12 Cush.) 270. MONT.—State v. Paisley, 36 Mont. 237, 92 Pac. 566. N. Y.—People v. McGinty, 24 Hun 62; In re Anderson, 1 City Hall Rec. 163; McCloskey v. People, 5 Park. Cr. Rep. 299; People v. Hall, 6 Park. Cr. Rep. 642. N. C.—State v. Trexler, 4 N. C. (2 Car. L. Rep.) 90, 6 Am. Dec. 558. TEX.—Wilson v. State, 3 Tex. App. 63. VA.—Johnson v. Com., 65 Va. (24 Gratt.) 555. FED. — United States v. Simms, 4 Cr. 618, Fed. Cas. No. 16290. ENG.—R. v. Walls, 2 Car. & K. 214, 61 Eng. C. L. 214; R. v. Gonsil, 1 Car. & P. 304, 12 Eng. C. L. 182; Danby's Case, 2 East P. C. 702; R. v. Steward, 2 East P. C. 702; Chick's Case, 2 East P. C. 703; R. v. Baker, 2 East P. C. 703, 1 Leach C. C. 290; R. v. Horner, 2 East P. C. 703; R. v. Grey, 2 East P. C. 708; R. v. McCauley, 1 Leach C. C. 287; R. v. Robin, 1 Leach C. C. 290, note.

Snatching up a revolver, lying in close proximity to the owner, then pointing it at the owner and wife to deter them from attempting to recover it or give pursuit, does not constitute robbery.—Jackson v. State, 114 Ga. 826, 83 Am. St. Rep. 60, 40 S. E. 1001.

Under statute, in some cases, the rule is different. See State v. Carr, 43 Iowa 418.

ties to warrant a conviction of robbery.[2] Where property is taken, without resistance, from a person who is in such a state of helpless intoxication as to be incapable of resistance and so stupefied as not to be conscious of the taking, it has been held the taking does not constitute robbery.[3] In all those cases in which the property is so attached to the person or his clothing as to offer resistance, and to require some degree of force and violence to detach it, the rule is that the snatching and breaking away of such property constitutes robbery.[4] Thus, where a purse is attached to the victim's finger with a steel chain, requiring such violence in the snatching away as to break the chain and injure the finger, the act constitutes robbery;[5] so is snatching a diamond pin from the head-dress of a woman, with such force as to pull out some of the hair with the pin;[6] or snatching an ear-ring from a woman's ear, with such force as to tear the lobe of the ear and cause it to bleed;[7] or snatching a watch-chain, with such force as to break it away from the watch, and tear out the buttonhole of the waistcoat,[8] or to break a steel chain attached to it and worn around the victim's neck,[9] or to break a

2 Jones v. Com., 112 Ky. 689, 99 Am. St. Rep. 330, 57 L. R. A. 432, 66 S. W. 633.

3 Hall v. People, 171 Ill. 540, 49 N. E. 495; Brennon v. State, 25 Ind. 403.

4 GA.—Smith v. State, 117 Ga. 321, 37 Am. St. Rep. 165, 43 S. E. 736. ILL.—Klein v. People, 113 Ill. 596. KY.—Stockton v. Com., 125 Ky. 271, 101 S. W. 298 (snatching bill held out to third person to be changed); Brown v. Com., 135 Ky. 640, 135 Am. St. Rep. 471, 117 S. W. 281 (snatching money from hand). MO.—State v. Broderick, 59 Mo. 318. N. Y.—People v. Hall, 6 Park. Cr. Rep. 642. R. I.—State v. McCune, 5 R. I. 60, 70 Am. Dec. 176. FED.—United States v. Simms, 4 Cr. 618, Fed. Cas. No. 16290. ENG.—R. v. Gonsil, 1 Car. & P. 304, 12 Eng. C. L. 182; R. v. Lapier, 2 East P. C. 557; R. v. Moore, 1 Leach C. C. 335; R. v. Samson, 29 Eng. L. & Eq. 530; R. v. Mason, 1 Russ. & R. 419.

5 Smith v. State, 117 Ga. 321, 97 Am. St. Rep. 165, 43 S. E. 736.

6 R. v. Moore, 1 Leach C. C. 335.

7 R. v. Lapier, 1 Leach C. C. 320.

8 State v. Broderick, 59 Mo. 318.

9 R. v. Mason, 1 Leach C. C. 418, 1 Russ. & R. 419.

ribbon watch-guard,[10]—although a contrary view is held in an early case in a federal court.[11]

§ 1215. —— THROUGH PUTTING IN FEAR. We have already seen that taking his property from the person or in his presence by putting in fear is the alternative method of robbery.[1] This latter method has been said to be a sort of constructive violence, supplying the place of actual force.[2] The pleading must be sufficient to show the fact that the act complained of was accomplished by means of putting the victim in fear of injury (1) to his person,[3] (2) to his property,[4] or (3) to his character,[5] otherwise it will be insufficient.[6] Fear, like force or vio-

10 State v. McCane, 5 R. I. 60, 70 **Am. Dec.** 176.

11 United States v. Simms, 4 Cr. 618, Fed. Cas. No. 16290.

1 See, supra, § 1213, footnote 7.

2 2 East P. C. 783. GA.—Lampkin v. State, 87 Ga. 516, 13 S. E. 523. MASS.—Com. v. Donahue, 148 Mass. 529, 12 **Am. St. Rep.** 591, 2 **L. R. A.** 623, 20 N. E. 171. N. C.—State v. Brown, 113 N. C. 645, 9 **Am. Cr. Rep.** 310, 18 S. E. 51. TEX.—Dill v. State, 6 Tex. App. 113; Coffelt v. State, 27 Tex. App. 608, 11 **Am. St. Rep.** 205, 11 S. W. 639.

3 **Fear of personal violence although victim did not know at time of the taking.**—Com. v. Snelling, 2 Binn. (Pa.) 379.

Dangerous weapon used in the assault.—People v. Du Veau, 105 App. Div. (N. Y.) 381, 19 N. Y. Cr. Rep. 268, 94 N. Y. Supp. 225.

As to form of indictment for robbery armed with a dangerous weapon, see Forms Nos. 1954-1959.

4 **Fear of loss of property.** See Paco v. Com., 16 Ky. L. Rep. 476, 29 S. W. 16; State v. Nicholson, 124 N. C. 820, 32 S. E. 813; R. v. Spencer, 2 East P. C. 712; R. v. Simons, 2 East P. C. 712, 731.

Fear of mob violence. See In re Ezeta, 62 Fed. 992; R. v. Winkworth, 4 Car. & P. 444, 19 Eng. C. L. 594; R. v. Simons, 2 East P. C. 712, 731; R. v. Spencer, 2 East P. C. 712; R. v. Taplin, 2 East P. C. 712; R. v. Astley, 2 East P. C. 729; R. v. Brown, 2 East P. C. 731.

5 **Fear of injury to character.** See Long v. State, 12 Ga. 293; People v. McDaniels, 1 Park. Cr. Rep. (N. Y.) 198; Britt v. State, 26 Tenn. (7 Humph.) 45; R. v. Harrold, 2 East P. C. 713; R. v. Jones, 2 East P. C. 714, 1 Leach C. C. 139; R. v. Donnally, 2 East P. C. 715, 1 Leach C. C. 193; R. v. Reane, 2 East P. C. 734, 2 Leach C. C. 619; R. v. Hickman, 1 Leach C. C. 278; R. v. Stringer, 2 Moo. C. C. 261; R. v. Cannon, 1 Russ. & R. 146; R. v. Egerton, 1 Russ. & R. 375; R. v. Fuller, 1 Russ. & R. 408; R. v. Chracknell, 10 Cox C. C. 408; R. v. Richards, 11 Cox C. C. 43.

6 Long v. State, 12 Ga. 293; R. v. Reane, 2 Leach C. C. 619.

lence,[7] must precede the taking and be present and immediate to the victim at the time of the act of the taking;[8] but the fear may be continuing, so that it is not necessary that the property be delivered at the time, but may be delivered or surrendered afterward, while the fear or apprehension of injury still continues.[9] It must be charged that the person put in fear was the person robbed.[10]

Kind of fear in which the person was put need not be alleged,[11] nor need it be alleged whether the force or threat producing the fear was directed against the person, the property, or the character of the victim,[12] in the absence of statutory provision to the contrary.[13] It is not necessary to allege that the putting in fear was "feloniously" done, where it is charged that the assault was feloniously made.[14]

7 See, supra, § 1213, footnote 3.

8 Clary v. State, 33 Ark. 361; State v. Jenkins, 36 Mo. 372; R. v. Grey, 2 East P. C. 708; R. v. Harman, 2 East P. C. 736.

9 Long v. State, 12 Ga. 293.

10 Trimble v. State, 16 Tex. App. 115. See R. v. Edwards, 5 Car. & P. 518, 24 Eng. C. L. 685, 1 Moo. & R. 257.

11 State v. Clancy, 20 Mont. 498, 52 Pac. 267; State v. Paisley, 36 Mont. 237, 92 Pac. 566; State v. Sanders, 14 N. D. 203, 13 N. W. 419.

12 State v. O'Neil, 71 Minn. 399, 73 N. W. 1091; State v. Clancy, 20 Mont. 498, 52 Pac. 267; State v. Gill, 21 Mont. 151, 53 Pac. 184.

13 **In Mississippi**, the indictment or information must allege immediate danger to the person.—Webb v. State, 99 Miss. 545, 55 So. 356.

In Missouri, to charge robbery in the first degree, under the statute, the indictment or information must allege that the fear was of immediate personal injury; it is not sufficient to charge merely putting "in bodily fear."—State v. Howerton, 59 Mo. 91; State v. Smith, 119 Mo. 439, 24 S. W. 1000.

In Oklahoma, an indictment or information charging robbery in the first degree, under the statute, must allege that the fear was of immediate personal injury, and must by its allegations show the danger of the impending injury.—Slover v. Territory, 5 Okla. 506, 49 Pac. 1009.

In Texas, the indictment or information must allege that the person assaulted and put in fear of his life and bodily harm was the party robbed.—Trimble v. State, 16 Tex. App. 115.

14 State v. Brown, 104 Mo. 365, 16 S. W. 406.

§ 1216. —— TAKING FROM PERSON OR PRESENCE. It is of the gist of the offense of robbery that the property shall be taken, not only by force or violence,[1] or through putting in fear,[2] but also that it be taken (1) from the person, or (2) from the presence of the victim; and an indictment or information charging robbery, to be sufficient, must allege that the property was taken either from the person or from the presence of a party other than the accused.[3] Merely alleging that the property was taken "from another person" is insufficient.[4] Charging that accused took property in the presence of a person named, is equivalent to an averment that he took it from such person;[5] consequently a charge of a taking in the presence constitutes a charge, constructively, that accused took the property from the person of the victim; but the indictment or information must show that the owner, or the person from whose presence the property

1 See, supra, §§ 1213, 1214.

2 See, supra, § 1215.

3 ALA.—Henderson v. State, 172 Ala. 415, 55 So. 816; Henderson v. State, 1 Ala. App. 154, 55 So. 816. CAL.—People v. Beck, 21 Cal. 385; People v. Ah Sing, 95 Cal. 654, 30 Pac. 796; People v. Ho Sing, 6 Cal. App. 752, 93 Pac. 204. GA.—Stegar v. State, 39 Ga. 583, 99 Am. Dec. 472. IND.—Seymour v. State, 15 Ind. 288. IOWA—State v. Leighton, 56 Iowa 595, 9 N. W. 896; State v. Kegan, 62 Iowa 106, 17 N. W. 179. KY.—Breckenridge v. Com., 97 Ky. 267, 30 S. W. 634. MISS.—Smith v. State, 82 Miss. 793, 35 So. 178. MO.—State v. Lawler, 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 797. NEB.—Stevens v. State, 19 Neb. 647, 28 N. W. 304. ORE.—State v. Lawrence, 20 Ore. 236, 25 Pac. 638. TENN.—Kit v. State, 30 Tenn. (11 Humph.) 167. TEX.—Smith v. State, 37 Tex. Cr. Rep. 342, 39 S. W. 933. UTAH—People v. Kerm, 8 Utah 268, 30 Pac. 988. ENG.—R. v. Smith, 1 East P. C. 783; R. v. Philpoe, 2 East P. C. 599, 2 Leach C. C. 673; R. v. Donnally, 2 East P. C. 715, 1 Leach C. C. 193; R. v. Rogan, 1 Jebb. C. C. 62.

Charging assault upon watchman in order to steal money in safe he was guarding, charges robbery. — O'Donnell v. People, 224 Ill. 225, 79 N. E. 642.

4 People v. Beck, 21 Cal. 385; State v. Leighton, 56 Iowa 595, 9 N. W. 896.

5 ALA.—Croker v. State, 47 Ala. 53; James v. State, 53 Ala. 380. ARK.—Clary v. State, 33 Ark. 561. CAL.—People v. Ah Sing, 95 Cal. 654, 30 Pac. 796. MO.—State v. Lamb, 141 Mo. 298, 42 S. W. 827. UTAH—People v. Kerm, 8 Utah 268, 30 Pac. 988.

was taken, was actually present at the time.[6] Thus, an allegation that the property was taken by the accused "from the wagon" of the prosecutor, is insufficient,[7] because it fails to show that the prosecutor was present at the time of the taking. A charge of taking either "from the person," or "from the presence," will sufficiently charge a robbery; and a charge that the property was taken both from the person and from the presence of the owner will not be duplicitous.[8]

§ 1217. —— TAKING WITHOUT CONSENT AND AGAINST WILL. Another essential element in the crime of robbery is that the property shall be taken without the consent and against the will of the person assaulted; and it is usual to expressly allege that the taking was against the will of the person robbed; yet, this is not necessary, it being sufficient for the indictment or information to allege that the act complained of was accomplished by force and violence, or through putting in fear, without a specific allegation that the taking was against the will of the victim,[1] although the contrary has been held;[2]

6 ALA. — Croker v. State, 47 Ala. 53; James v. State, 53 Ala. 380. ARK.—Clary v. State, 33 Ark. 561. MO. — State v. Jenkins, 36 Mo. 372. N. Y.—Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460. OHIO—Turner v. State, 1 Ohio St. 422. TENN.—Hammond v. State, 43 Tenn. (3 Coldw.) 129; Crews v. State, 43 Tenn. (3 Coldw.) 350. FED.—United States v. Jones, 3 Wash. 209, Fed. Cas. No. 15494. ENG.—R. v. Francis, 2 Str. 1015, 93 Eng. Repr. 1004.

7 Henderson v. State, 172 Ala. 415, 55 So. 816.

8 See, infra, § 1221.

1 ALA. — Chappell v. State, 52 Ala. 359. CAL.—People v. Shuler, 28 Cal. 490; People v. Riley, 75 Cal. 98, 7 Am. Cr. Rep. 600, 16 Pac. 544. IND.—Terry v. State, 13 Ind. 70; Anderson v. State, 28 Ind. 22. IOWA—State v. Kegan, 62 Iowa 106, 17 N. W. 179. LA.—State v. Patterson, 42 La. Ann. 934, 8 So. 529; State v. Wilson, 136 La. 345, 67 So. 26. MISS.—State v. Presley, 91 Miss. 377, 44 So. 827. MO. — State v. Carroll, 214 Mo. 392, 21 L. R. A. (N. S.) 311, 113 S. W. 1051. PA.—Acker v. Com., 94 Pa. St. 284. TENN. — Kit v. State, 30 Tenn. (11 Humph.) 167. TEX.—Chancey v. State, 58 Tex. Cr. Rep. 54, 124 S. W. 426. UTAH — State v. La Chall, 28 Utah 80, 77 Pac. 3.

2 Kit v. State, 30 Tenn. (11 Humph.) 167.

neither is it necessary to negative the consent of the victim to the taking of the property.[3]

§ 1218. ATTEMPTS, AND ASSAULTS, TO COMMIT ROBBERY. An indictment charging an attempt to commit the crime of robbery by attempting to take by force a designated sum of money from a specified person, in the latter's presence, and from his person, by violence to his person and by putting him in fear of some immediate injury to his person, is a sufficient charge of an attempt to rob;[1] but it has been said that an allegation that accused put A "in fear of immediate injury," instead of "in fear of immediate injury to his person," is insufficient to charge an attempt at robbery.[2] Charging that accused attempted to rob a named person, of a designated sum of money and one pocket-book, of a stated value, lawful currency of the United States, of the goods and chattels of the person named, by thrusting his hand into the pocket of such person, has been held sufficient to charge an attempt at robbery under the Louisiana statute,[3] but such an assault is usually regarded as merely an attempt to pick the pocket and is treated as an attempt at larceny,[4] or stealing from the person.[5]

§ 1219. JOINDER OF DEFENDANTS. Where two or more persons are concerned in a single robbery, they may be jointly indicted charged with the commission of the offense,[1] without charging a conspiracy to commit the crime;[2] neither is it necessary to expressly aver that they all acted together in the commission of the act complained of, all being charged as principals.[3]

3 People v. Shuler, 28 Cal. 490.

1 State v. Montgomery, 109 Mo. 645, 32 Am. St. Rep. 684, 19 S. W. 231.

2 State v. Smith, 119 Mo. 439, 24 S. W. 1000.

3 State v. Curtin, 111 La. 129, 35 So. 485.

4 See, supra, § 823.

5 See, supra, § 883.

1 Bell v. State, 1 Tex. App. 598.

2 Id.

3 Id.

§ 1220. JOINDER OF COUNTS AND OF OFFENSES. A sufficient indictment or information charging robbery necessarily charges also the crime of larceny, or larceny from the person,[1] and in one count the indictment or information may accurately and sufficiently describe both the offense of robbery and the offense of larceny, or of larceny from the person, and where this is done, a conviction may be had of either offense, as the evidence on the trial may justify.[2] In those cases where the indictment or information is insufficient to charge robbery, and larceny from the person is sufficiently described, the insufficient description as to the robbery may be rejected as surplusage, and the indictment held to charge larceny.[3]

Joinder of counts is permissible in an indictment or information for robbery where the offenses charged all belong to the same family of crimes. Thus, with a count charging robbery there may be joined a count charging larceny,[4] or a count charging stealing from the person,[5] —although the contrary has been held,[6]—instead of charging these latter offenses in the count charging robbery, which is permissible, as we have seen above.

Joinder of offenses is not permissible where those offenses do not belong to the same family of crimes. Thus, with a count charging robbery there can not be joined a count charging assault and battery,[7] nor a count charging assault to murder,[8] nor a count charging swindling,[9] and the like.

1 See, supra, § 883.

2 ARK.—Haley v. State, 49 Ark. 147, 4 S. W. 746. GA.—Brown v. State, 90 Ga. 454, 16 S. E. 204. ILL.—Burke v. People, 148 Ill. 70, 35 N. E. 376. LA.—State v. Devine, 51 La. Ann. 1296, 26 So. 105. MICH.—People v. Calvin, 60 Mich. 113, 26 N. W. 851. MO.—State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643; State v. Pitts, 57 Mo. 85; State v. Kneeland, 90 Mo. 337, 2 S. W. 442. NEB.—Brown v. State, 33 Neb. 354, 50 N. W. 154.

3 People v. Calvin, 60 Mich. 113, 26 N. W. 851.

4 Damewood v. State, 2 Miss. (1 How.) 262.

5 McTigue v. State, 63 Tenn. (4 Baxt.) 313.

6 Doyle v. State, 77 Ga. 513.

7 Davis v. State, 57 Ga. 66.

8 State v. Osborne, 96 Iowa 281, 65 N. W. 159.

9 Doyle v. State, 77 Ga. 513.

§ 1221. DUPLICITY. In accordance with the general rule of criminal pleading, which provides that when, under the statute, an offense may be committed by several methods, the indictment or information may charge that it was committed by any or all such different methods as are not inconsistent with, or repugnant to, each other,[1] an indictment or information which charges robbery "by force" and also "by putting in fear," is not bad for duplicity, there being but one offense charged;[2] and charging that accused took the property "from the person" and "in the presence" of the victim, is not bad for duplicity on the ground that it charges two offenses.[3]

1 State v. Montgomery, 109 Mo. 645, 32 Am. St. Rep. 684, 19 S. W. 231, citing: State v. Fitzsimmons, 30 Mo. 236; State v. Murphy, 47 Mo. 274; State v. Fancher, 71 Mo. 460; State v. Pittman, 76 Mo. 56; State v. Bregard, 76 Mo. 322.

2 Long v. State, 12 Ga. 293.

3 Croker v. State, 47 Ala. 53; State v. Montgomery, 109 Mo. 645, 32 Am. St. Rep. 684, 19 S. W. 231.

CHAPTER LXXVII.

INDICTMENT—SPECIFIC CRIMES.

Seduction.

§ 1222. Requisites and sufficiency of indictment—In general.
§ 1223. —— Following language of statute.
§ 1224. —— Allegations as to time and place.
§ 1225. —— Allegations as to accused.
§ 1226. —— Allegations as to person seduced.
§ 1227. —— Allegations as to age.
§ 1228. —— Allegations as to marriage.
§ 1229. —— Allegations as to previous chastity.
§ 1230. Means and acts of seduction—In general.
§ 1231. —— Under promise of marriage.
§ 1232. Defilement of female under care, control, or in employment.
§ 1233. Joinder of counts and offenses—Election.

§ 1222. Requisites and sufficiency of indictment[1]—In general. The crime of seduction was unknown to the common law;[2] it is purely of statutory creation in the various jurisdictions, and the requisites and sufficiency of an indictment or information charging the offense are governed entirely by the provisions of the statute in the jurisdiction in which the prosecution is had. Every element necessary to constitute the offense under the statute must be clearly alleged in the indictment or information[3] and proved on the trial,[4] except as to those things

1 As to forms of indictment for seduction, see Forms Nos. 684, 1967-1981.

2 See Caldwell v. State, 73 Ark. 139, 108 Am. St. Rep. 28, 83 S. W. 922.

3 ARK.—Wright v. State, 62 Ark. 145, 34 S. W. 545; Walton v. State, 71 Ark. 398, 75 S. W. 1. CAL.—People v. Roderigas, 49 Cal. 9. GA.—Langston v. State, 109 Ga. 153, 35 S. E. 166. MINN.—State v. Gates, 27 Minn. 52, 6 N. W. 404. PA.—Com. v. Schull, 1 Pa. Co. Ct. Rep. 52.

4 Butts v. State, (Okla. Cr.) 157

which are necessarily implied from the facts stated,[5] and where all these elements are alleged the indictment or information will be sufficient.[6] The use of the statutory word "seduce" is a sufficient description of the act complained of,[7] even though the statute may use such other and further words as "seduce and debauch,"[8] or "seduce and commit fornication,"[9] for the reason that the word "seduce," ex vi termini, implies the act of debauching or the offense of fornication;[10] but no other word will take the place of "seduce" or "seduction."[11] Mere matters of defense are not required to be negatived.[12]

Corroboration of prosecutrix required by statute before an indictment can be found, by provision of statute, where an indictment or information is returned upon the uncorroborated testimony of the prosecutrix will be insufficient, and will be quashed on motion.[13]

§ 1223. —— Following language of statute. An indictment or information charging seduction which follows the language of the statute,[1] or substantially the

Pac. 704; State v. Holter, 32 S. D. 43, 46 L. R. A. (N. S.) 376, 142 S. W. 657, reversing 30 S. D. 353, 138 N. W. 953.

5 Moore v. State, 65 Ind. 213; State v. Bryan, 34 Kan. 63, 7 Am. Cr. Rep. 604, 8 Pac. 260; Carlisle v. State, 73 Miss. 387, 19 So. 207.

6 Hinkle v. State, 157 Ind. 237, 61 N. E. 157; State v. Gates, 27 Minn. 52, 6 N. W. 404; State v. O'Keefe, 141 Mo. 271, 42 S. W. 725.

7 CAL.—People v. Higuera, 122 Cal. 466, 55 Pac. 252. CONN.—State v. Bierce, 27 Conn. 319. MINN.—State v. Abrisch, 41 Minn. 41, 42 N. W. 543. MISS.—Carlisle v. State, 73 Miss. 387, 19 So. 207.

8 State v. Curran, 51 Iowa 112, 3 Am. Cr. Rep. 405, 49 N. W. 1006.

9 State v. Bierce, 27 Conn. 319.

10 Id.

11 Com. v. Schull, 1 Pa. Co. Ct. Rep. 52.

12 Caldwell v. State, 73 Ark. 139, 108 Am. St. Rep. 28, 83 S. W. 929; Hoff v. State, 83 Miss. 488, 35 So. 950; State v. Turner, 82 S. C. 278, 64 S. E. 424.

13 Hart v. State, 117 Ala. 183, 23 So. 43.

1 ALA.—Wilson v. State, 73 Ala. 527. ARK.—Caldwell v. State, 73 Ark. 139, 108 Am. St. Rep. 28, 83 S. W. 929. CAL.—People v. Higuera, 122 Cal. 466, 55 Pac. 252. CONN.—State v. Bierce, 27 Conn. 319. IND. TER.—Kerr v. United States, 7 Ind. Ter. 486, 104 S. W. 809. IOWA—State v. Curran, 51 Iowa 112, 3 Am. Cr. Rep. 405, 49 N. W. 1006; State v. Whalen, 98 Iowa 662, 68 N. W. 554. KAN.—State v. Bryan, 34 Kan. 63, 7 Am.

language of the statute,[2] will be sufficient,[3] where the facts constituting the alleged offense are sufficient to apprise the accused of the precise nature of the charge against him and the specific act complained of.[4] The use of words additional to those in the statute in the description of the means of accomplishing the act complained of, will not vitiate the indictment or information.[5]

Cr. Rep. 604, 8 Pac. 260. KY.—Cargill v. Com., 13 S. W. 916; Davis v. Com., 98 Ky. 708, 34 S. W. 699. MINN.—State v. Abrisch, 41 Minn. 41, 42 N. W. 543. MISS.—Carlisle v. State, 73 Miss. 387, 19 So. 207. MO.—State v. Primm, 98 Mo. 368, 11 S. W. 732. N. Y.—Crozier v. People, 1 Park. Cr. Rep. 453. TEX.—Luckie v. State, 33 Tex. Cr. Rep. 562, 28 S. W. 533.

"Unlawfully and feloniously did seduce, carnally know and debauch one L. E. H.," is sufficient, as being in the language of the statute.—State v. Curran, 51 Iowa 112, 3 Am. Cr. Rep. 405, 49 N. W. 1006.

2 ARK. — Cheaney v. State, 36 Ark. 74. IND.—State v. Stodgel, 13 Ind. 565; Stinehouse v. State, 47 Ind. 17; Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211. IOWA—State v. Hemm, 82 Iowa 609, 48 N. W. 971; State v. Olson, 108 Iowa 667, 77 N. W. 332. MO.—State v. Primm, 98 Mo. 368, 11 S. W. 732; State v. O'Keefe, 141 Mo. 271, 42 S. W. 725.

"Female" for "woman" will be immaterial. Thus, where the statute prohibits the seduction of an "unmarried woman," indictment or information charging "seducing Mary A., an unmarried female," is sufficient.—State v. Hemm, 82 Iowa 609, 48 N. W. 971.

"Person" of previous chaste character is sufficient compliance with statute specifying a "woman" of that character.—State v. Olson, 108 Iowa 667, 77 N. W. 332.

"Seduce" instead of the statutory words "seduce and commit fornication."—State v. Bierce, 27 Conn. 319.

See discussion, supra, § 1222.

3 ALA.—Wilson v. State, 73 Ala. 527. ARK.—Wright v. State, 62 Ark. 145, 34 S. W. 545; Caldwell v. State, 73 Ark. 139, 108 Am. St. Rep. 28, 83 S. W. 929. CAL.—People v. Fowler, 88 Cal. 136, 25 Pac. 1110; People v. Higuera, 122 Cal. 466, 55 Pac. 252. CONN.—State v. Bierce, 27 Conn. 319. IND. TER.—Kerr v. United States, 7 Ind. Terr. 486, 104 S. W. 804. IOWA—State v. Curran, 51 Iowa 112, 3 Am. Cr. Rep. 405, 49 N. W. 1006; State v. Whalen, 98 Iowa 662, 68 N. W. 554. KY.—Davis v. Com., 98 Ky. 708, 34 S. W. 699. MINN.—State v. Abrisch, 41 Minn. 41, 42 N. W. 543. MISS.—Carlisle v. State, 73 Miss. 387, 19 So. 207. MO.—State v. Primm, 98 Mo. 368, 11 S. W. 732.

4 State v. Doran, 99 Me. 329, 105 Am. St. Rep. 278, 59 Atl. 440.

5 See, infra, § 1231.

§ 1224. —— ALLEGATIONS AS TO TIME AND PLACE. An indictment or information charging accused with the offense of seduction should state the place where and the time when the act complained of was committed in order to show that it occurred within the time in which a prosecution may be maintained and at a place over which the court has jurisdiction.[1] But neither the place where[2] nor the time when the act occurred being of the essence of the offense as defined by the statute, an indictment or information will not be fatally defective which fails to state a certain place,[3] or to fix a definite date within the limit of the period of prosecution therefor.[4] But where a date is fixed as the nineteenth of a stated month, and prosecutrix, under cross-examination admits sexual intercourse with the accused as far back as the first of that month, evidence is inadmissible to show the actual seduction took place three months previous to the time alleged.[5]

Several different occasions may properly be alleged in the indictment or information as the occasion on which the seduction or sexual intercourse took place.[6]

§ 1225. —— ALLEGATIONS AS TO ACCUSED. In an indictment or information charging that accused "did entice,

1 People v. Gumaer, 80 Hun (N. Y.) 78, 9 N. Y. Cr. Rep. 258, 30 N. Y. Supp. 17; reversed on other grounds, 4 App. Div. 412, 11 N. Y. Cr. Rep. 305, 39 N. Y. Supp. 326.

2 Price v. State, 61 N. J. L. 500, 39 Atl. 709.

3 Id.; State v. Deitrick, 51 Iowa 467, 3 Am. St. Rep. 415, 1 N. W. 732; Carlisle v. State, 73 Miss. 387, 19 So. 207.

4 State v. Deitrick, 51 Iowa 467, 3 Am. Cr. Rep. 415, 1 N. W. 732; Carlisle v. State, 73 Miss. 387, 19 So. 207.

"On the ...... day of July, 1877," in indictment presented on January 9, 1879, held that an allegation of a date within the eighteen months' period of limitation was immaterial, since time was not a material ingredient of the offense.—State v. Deitrick, 51 Iowa 467, 3 Am. Cr. Rep. 415, 1 N. W. 732.

5 People v. Bressler, 131 Mich. 390, 91 N. W. 639.

6 Price v. State, 61 N. J. L. 500, 39 Atl. 709; Hausenfluck v. Com., 85 Va. 702, 8 S. E. 683.

seduce, and have sexual intercourse with" a named female necessarily implies that accused is a man, and a specific allegation of that fact is unnecessary;[1] neither need it be alleged whether the accused is a single or a married man,[2] but where his marriage is alleged, it must be proved.[3]

§ 1226. —— ALLEGATIONS AS TO PERSON SEDUCED. In a charge of seduction the female injured must be named;[1] but where the statute provides that where the criminal act is otherwise identified, an erroneous allegation as to the person injured is immaterial, an indictment or information giving the name of the woman injured as "Mary Ellen" and the evidence shows "Nellie" to have been the victim, the variance will not vitiate the instrument.[2]

§ 1227. —— ALLEGATIONS AS TO AGE. The general rule seems to be that an indictment or information charging seduction is not required to give the age of the accused,[1] or to allege the victim was under the statutory age,[2] or that she was of a sufficient age to contract marriage.[3] The fact that the seducer is under the age at which he

1 Carlisle v. State, 73 Miss. 387, 19 So. 207.

2 GA.—Jordan v. State, 120 Ga. 864, 48 S. E. 352. KAN.—State v. Bryan, 34 Kan. 63, 7 Am. Cr. Rep. 604, 8 Pac. 260. KY.—Davis v. Com., 98 Ky. 708, 34 S. W. 699. MISS.—Norton v. State, 72 Miss. 128, 48 Am. St. Rep. 538, 9 Am. Cr. Rep. 606, 16 So. 264, 18 So. 916. MO.—State v. Primm, 98 Mo. 368, 11 S. W. 732. TEX.—Luckie v. State, 33 Tex. Cr. 562, 28 S. W. 533.

Marriage of accused charged with seduction under promise of marriage, is a matter of defense, where the woman knew that he was married. — Norton v. State, 72 Miss. 128, 48 Am. St. Rep. 538, 9 Am. Cr. Rep. 606, 16 So. 264, 18 So. 916.

3 West v. State, 1 Wis. 209.

1 State v. Marshall, 121 Mo. 476, 26 S. W. 562.

2 State v. Burns, 119 Iowa 663, 94 N. W. 238.

1 Polk v. State, 40 Ark. 482, 48 Am. Rep. 17.

2 Carlisle v. State, 73 Miss. 387, 19 So. 207; People v. Gumaer, 80 Hun (N. Y.) 78, 9 N. Y. Cr. Rep. 258, 30 N. Y. Supp. 17; reversed on other grounds, 4 App. Div. 412, 11 N. Y. Cr. Rep. 305, 39 N. Y. Supp. 326.

3 Polk v. State, 40 Ark. 482, 48 Am. Rep. 17; State v. Primm, 98 Mo. 368, 11 S. W. 732.

is capable of contracting marriage, constitutes no defense in a prosecution charging seduction under a promise of marriage.[4]

§ 1228. —— ALLEGATIONS AS TO MARRIAGE. Whether it is necessary that an indictment or information charging seduction shall allege that the female is unmarried depends entirely upon the provisions of the statute under which the prosecution is had. Under some statutes it must appear from the indictment or information that the female is unmarried,[1] and where this is required it is better to allege the fact in express terms, although it has been held to be sufficient to have it appear inferentially;[2] but in the absence of a statutory provision making such an allegation necessary it is not required,[3] the fact of marriage being a matter of defense.[4]

Defendant's marriage or single state, is generally a matter that it is not necessary to allege, we have already seen.[5]

§ 1229. —— ALLEGATIONS AS TO PREVIOUS CHASTITY. The question whether the indictment or information must allege that the prosecutrix was of chaste character, is one depending entirely upon the provision of the statute

4 People v. Kehoe, 123 Cal. 224, 69 Am. St. Rep. 52, 55 Pac. 911.

1 KAN.—State v. Bryan, 34 Kan. 63, 7 Am. Cr. Rep. 604, 8 Pac. 260. MINN. — State v. Sortviet, 100 Minn. 12, 110 N. W. 100. MO.—State v. Wheeler, 108 Mo. 658, 18 S. W. 924. TEX.—Mesa v. State, 17 Tex. App. 395.

"Then and there" unmarried is a sufficient allegation that the female was unmarried, on a charge of seduction under promise of marriage.—State v. Sortviet, 100 Minn. 12, 110 N. W. 100.

2 State v. Bryan, 34 Kan. 63, 7 Am. Cr. Rep. 604, 8 Pac. 260; Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66; Norton v. State, 72 Miss. 128, 48 Am. St. Rep. 538, 9 Am. Cr. Rep. 606, 16 So. 264, 18 So. 916.

3 State v. Bryan, 34 Kan. 63, 7 Am. Cr. Rep. 604, 8 Pac. 260; Davis v. Com., 98 Ky. 708, 34 S. W. 699; Norton v. State, 72 Miss. 128, 48 Am. St. Rep. 538, 9 Am. Cr. Rep. 606, 16 So. 264, 18 So. 916; Hoff v. State, 83 Miss. 488, 35 So. 950.

4 Norton v. State, 72 Miss. 128, 48 Am. St. Rep. 538, 9 Am. Cr. Rep. 606, 16 So. 264, 18 So. 916.

5 See, supra, § 1225.

under which the prosecution is had. It may be laid down as a general rule that where the statute makes no mention of the previous chastity of the woman, it need not be alleged or proved,[1] as the fact of previous chastity is presumed;[2] but where the good character and repute of the woman are an ingredient in the offense as defined and described by the statute under which prosecution is had, it must be alleged and proved.[3] And where previous chaste character is required to be alleged, it must be averred that such chaste character continued down to the time of the seduction.[4]

1 Walton v. State, 71 Ark. 398, 75 S. W. 1; Caldwell v. State, 73 Ark. 139, 108 Am. St. Rep. 28, 83 S. W. 929; Rucker v. State, 77 Ark. 23, 90 S. W. 151; Willhite v. State, 84 Ark. 67, 104 S. W. 531; Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66; State v. Turner, 82 S. C. 278, 64 S. E. 424.

2 ARK. — Caldwell v. State, 73 Ark. 139, 108 Am. St. Rep. 28, 83 S. W. 929. MISS. — Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66. MO.—State v. Eckler, 106 Mo. 585, 27 Am. St. Rep. 372, 17 S. W. 814. OKLA.— Butts v. State, 157 Pac. 704.

Statute assumes women are chaste and imposes on the accused charged with seduction the burden of showing the contrary. —Perry v. State, 37 Ark. 54; Dean v. State, 37 Ark. 57; Caldweil v. State, 73 Ark. 139, 108 Am. St. Rep. 28, 83 S. W. 929.

3 ARK.—Polk v. State, 40 Ark. 482, 48 Am. Rep. 17. CAL.—People v. Roderigas, 49 Cal. 9. IND. TER.—Kerr v. United States, 7 Ind. Ter. 486, 104 S. W. 809. IOWA—State v. Prizer, 49 Iowa 531, 31 Am. Rep. 155; State v. Olson, 108 Iowa 667, 77 N. W. 332. MINN.—State v. Gates, 27 Minn. 52, 6 N. W. 404; State v. Wenz, 41 Minn. 196, 42 N. W. 933; State v. Lockerby, 50 Minn. 363, 36 Am. St. Rep. 656, 52 N. W. 958. MISS.— Norton v. State, 72 Miss. 128, 48 Am. St. Rep. 538, 9 Am. Cr. Rep. 606, 16 So. 264, 18 So. 916 (although the statute creating the offense does not require the woman to be of chaste character at the time), overruling, in effect, Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66. MO.—State v. McCaskey, 104 Mo. 644, 16 S. W. 511. N. J.—Zabriskie v. State, 43 N. J. L. (14 Vr.) 640, 39 Am. Rep. 610. OKLA.—Harvey v. Territory, 11 Okla. 159, 65 Pac. 838. PA.—Oliver v. Com., 101 Pa. St. 215, 47 Am. Rep. 704. VA.— Baker v. Com., 90 Va. 820, 20 S. E. 776. WIS.—West v. State, 1 Wis. 209.

4 State v. Gates, 27 Minn. 52, 6 N. W. 404.

"Then and there an unmarried female of previous chaste character," has been held to be a sufficient averment of continuing chastity.—State v. Wenz, 41 Minn. 196, 42 N. W. 933.

§ 1230. MEANS AND ACTS OF SEDUCTION—IN GENERAL. The general rule is that an indictment or information charging accused with seduction need not allege either the means employed[1] or the acts constituting the seduction,[2] although it is permissible to do so.[3] However, there are some authorities which hold that the means employed to seduce the woman must be stated.[4] We have already seen that the use of the word "seduce," which has a well-defined and a well-understood meaning, sufficiently describes the offense and the act complained of,[5] and that this word must be used,[6] it seems, as no other word or phrase will take its place.[7] Illicit sexual intercourse need not be alleged where it is charged that accused "seduced" the female, that word including, ex vi termini, the act of sexual intercourse, although such an allegation is frequently included.[8] It is usually held to be sufficient description of the means used and the acts constituting the offense charged to allege, in the language of the statute,[9] that the accused "by means of temptations, deceptions, acts, flattery, or a promise of marriage," or "by a sham marriage,"[10] "did seduce," or "seduced" the female,[11] without charging the means employed,[12] al-

1 Wilson v. State, 73 Ala. 527; State v. Curran, 51 Iowa 112, 3 Am. Cr. Rep. 405, 49 N. W. 1006.

2 Id.; State v. Bierce, 27 Conn. 319; State v. Conkright, 58 Iowa 338, 12 N. W. 283; Carlisle v. State, 73 Miss. 387, 19 So. 207.

3 Wood v. State, 48 Ga. 192, 15 Am. Rep. 664; State v. Fitzgerald, 63 Iowa 268, 19 N. W. 202; State v. Rogan, 18 Wash. 43, 50 Pac. 582.

4 Langston v. State, 109 Ga. 153, 35 S. E. 166, 779.

5 See, supra, § 1222, footnotes 7 et seq.

6 Com. v. Schull, 1 Pa. Co. Ct. Rep. 52.

7 See, supra, § 1222, footnote 11.

8 CONN.—State v. Bierce, 27 Conn. 319. IOWA—State v. Conkright, 58 Iowa 338, 12 N. W. 283; State v. Whalen, 98 Iowa 662, 68 N. W. 554, following State v. Curran, 51 Iowa 112, 3 Am. Cr. Rep. 405, 49 N. W. 1006. MISS.—Carlisle v. State, 73 Miss. 387, 19 So. 207. S. D.—State v. King, 9 S. D. 628, 70 N. W. 1046.

9 See, supra, § 1223.

10 State v. Savoye, 48 Iowa 562; but see Saltham v. State, (Tex.) 141 S. W. 953.

11 Wilson v. State, 73 Ala. 527.

12 State v. Curran, 51 Iowa 112, 3 Am. Cr. Rep. 405, 49 N. W. 1006; State v. Conkright, 58 Iowa 338, 12 N. W. 283; State v. Whalen,

though there are cases requiring that the indictment or information shall set forth the specific means employed.[13]

Sham marriage charged as the means by which accused accomplished the seduction of the female, alleging that the act was accomplished "by a form of marriage," has been said to be insufficient to charge seduction under the Texas statute.[14]

§ 1231. —— UNDER PROMISE OF MARRIAGE. A promise of marriage as a means of seduction is not an element under the statutes in some of the states, but it is always well to allege it as the means by which the seduction was accomplished, where such is the fact.[1] By the statutory provisions in some states, a promise of marriage is a vital element in the offense. Under the latter statutes the indictment or information must allege that the seduction was accomplished "by means of"[2] or "under a false promise of marriage";[3] but there need not be an allega-

98 Iowa 662, 68 N. W. 554; Carlisle v. State, 73 Miss. 387, 19 So. 207.

13 See footnote 4, this section.

"By persuasion and promise of marriage, and by other false and fraudulent means," held to be insufficient allegation to charge seduction, because of a failure to set forth what means, other than persuasion, accompanied the promise of marriage.—Langston v. State, 109 Ga. 153, 35 S. E. 166, 779.

This decision is unsound in principle as well as against the overwhelming weight of authority. Conceding, for the sake of argument, that the means by which the seduction was accomplished must be set out, seduction "by promise of marriage," being one of the statutory modes in which the offense may be committed, the allegation that the seduction was "by promise of marriage" is clearly sufficient, and the indictment should have been upheld, even if we concede—which we do not—that the description of the other means used was insufficient. The insufficient description should have been disregarded, or rejected as surplusage, leaving a description of the means as "by promise of marriage"; which was an amplification of the means—even conceding that it is necessary to describe the means at all.

14 Saltham v. State, (Tex. Cr.) 141 S. W. 953.

1 Wood v. State, 48 Ga. 192, 15 Am. Rep. 664; Putnam v. State, 29 Tex. App. 454, 25 Am. St. Rep. 738, 16 S. W. 97.

2 Wright v. State, 62 Ark. 145, 34 S. W. 545.

3 "By means of a promise of marriage" instead of the statutory

tion that the promise of marriage was a mutual promise to marry; that is, it need not be alleged that the woman promised to marry the accused,[4] that fact will be presumed, a mutual promise and a binding contract not entering into the elements of the offense;[5] neither is it necessary to allege that the promise of marriage was made by the accused to the female,[6] but it must be alleged that the female was at the time of the alleged promise and of the commission of the act complained of an unmarried[7] female,[8] and chaste.[9] However, it has been held that the failure of the indictment or information to allege directly and positively that the female seduced was unmarried will not be a ground for setting aside a conviction, when the indictment and the evidence reasonably show that she was in fact unmarried.[10]

"Form of marriage" charged as the means of accomplishing seduction said to be an insufficient description of the crime charged, under the Texas statute.[11]

§ 1232. DEFILEMENT OF FEMALE UNDER CARE, CONTROL, OR IN EMPLOYMENT.[1] Under a statute punishing defilement of a female under a specified age, by a man to

words "under a promise of marriage," is sufficient. — Stinehouse v. State, 47 Ind. 17; Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211.

4 State v. Primm, 98 Mo. 368, 11 S. W. 732; State v. Eckler, 106 Mo. 585, 27 Am. St. Rep. 372, 17 S. W. 814.

5 State v. Primm, 98 Mo. 368, 11 S. W. 732; State v. Eckler, 106 Mo. 585, 27 Am. St. Rep. 372, 17 S. W. 814; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Crozier v. People, 1 Park. Cr. Rep. (N. Y.) 453.

6 Norton v. State, 72 Miss. 128, 48 Am. St. Rep. 538, 9 Am. Cr. Rep. 606, 16 So. 264, 18 So. 916.

7 See, supra, § 1228.

8 People v. Krusick, 93 Cal. 74, 28 Pac. 794; State v. Wheeler, 108 Mo. 658, 18 S. W. 924.

See note, 87 Am. Dec. 405.

9 Mrous v. State, 31 Tex. Cr. Rep. 597, 37 Am. St. Rep. 834, 21 S. W. 764.

See, also, supra, § 1229.

10 Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66.

11 Latham v. State, (Tex. Cr.) 141 S. W. 953.

1 As to form of indictment for defilement of girl under prohibited age entrusted to care or custody, or in employment, see Forms Nos. 1980, 1981.

whose care, custody, or control she has been entrusted, or in whose employment she is engaged, an indictment or information charging this statutory offense, as in seduction proper,[2] must set out all the essential elements of the offense and must specifically allege (1) that the female was confided to the care or custody, or in the employment, as the case may be, of the accused;[3] (2) that she was under the age designated in the statute;[4] that he had sexual intercourse with her;[5] and that the act complained of occurred while the female was in his care, or custody, or employment, as the case may be.[6] Where it is charged that the female was committed or entrusted to the care and custody of the accused by her parents, the indictment or information need not allege in terms that such parents were her natural guardians.[7]

§ 1233. Joinder of counts and offenses—Election. An indictment or information charging seduction may join in one indictment several counts where it is apparent from the facts and circumstances set out that the counts all refer to one and the same transaction;[1] and the prose-

2 See, supra, § 1222.

3 State v. Jones, 16 Kan. 608; State v. Sipe, 38 Kan. 201, 16 Pac. 257; State v. Buster, 90 Mo. 514, 2 S. W. 834.

4 State v. Sipe, 38 Kan. 201, 16 Pac. 257; State v. Buster, 90 Mo. 514, 2 S. W. 834; State v. Lingle, 128 Mo. 528, 31 S. W. 20.

"Being then and there a female under the age of eighteen years," in an indictment charging defilement of female, the "then and there" refers to the female being under eighteen years of age.—State v. Sipe, 38 Kan. 201, 16 Pac. 257.

Knowledge girl was under age named in statute, need not be alleged on the part of accused.—State v. Jones, 16 Kan. 608.

5 State v. Buster, 90 Mo. 514, 2 S. W. 834; State v. Terry, 106 Mo. 209, 17 S. W. 288; State v. Lingle, 128 Mo. 528, 31 S. W. 20.

6 State v. Sipe, 38 Kan. 201, 16 Pac. 257; State v. Buster, 90 Mo. 514, 2 S. W. 834; State v. Terry, 106 Mo. 209, 17 S. W. 288; State v. Lingle, 128 Mo. 528, 31 S. W. 20.

"Then and there being in his care, custody, and employment," in an indictment charging defilement of female under eighteen years of age, sufficiently alleges that the offense was committed "while she remained in his care, custody, or employment."—State v. Terry, 106 Mo. 209, 17 S. W. 288.

7 State v. Jones, 16 Kan. 608.

1 People v. Crotty, 30 N. Y. St. Rep. 44, 9 N. Y. Supp. 937.

cution will not be required to elect upon which count reliance will be had for conviction;[2] but where two or more counts are joined in an indictment or information, each covering distinct transactions, the prosecution will not be allowed to go to the jury on more than one of the counts, and where evidence has been introduced tending to prove one of the acts charged, this will be regarded as an election by the prosecution upon which count it will stand.[3]

2 Armstrong v. People, 70 N. Y. 38; Cook v. People, 2 Thomp. & C. (N. Y.) 404; Hausenfluck v. Com., 85 Va. 702, 8 So. 683.

3 People v. Clark, 33 Mich. 112, 1 Am. Cr. Rep. 660.

CHAPTER LXXVIII.

INDICTMENT—SPECIFIC CRIMES.

Sodomy, Bestiality and Buggery.

§ 1234. Requisites and sufficiency of indictment—In general.
§ 1235. —— Common-law indictment.
§ 1236. —— Language of statute.
§ 1237. —— Time and place of offense.
§ 1238. ——Act "feloniously" done.
§ 1239. —— Attempts.
§ 1240. —— Conclusion.
§ 1241. With human being—Charging the offense.
§ 1242. —— Name and description of pathic.
§ 1243. —— Allegation of assault.
§ 1244. Bestiality and buggery—Charging the offense.
§ 1245. —— Description of animal or fowl.
§ 1246. Joinder of defendants.
§ 1247. Duplicity.

§ 1234. REQUISITES AND SUFFICIENCY OF INDICTMENT[1]—IN GENERAL. The crime of sodomy is one of the crimes an indictment or information is not required to define[2] or set forth the essential elements[3] of the offense or describe the acts constituting the crime charged;[4] but the acts complained of should be designated in a general way,[5] and with sufficient precision and certainty to apprise the accused of the particular offense with which he

1 As to form of indictments charging sodomy and bestiality, see Forms Nos. 390, 1987-1993.

2 Ex parte Bergen, 14 Tex. App. 52; Cross v. State, 17 Tex. App. 476.

3 Davis v. State, 3 Harr. & J. (Md.) 154.

4 Id.; Lambertson v. People, 5 Park. Cr. Rep. (N. Y.) 200.

5 State v. Wellman, 253 Mo. 302, 161 S. W. 795; State v. Campbell, 29 Tex. 44, 94 Am. Dec. 251.

Charging the offense as committed by copulation with a woman in that he penetrated her anus with his private parts is sufficient.—James v. State, 61 Tex. Cr. Rep. 232, 134 S. W. 699.

is charged and enable him to prepare his defense.[6] It is sufficient merely to charge the accused with the commission of the crime of "sodomy,"[7] or of "the crime against nature,"[8] is sufficient, the crime being too well known and too disgusting to require other definition or further details or description;[9] if the accused wishes further particulars on motion therefor, the court will require the prosecution to furnish him with specifications of the act.[10] To allege that the accused "had a venereal affair,"[11] "a certain unnatural and lascivious act,"[12] or other like expressions, while permissible, and even usual, is not necessary;[13] but it is necessary to charge that accused made an assault.[14]

§ 1235. —— COMMON-LAW INDICTMENT. An ordinary common-law form of indictment is sufficient,[1] but such an indictment must, in terms, charge carnal copulation.[2]

6 State v. Whitmarsh, 26 S. D. 426, 128 N. W. 580; State v. Campbell, 29 Tex. 44, 94 Am. Dec. 251; State v. Romans, 21 Wash. 284, 57 Pac. 819; State v. George, 79 Wash. 262, 140 Pac. 337.

In State v. McAllister, 67 Ore. 480, 136 Pac. 354, an indictment charging the crime against nature committed with a male person, and alleging "the said crime against nature being too well understood and too disgusting to be herein more fully set forth," was held sufficient to enable the accused to know what was intended.

7 State v. Williams, 34 La. Ann. 87; Davis v. State, 3 Harr. & J. (Md.) 154; State v. Chandonette, 10 Mont. 280, 25 Pac. 438; Ex parte Burgen, 14 Tex. App. 52; Cross v. State, 17 Tex. App. 476.

8 Bradford v. State, 104 Ala. 68, 53 Am. St. Rep. 24, 16 So. 107; People v. Williams, 59 Cal. 397; State v. Williams, 34 La. Ann. 87; Com. v. Dill, 160 Mass. 536, 36 N. E. 472; State v. Chandonette, 10 Mont. 280, 25 Pac. 438.

9 Com. v. Dill, 160 Mass. 536, 36 N. E. 472.

10 Id.

Bill of particulars will be required to be furnished by the prosecutor in those instances, only, where it appears that the accused can not properly prepare his defense without such bill.—Kelly v. People, 192 Ill. 119, 85 Am. St. Rep. 323, 61 N. E. 425.

11 Lambertson v. People, 5 Park. Cr. Rep. (N. Y.) 200.

12 Com. v. Dill, 160 Mass. 536, 36 N. E. 472.

13 Lambertson v. People, 5 Park. Cr. Rep. (N. Y.) 200.

14 See, infra, § 1243.

1 State v. Chandonette, 10 Mont. 280, 25 Pac. 438.

2 1 Hawks P. C., ch. 4; 1 Russ. on Crimes (9th Am. ed.), p. 938.

§ 1236. —— LANGUAGE OF STATUTE. The general rule is that an indictment or information charging either sodomy, bestiality or buggery in the language of the statute is sufficient[1] where there is a sufficient description of the offense by the language used in the statute,[2] otherwise it will be insufficient.[3]

§ 1237. —— TIME AND PLACE OF OFFENSE. An indictment or information charging sodomy in any of its forms must allege the time when and the place where the offense charged occurred, the same as in charging any other crime, to show that if the offense charged really happened the time within which prosecution may be had has not passed, and also to show that the court has jurisdiction to try the cause.[1]

§ 1238. —— ACT "FELONIOUSLY" DONE. The crime of sodomy, in any of its forms, must be charged to have been "feloniously,"[1] or "unlawfully and feloniously,"[2] done.

§ 1239. —— ATTEMPTS. Where the statute makes an attempt to commit sodomy in any of its phases an offense, an indictment or information, in the language of the statute,[1] is sufficient;[2] but in charging an attempt to commit

1 CONN.—Whiting v. State, 14 Conn. 487, 36 Am. Dec. 499. ILL.—Honselman v. People, 168 Ill. 172, 48 N. E. 304; Kelly v. People, 192 Ill. 119, 85 Am. St. Rep. 323, 61 N. E. 425. MD.—Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522. MASS.—Com. v. Dill, 160 Mass. 536, 36 N. E. 472. MO.—Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131. OHIO—Hess v. State, 5 Ohio 5, 22 Am. Dec. 767. S. C.—State v. Smart, 4 Rich. L. 356, 55 Am. Dec. 683. TEX.—State v. Campbell, 29 Tex. 44, 94 Am. Dec. 251.

2 Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544.

3 State v. Campbell, 29 Tex. 44, 94 Am. Dec. 251.

1 Com. v. Dill, 160 Mass. 536, 36 N. E. 472; State v. Romans, 21 Wash. 284, 57 Pac. 819.

Assault upon train prior to time of reaching county in which the assault with intent to commit sodomy occurred, is permissible to be given in evidence to show intent.—State v. Place, 5 Wash. 773, 32 Pac. 736.

1 State v. Romans, 21 Wash. 284, 57 Pac. 819.

2 Com. v. Dill, 160 Mass. 536, 36 N. E. 472.

1 See, supra, § 1236.

2 People v. Erwin, 4 Cal. App.

buggery, some overt act must be set out,[3] although the contrary has been held[4] charging that accused compelled A, a male person, to unbutton his trousers and expose his person to accused; that accused did lie upon the body of A, and "then and there did fail in the perpetration of said offense," sufficiently charges an attempt to commit sodomy.[5] A conviction of an attempt, on a charge of the commission of an act of sodomy, may be had where by statute an attempt to commit the crime is made an offense.[6]

§ 1240. —— CONCLUSION. Where sodomy in any of its phases is made a statutory offense, an indictment or information charging the crime should conclude "contrary to the statute," etc.[1]

§ 1241. WITH HUMAN BEING—CHARGING THE OFFENSE. The general rule is that an indictment or information, in the language of the statute,[1] charging accused "did unlawfully and feloniously commit a certain unnatural and lascivious act" with a person named, is sufficient without further description of the act charged;[2] and it is immaterial whether accused is charged as agent or pathic provided the particular act charged is brought within the definition and terms of the statute,[3] although the contrary has been held in California.[4] An indictment charging that the accused committed "the infamous crime against na-

394, 88 Pac. 371; State v. Smith, 137 Mo. 25, 38 S. W. 717; State v. Place, 5 Wash. 773, 32 Pac. 736.

3 State v. Hefner, 129 N. C. 548, 40 S. E. 2.

4 Bradford v. State, 104 Ala. 68, 53 Am. St. Rep. 68 ("attempted to carnally know a certain beast, to wit, a cow," is sufficient).

5 State v. Smith, 137 Mo. 25, 38 S. W. 717.

6 State v. Romans, 21 Wash. 284, 57 Pac. 819.

1 State v. Chandonette, 10 Mont. 280, 25 Pac. 438; State v. Romans, 21 Wash. 284, 57 Pac. 819.

See, supra, §§ 330 et seq.

1 See, supra, § 1236.

2 Com. v. Dill, 160 Mass. 536, 36 N. E. 472.

See, supra, § 1234.

3 State v. Vicknair, 52 La. Ann. 1921, 28 So. 273.

4 See, infra, § 1242.

ture" with a named man and stating the manner of the act is good.[5]

§ 1242. —— NAME AND DESCRIPTION OF PATHIC. An indictment or information charging the commission of the crime of sodomy with a human being, the name of the pathic should be stated where known.[1] Whether the sex of the person upon whom the act complained must[2] or need not[3] be stated, depends upon the provision of the statute under which the prosecution is had. It has been said by the supreme court of California that an indictment or information charging that accused committed the offense charged "in and upon the person of one Carl Kaler" sufficiently states that the act was committed upon a human being, as distinguished from an animal;[4] but the district courts of appeal hold that such an indictment is insufficient because it fails to allege that the pathic was a male person,[5] where the indictment charges that accused had carnal knowledge of the named person. This ruling is placed on the ground (1) that "carnal knowledge" is synonymous with "sexual intercourse,"[6] and (2) that judicial knowledge can not be taken of sex of a party upon whom the infamous crime against nature is committed from the name alone,[7]—all of which is too much like "special pleading" to be regarded as a safe reliance outside of California. The charge that the act

5 Ex parte Benites, 37 Nev. 145, 140 Pac. 436; State v. Romans, 21 Wash. 284, 57 Pac. 819.

1 State v. Chandonette, 10 Mont. 280, 25 Pac. 438; Cross v. State, 17 Tex. App. 476; State v. Romans, 21 Wash. 284, 57 Pac. 819.

2 People v. Carroll, 1 Cal. App. 4, 81 Pac. 680; People v. Allison, 25 Cal. App. 746, 145 Pac. 539.

3 People v. Moore, 103 Cal. 508, 37 Pac. 510; Adams v. State, 48 Tex. Cr. 90, 122 Am. St. Rep. 733, 86 S. W. 334.

4 People v. Moore, 103 Cal. 508, 37 Pac. 510. See Foster v. State, 1 Ohio Circ. Dec. 261.

5 See cases in footnote 2, this section.

6 People v. Allison, 25 Cal. App. 746, 145 Pac. 539.

7 People v. Carroll, 1 Cal. App. 2, 81 Pac. 680.

Contra: Foster v. State, 1 Ohio Circ. Dec. 261.

See, also, infra, § 1246.

complained of was "the crime against nature"[8] is amply sufficient to characterize the nature of the offense, whether the pathic was male or female, for the crime may be committed between man and woman as well as man and man, even though the woman is the wife[9] of the accused,[10]—where the penetration is per anum,[11] as it is required to be in most jurisdictions, a penetration of the mouth not being sufficient.[12]

§ 1243. —— ALLEGATION OF ASSAULT. In those cases in which the act of sodomy charged is committed by force and against the will of the victim, an assault should be charged;[1] where with the consent of the pathic, both should be charged as principals in those states where the act of free submission to the commission of the crime comes within the provisions of the statute.[2]

8 "Infamous crime against nature" being the words used in the California Penal Code (Kerr's Cyc. Pen. Code, § 286), is not thought to make the word "infamous" an essential word to be in an indictment or information under a statute which requires simply that the indictment or information shall contain "a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended" (Kerr's Cyc. Cal. Pen. Code, § 950, par. 2). An indictment framed in the language of the statute, omitting the word "infamous" meets all the requirements of the statute regarding the form and sufficiency of the indictment for persons "of common understanding"; it is only the refinements of hair-splitting technicalities that make it insufficient, and work miscarriages of justice.

9 R. v. Jellyman, 8 Car. & P. 604, 34 Eng. C. L. 916.

10 See 1 Kerr's Whart. Crim. Law, § 754.

11 Lewis v. State, 36 Tex. Cr. Rep. 37, 61 Am. St. Rep. 831, 35 S. W. 372; Adams v. State, 48 Tex. Cr. Rep. 90, 122 Am. St. Rep. 733, 86 S. W. 334; R. v. Wiseman, 1 Fortes. 91, 92 Eng. Rep. 774.

12 See People v. Boyle, 116 Cal. 658, 48 Pac. 800; Kinnan v. State, 86 Neb. 234, 21 Ann. Cas. 335, 27 L. R. A. (N. S.) 478, 125 N. W. 594; Prindle v. State, 31 Tex. Cr. Rep. 551, 37 Am. St. Rep. 833, 21 S. W. 360; Mitchell v. State, 49 Tex. Cr. Rep. 535, 95 S. W. 500; Com. v. Thomas, 3 Va. (1 Va. Cas.) 307.

1 State v. Chandonette, 10 Mont. 280, 25 Pac. 438; State v. Romans, 21 Wash. 284, 57 Pac. 819.

2 See, infra, § 1246.

§ 1244. BESTIALITY AND BUGGERY—CHARGING THE OFFENSE. An indictment or information charging an act of sodomy with a beast or a fowl, must conform to the rules above laid down in charging the offense with a human being; but where an attempt to commit this crime an overt act as constituting the offense must be alleged.[1]

§ 1245. —— DESCRIPTION OF ANIMAL OR FOWL. An indictment or information charging buggery or bestiality, which is sodomy committed with an animal, there must be a description of the animal[1] or fowl,[2] the same as there must be a description of the person who is the victim of the assault, as above pointed out.[3] Thus, it has been held sufficiently descriptive of the animal victim to describe it as a beast,[4] a bitch,[5] where a man is accused; a cow,[6] a dog,[7] where a woman is accused; a duck,[8] an ewe,[9] a goat, where a woman is accused;[10] a jennet,[11] a mare,[12] a sow,[13] and the like.

1 See, supra, § 1239.

1 People v. Williams, 59 Cal. 397; Com. v. Poindexter, 133 Ky. 720, 118 S. W. 943; Com. v. Thomas, 3 Va. (1 Va. Cas.) 307.

2 R. v. Brown, L. R. 24 Q. B. Div. 357, 16 Cox C. C. 715 (duck an "animal" within the statute), overruling R. v. Collins, 1 Leigh C. C. C. 471, 9 Cox C. C. 497, and distinguishing R. v. Clark, L. R. 1 C. C. 54, 10 Cox C. C. 338.

Compare R. v. Multreaty, 1 Russ. on Crimes (9th Am. Ed.) 938, holding that a "fowl" is not a "beast" within the common-law definition.

3 See, supra, § 1242.

4 Haynes v. Ritchey, 30 Iowa 76, 6 Am. Rep. 640.

5 R. v. Allen, 1 Car. & K. 496, 47 Eng. C. L. 495.

6 Bradford v. State, 104 Ala. 68, 53 Am. St. Rep. 24, 16 So. 107.

7 Aushman v. Veal, 10 Ind. 355, 71 Am. Dec. 331; Cleveland v. Detweiler, 18 Iowa 299.

8 See authorities in footnote 2, this section.

9 R. v. Cozins, 6 Car. & P. 351, 25 Eng. C. L. 469.

10 See 10 Voltair's Works (St. Hubert Guild Ed.) 303.

11 Almendaris v. State (Tex.), 73 S. W. 1055.

12 Edgar v. McCutchen, 9 Mo. 768; Cross v. State, 17 Tex. App. 476; State v. Campbell, 29 Tex. 44, 94 Am. Dec. 251; Com. v. Thomas, 3 Va. (1 Va. Cas.) 307.

13 Shirley v. Snyder, 45 Ind. 541; Goodrich v. Wolcott, 3 Cow. (N. Y.) 231; affirmed in Wolcott v. Goodrich, 5 Cow. 714; Langford v. State, 48 Tex. Cr. Rep. 561, 89 S. W. 830.

§ 1246. JOINDER OF DEFENDANTS. Under the general rule in criminal pleading providing that all participating in a single act or transaction constituting the offense charged, where the crime of sodomy is committed between human beings,—male with male, or male with female,—by mutual consent, both may be joined in the same indictment, in those jurisdictions, at least, in which submission to the commission of the offense is within the definition and prohibition of the statute.[1] Where both parties are joined as defendants the indictment or information must be definite and certain as to the acts charged, and be sufficient to bring them within the description and punishment of the statute.[2] Where two or more persons assault another for the purpose or do actually have copulation with him against nature, is good although it does not state the sex of the accused, where the names given of the accused and the name given of the person assaulted are all names usually applied to male persons, only.[3]

§ 1247. DUPLICITY. An indictment or information charging that accused committed "the crime against nature" by a certain specific act of carnal knowledge, "and did then and there commit the crime of sodomy," the instrument is not open to the objection that it is duplicitous, for the reason that the terms "crime against nature" and "sodomy" are equivalent or synonymous expressions and both charge one and the same crime.[1]

1 R. v. Allen, 2 Car. & K. 869, 61 Eng. C. L. 869, 1 Den. C. C. 364, 3 Cox C. C. 270; R. v. Harris, 1 Den. C. C. 464.

2 See R. v. Rowed, 3 Ad. & E. N. S. (3 Q. B.) 179, 183, 43 Eng. C. L. 688, 689, 2 Gale & D. 518.

3 Foster v. State, 1 Ohio Circ. Dec. 261.

1 State v. Thiodeaux, 127 La. Ann. 332, 53 So. 582.

CHAPTER LXXIX.

INDICTMENT—SPECIFIC CRIMES.

Threats and Threatening Letters.

§ 1248. Requisites of indictment—Threats to accuse of crime, etc.
§ 1249. —— Threats to extort money.
§ 1250. —— Threats to prevent engaging in business.
§ 1251. —— Threatening letters.

§ 1248. REQUISITES OF INDICTMENT[1]—THREATS TO ACCUSE OF CRIME, ETC. It is sufficient to allege that the defendant threatened to accuse the prosecutor of a specified crime[2] without giving a technical description or particulars of the crime charged.[3] The threat must be averred[4] to accuse prosecutor of some crime or offense.[5] The character of the threat should be set forth so that it may be seen whether or not a substantial threat was really made,[6] but the words of the threat need not be set forth.[7]

1 As to forms of indictment for threats and sending threatening letters, see Forms Nos. 1496-2002.

2 Lee v. State, 16 Ariz. 291, 145 Pac. 244; State v. Robinson, 85 Me. 195, 27 Atl. 99.

An information charging that accused threatened prosecutor that unless the latter delivered a named sum the former would cause him "to be placed in prison" does not charge an offense.—People v. Avery, 192 Ill. App. 128.

3 Lee v. State, 16 Ariz. 291, 145 Pac. 244.

4 State v. O'Mally, 48 Iowa 501.

An allegation that defendant did "wilfully and maliciously verbally threaten to kill and murder Z-S- and F. S. W." is sufficient without setting out the words used.—State v. O'Mally, 48 Iowa 501.

5 State v. Robinson, 85 Me. 195, 27 Atl. 99.

Threat to publish accusation of bribery is not a threat to injure a person, his property, or business.—Schultz v. State, 135 Wis. 650, 114 N. W. 505.

6 People v. Jones, 62 Mich. 304, 24 N. W. 839.

7 ILL.—Glover v. People, 204 Ill. 170, 68 N. E. 464. IOWA—State v. O'Mally, 48 Iowa 501. ME.—State v. Blackington, 111 Me. 229, 88 Atl. 726. MASS.—Com. v. Dorus, 108 Mass. 488; Com. v. Goodwin, 122 Mass. 19. TEX.—Diggs v. State, 64 Tex. Cr. 122, 141 S. W. 100. VT.—Grimes v. Gates, 47 Vt. 594, 19 Am. Rep. 129.

The name of the person threatened must be alleged and proved as laid,[8] except where the threat was made against the whole community,[9] in which case it may name all the property holders.[10] It need not be alleged that the person threatened was innocent of the crime, offense or immorality charged.[11] The indictment or information may be drawn in the language of the statute, or may use words of equivalent import.[12] Where the statute makes it an offense to threaten "either verbally or by any written or printed communication" the indictment must allege which method was employed.[13]

§ 1249. —— THREATS TO EXTORT MONEY. An indictment or information charging threats to extort money, or threats for any other purpose, must allege facts sufficient to show a commission of the crime charged, within the provisions of the statute;[1] and must allege to whom[2] and by what means[3] the threats were made, as well as

8 Com. v. Buckley, 145 Mass. 181, 13 N. E. 368.

9 State v. Asberry, 37 La. Ann. 124.

10 State v. Asberry, 37 La. Ann. 124, where the threat was to burn an entire town.

11 Kessler v. State, 50 Ind. 229; State v. Debolt, 104 Iowa 105, 73 N. W. 499; State v. McCabe, 135 Mo. 450, 58 Am. St. Rep. 589, 34 L. R. A. 127, 37 S. W. 123; People v. Wightman, 104 N. Y. 598, 5 N. Y. Cr. Rep. 545, 11 N. E. 135, affirming 43 Hun 358; Elliot v. State, 36 Ohio St. 318.

12 Glover v. People, 204 Ill. 170, 68 N. E. 464; State v. Waite, 101 Iowa 377, 70 N. W. 596; State v. Goodwin, 37 La. Ann. 713; Hewitt v. Newberger, 141 N. Y. 538, 36 N. E. 593, reversing 66 Hun 320, 20 N. Y. Supp. 913; Ditzler v. State, 2 Ohio Cir. Dec. 702, 4 Ohio Cir. Ct. Rep. 551.

13 Com. v. Harris, 101 Mass. 29.

1 ALA.—Johnson v. State, 152 Ala. 46, 44 So. 470. CAL.—People v. Brennan, 121 Cal. 495, 53 Pac. 1098; People v. Schmitz, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717, 94 Pac. 704 (this decision thought not to be good law outside of California). IOWA—State v. Young, 26 Iowa 122. MICH.—People v. Whittemore, 102 Mich. 519, 61 N. W. 13. OHIO—Mann v. State, 47 Iowa St. 566, 11 L. R. A. 656, 26 N. E. 226; Smith v. State, 25 Ohio Cir. Ct. Rep. 22. TENN.—State v. Morgan, 50 Tenn. (3 Heisk.) 262. VT.—Grimes v. Gates, 47 Vt. 594, 19 Am. Rep. 129.

2 Glover v. People, 204 Ill. 170, 68 N. E. 464; Kessler v. State, 50 Ind. 229.

3 Utterback v. State, 153 Ind. 545, 55 N. E. 420; Robinson v. Com., 100 Mass. 27.

state the ownership of the property sought to be extorted.[4] Under a statute making it an offense to threaten any injury to person or property, with intent to extort money, or other pecuniary advantage, the indictment must charge the intent in order to bring the offense within the provisions of the statute.[5] The offense need not be charged in the language of the statute, provided words of similar import are used.[6] An indictment or information charging a threat to publish the name of a debtor in a claim agency,[7] need not allege the connection of the accused with such agency, nor state the character of the agency, whether a corporation or a partnership.[8]

§ 1250. —— THREATS TO PREVENT ENGAGING IN BUSINESS. An indictment for intimidation by means of threats, wherein the accused was charged with preventing the prosecutor from engaging in a lawful employment, is sufficient where the lawful employment is set out, without alleging the means used more specifically than "by threatening words, acts of violence, and intimidation."[1]

§ 1251. —— THREATENING LETTERS. An indictment or information charging sending threatening letter[1] or conspiracy to intimidate by sending threatening letter must set out the letter or its substance,[2] unless it has been

4 Green v. State, 157 Ind. 101, 60 N. E. 491; State v. Ullman, 5 Minn. 13.

5 CAL.—People v. Hoffman, 126 Cal. 366, 58 Pac. 856. MASS.—Com. v. Davis, 108 Mass. 488. MINN.—State v. Ullman, 5 Minn. 13. N. M.—State v. Strickland, 21 N. M. 411, 155 Pac. 719. TEX.—Landa v. State, 26 Tex. App. 580, 10 S. W. 218.

Insufficient to allege simply that the defendant threatened another without alleging that the threat was to injure the person or property.—State v. Strickland, 21 N. M. 412, 155 Pac. 719.

6 See, supra, § 1248, authorities in footnote 12.

7 As to threats by claim agencies, displays on envelopes, use of different colored envelopes, etc., see, infra, § 1251, footnote 2.

8 State v. McCabe, 135 Mo. 450, 58 Am. St. Rep. 589, 34 L. R. A. 127, 37 S. W. 123.

1 Diggs v. State, 64 Tex. Cr. Rep. 122, 141 S. W. 100.

1 Tynes v. State, 17 Tex. App. 123.

2 Com. v. Patrick, 127 Ky. 473, 105 S. W. 981; Com. v. Morton, 140 Ky. 628, Ann. Cas. 1912B, 454,

lost or destroyed, or is in the possession of the accused, or contains matter too obscene to be perpetuated as a

131 S. W. 506; Grimes v. Gates, 47 Vt. 594, 19 Am. Rep. 129.

Collection agency's name displayed in large letters on the envelope, in addition to the return card in the corner is a "delineation" within the prohibition of federal act September 26, 1888 (5 Fed. Stats. Ann., 1st ed., p. 849).—United States v. Brown, 43 Fed. 135; In re Barber, 75 Fed. 980.

Devices of collection agency by means of which different colored envelopes are used for second and subsequent demands for payment of claim alleged to be valid and unpaid, within provisions and prohibition of federal act September 26, 1888 (5 Fed. Stats. Ann., 1st Ed., p. 849).—United States v. Dodge, 70 Fed. 235.

Dunning cards are within the prohibition of the federal statute of September 26, 1888 (5 Fed. Stats. Ann., 1st Ed., p. 849).—Griffith v. Pembroke, 64 Mo. App. 263; United States v. Bayle, 40 Fed. 664.

Post card stating that rent is long past due and that a collector has called several times, but concluded in respectful terms with no intent apparent to attract public notice, is said not to be prohibited in United States v. Bayle, 40 Fed. 664; United States v. Elliot, 51 Fed. 807.

Postal card demanding payment of debt and stating that if not paid at once account will be placed in hands of a lawyer for collection, offense against the statute.—United States v. Bayle, 40 Fed. 664.

Writing on postal card, "you have promised and not performed" and adding "I see very plainly you do not intend to pay any attention either to my letters or your agreements," offense against the statute.—United States v. Simmons, 61 Fed. 640.

—**Threat to garnishee and foreclose,** but would dislike to do so if addressee would only be half-white, imputed dishonesty in the addressee, and is prohibited.—United States v. Smith, 69 Fed. 971.

Dunning letter in an unsealed envelope, in respectful terms, with an ordinary return address upon the envelope of a collection agency, is not prohibited.—In re Barber, 75 Fed. 980.

Threatening letter must be of the kind and made or conveyed with the intent specified in the statute, and is within the prohibition.—People v. Thompson, 97 N. Y. 313, 2 N. Y. Cr. Rep. 520.

A letter containing a threat "to proceed against you criminally," is in terms a threat to accuse the addressee of a crime, and within the prohibition.—People v. Eichler, 75 Hun (N. Y.) 26, 9 N. Y. Cr. Rep. 168, 26 N. Y. Supp. 998; appeal dismissed, 142 N. Y. 642, 37 N. E. 567.

—**Dismissal of appeal** object of threat in letter is within the prohibition.—People v. Cadman, 57 Cal. 562.

—**Requesting addressee to send ten dollars, threatening if he did** not that he should be indicted, within the prohibition.—State v. Patterson, 68 Me. 473.

Threatening to post as a "dead-

part of the records of the court.[3] It must also charge that the letter or writing was sent, circulated, or exhibited by the persons who had confederated for the purpose of intimidating or alarming the prosecutor,[4] also that it was delivered.[5] Where the letter on its face contains no threats the information must set forth extrinsic facts to show that in fact there were threats.[6] It is sufficient to set forth the letter by its purport instead of by its tenor.[7] There must be an averment of the specific criminal offense the defendant proposed to charge.[8] The letter should be set forth according to its purport[9] and an English translation of the same if it is in a foreign language.[10] It is sufficient to set forth the offense in the language of the statute[11] or in words of substantial import.[12]

beat," in a sealed letter addressed to a person, is not a crime within the meaning of § 3893, U. S. Rev. Stats. (5 Fed. Stats. Ann., 1st ed., p. 839).—Ex parte Doran, 32 Fed. 76.

Neither is it within a state statute making it a crime to send a letter threatening to do injury to the "person or property" of another; credit or reputation not being "property" within the meaning of such a statute.—State v. Ban, 28 Mo. App. 84.

3 Com. v. Morton, 140 Ky. 628, Ann. Cas. 1912B, 454, 131 S. W. 506.

4 Com. v. Morton, 140 Ky. 628, Ann. Cas. 1912B, 454, 131 S. W. 506.

5 To allege that the letter was sent is not a sufficient allegation that it was delivered.—Landa v. State, 26 Tex. App. 580.

6 State v. Jamison, 99 Miss. 248, 54 So. 843.

7 ALA.—Johnson v. State, 152 Ala. 46, 44 So. 670. MO.—State v. Stewart, 90 Mo. 507, 2 S. W. 790. N. Y.—People v. Misiani, 148 App. Div. 797, 27 N. Y. Cr. Rep. 94, 133 N. Y. Supp. 291. TEX.—Bradfield v. State, 73 Tex. Cr. Rep. 353, 166 S. W. 734.

8 Merely setting out the letter in hæc verba with the general averment that it threatened to accuse the prosecutor of a criminal offense is not sufficient.—Cohen v. State, 37 Tex. Cr. Rep. 118, 38 S. W. 1005.

9 State v. Conradi, 128 La. 105, 54 So. 577.

10 Id.

11 Chunn v. State, 125 Ga. 789, 54 S. E. 751; State v. Stewart, 90 Mo. 507, 2 S. W. 790.

12 State v. Goodwin, 37 La. Ann. 713 (the use of the words "willfully, maliciously, and feloniously" are the equivalent of the statutory words "knowingly and maliciously").

CHAPTER LXXX.

INDICTMENT—SPECIFIC CRIMES.

Treason.

§ 1252. Form and sufficiency of indictment.

§ 1252. Form and sufficiency of indictment.[1] An indictment charging treason may follow the language of the act creating the offense[2] and need not use the phrase "levying war" specifically.[3] The indictment must specify an overt act.[4] In laying the overt act it is sufficient to allege that defendant sent intelligence to the enemy without setting forth the particular letter or its contents.[5]

1 As to forms of indictment charging treason, see Forms Nos. 2005-2011.

2 United States v. Greathouse, 4 Sawy. 457, 2 Abb. 364, Fed. Cas. No. 15254.

3 United States v. Greathouse, 4 Sawy. 457, 2 Abb. 364, Fed. Cas. No. 15254.

4 United States v. Burr (Coombs' Trial of Aaron Burr), Fed. Cas. No. 14693.

5 Respublica v. Carlisle, 1 U. S. (1 Dall.) 35, 1 L. Ed. 26.

CHAPTER LXXXI.

INDICTMENT—SPECIFIC CRIMES.

Vagrancy.

§ 1253. Requisites and sufficiency of indictment—In general.
§ 1254. —— Language of statute.
§ 1255. —— Time and place.
§ 1255a. Duplicity.

§ 1253. REQUISITES AND SUFFICIENCY OF INDICTMENT[1]—IN GENERAL. The general rules of criminal pleading applicable to statutory crimes generally govern an indictment or information charging vagrancy. The acts charged must (1) clearly bring the accused within the provision of the statute defining the particular act of vagrancy charged,[2] and (2) be sufficient to inform the accused of the particular acts with which he is charged and enable him to make his defense. To accomplish this every essential element under the statute must be set out,[3] and every word which describes the particular vagrancy in the definition in the statute must be used,[4] but none other. Thus, where the statute defines more than one class of vagrancies which fall within the prohibition and punishment thereof, words defining a class of vagrancy other than the class prosecuted, need not be incorporated in the indictment or information.[5] One charged with

1 As to forms of indictment charging vagrancy, see Forms Nos. 2012-2015.

2 State v. Custer, 65 N. C. 339; Edwards v. State, 71 Tex. Cr. Rep. 405, 160 S. W. 80.

3 In re Maloney, 6 N. Y. Cr. Rep. 241.

4 Ex parte McCarthy, 72 Cal. 384, 14 Pac. 96; People v. Forbes, 11 Abb. Pr. (N. Y.) 52, 19 How. Pr. 457, 4 Park. Cr. Rep. 611; R. v. Pepper, 19 Manitoba 209, 15 Can. C. C. 314.

5 Ex parte McCarthy, 72 Cal. 384, 14 Pac. 96.

An information charging "wilfully and unlawfully was, has been, and during said time continued to be, and still is, an idle and dis-

being an idle, lewd, and dissolute person is sufficiently advised of the character of his offense.[6] Under some statutes it is necessary to negative the fact that the accused was unable to work, because ability to work is a necessary element of the offense charged;[7] but where the indictment, information or complaint is in the language of the statute,[8] there need be no averment that accused was able to work.[9] Under a statute making one a vagrant who "endeavors to maintain himself or his family by any undue or unlawful means" the indictment must allege the particular undue or unlawful means; it is not sufficient simply to allege "by other undue means."[10] Under an ordinance denouncing as vagrants all persons who live by gambling, charging that the defendant is a "vagrant, being a person without visible means of support, who gambles, at the game of draw-poker, for a living, in the city of S——" charges an offense, and it is unnecessary to specifically charge that draw-poker is gambling.[11]

Scandalous matter, unnecessarily included in an indictment or information, or a complaint charging vagrancy, will not vitiate an indictment otherwise sufficient,—e. g., charging accused with "being a first-class pimp,"—and the court may, of its own motion, strike out the objectionable words.[12]

solute person, who wanders and roams, and has during said time wandered and roamed, about the streets of said city and county, at late and unusual hours of the night," is sufficient.—Ex parte McCarthy, 72 Cal. 384, 14 Pac. 96; affirmed in State v. Preston, 4 Ida. 215, 38 Pac. 694.

6 Ex parte McCue, 7 Cal. App. 765, 96 Pac. 110.

7 State v. Custer, 65 N. C. 339; Armstead v. State, 11 Okla. Cr. 649, 150 Pac. 511.

8 As to indictment in language of statute charging vagrancy, see, infra, § 1253.

9 Traylor v. State, 100 Ala. 142, 14 So. 634, overruling Bonlo v. State, 49 Ala. 22.

That defendant was unable to work might constitute a good ground of defense. — Traylor v. State, 100 Ala. 142, 14 So. 634.

10 State v. Custer, 65 N. C. 339.

11 Shreveport (City of) v. Bowen, 116 La. 522, 40 So. 859.

12 Butte (City of) v. Peasley, 18 Mont. 303, 45 Pac. 210.

§ 1254. —— LANGUAGE OF STATUTE. An indictment, information or complaint charging vagrancy in the language of the statute is sufficient[1] where the statute contains all the elements of the offense charged, as is the case in charging other statutory crimes and offenses, except in those cases in which a more particular statement of the facts is necessary to charge the essential elements of the offense alleged.[2]

§ 1255. —— TIME AND PLACE. On a charge of vagrancy the time and place the alleged offense was committed should be stated,[1] under the general rule of criminal pleading requiring a showing that the offense charged occurred within the period of time in which a prosecution may be maintained, and in a place over which the court has jurisdiction, although time and place are not of the essence of the offense. The time of the offense may be laid within certain named dates.[2]

§ 1255a. DUPLICITY. An indictment or information charging vagrancy, uniting in one count all the methods in which the act of vagrancy may be committed under the statute, is not objectionable on the ground of duplicity,[1] and the court will not require the prosecution to elect upon which it will rely for conviction.[2]

1 Grattan v. State, 71 Ala. 344; Traylor v. State, 100 Ala. 142, 14 So. 634; Com. v. Doherty, 137 Mass. 247; Com. v. Brown, 141 Mass. 78, 6 N. E. 377; Com. v. Ellis, 207 Mass. 572, 93 N. E. 823.

2 Armstead v. State, 11 Okla. Cr. 649, 150 Pac. 511.

1 Com. v. Sullivan, 87 Mass. (5 Allen) 511; Com. v. Brown, 141 Mass. 78, 6 N. E. 377; Com. v. Lord, 147 Mass. 399, 18 N. E. 67.

2 Com. v. Ellis, 207 Mass. 572, 93 N. E. 823.

1 Cody v. State, 118 Ga. 748, 45 S. E. 622.

2 Id.

CHAPTER LXXXII.

INDICTMENT—SPECIFIC CRIMES.

White Slave Traffic.

§ 1256. Requisites and sufficiency of indictment.
§ 1257. Duplicity and variance.

§ 1256. Requisites and sufficiency of indictment. An indictment or information charging a violation of the White Slave Traffic Act or Mann Act[1] drawn in the language of the statute[2] or in the substantial language of the statute[3] is sufficient. The indictment or information need not go beyond the language or the purpose of the statute;[4] therefore an indictment charging first in the language of the statute, and then specifically setting out the ways and manner of the alleged violation is good.[5] Where the means of transportation set out in the indictment was two automobiles, it was not defective for failing to allege that the automobiles were common carriers.[6] Under that portion of the act requiring every person harboring,—within three years after her entry from any country which is a party to the arrangement for the suppression of the white slave traffic,—any alien female for immoral purposes, to file a statement with the Commissioner of Immigration reciting certain facts, etc., an indictment is fatally defective unless it alleges that the woman is from one of the countries which is a party to

1 Act of Congress, June 25, 1912, ch. 395; Fed. Stats. Ann., Supp. 1912, vol. I, p. 419.

2 United States v. Flaspoller, 205 Fed. 1006.

3 Kalen v. United States, 116 C. C. A. 450, 196 Fed. 888; United States v. Brand, 229 Fed. 847.

4 United States v. Brand, 229 Fed. 847.

5 Weddell v. United States, 129 C. C. A. 552, 213 Fed. 208.

6 United States v. Burch, 226 Fed. 974.

the arrangement for the suppression of the white slave traffic.[7]

§ 1257. Duplicity and variance. An indictment or information charging a violation of the white slave traffic act is not duplicitous because it charges the transportation of two women, where it alleges that such transportation was done at one and the same time and for the same purpose.[1] Where the offense is thus charged, and the proof on the trial establishes the offense as to one of the women only, this will not constitute a fatal variance.[2]

7 United States v. Davin, 189 Fed. 244.

1 United States v. Westman, 182 Fed. 1017.

2 Bennett v. United States, 194 Fed. 630.

CHAPTER LXXXIII.

OF FINDING INDICTMENTS, AND HEREIN OF GRAND JURIES.

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I. INTRODUCTORY.

§ 1258. CONFLICT OF OPINION AS TO POWER OF GRAND JURIES TO ORIGINATE PROSECUTIONS. The value of grand juries is one of those questions which shift with the political tendencies of the age. When liberty is threatened by excess of authority, then a grand jury, irresponsible as it is, and springing (supposing it to be fairly constituted) from the body of the people, is an important safeguard of liberty. If, on the other hand, public order, and the settled institutions of the land, are in danger from momentary popular excitement, then a grand jury, irresponsible and secret, partaking, without check, of the popular impulse, may, through its inquisitorial powers, become an engine of great mischief to liberty as well as to order. In the time of James II, when Lord Somers's famous tract was written, a barrier was needed against oppressive state prosecutions, and this barrier grand juries presented. In our own times a restraint may be 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.[1] It is possible to conceive of a third even more perilous contingency: that grand juries, selected in times of high party excitement, may be so organized as to become the unscrupulous political tools of the party which happens to be in power, and may be used by this party to annoy or oppress its political antagonists. Rejecting, however, this hypothesis as one which a free people living under a constitutional government would not permanently tolerate, we may view the question in its relation to the conditions above first stated. Assuming that of 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?

§ 1259. —— THREE VIEWS. 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:

II. POWER TO INSTITUTE PROSECUTIONS.

§ 1260. THEORY THAT SUCH POWER BELONGS TO GRAND JURY. That grand juries may on their own motion institute all prosecutions whatsoever is a view which was generally accepted at the institution of the federal government, and was in accordance with the English practice then obtaining.[1]

[1] See London Law Times, Oct. 4, 1879.

[1] Report of the English Commissioners of 1879, we have the following (pp. 32-33):

"We doubt whether the existence of the power to send up a bill before a grand jury without a preliminary inquiry before a magistrate; the extent of this power, and the facilities which it gives for abuse, are generally known. It is not improbable that many lawyers, and most persons

The right of a prosecutor to make complaint personally to a grand jury was 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.[2]

§ 1261. —— JUDGE WILSON'S VIEW. Such, also, appears to have been the view of the late Judge Wilson of the Supreme Court of the United States.[1]

§ 1262. —— VIEWS OF JUDGES HOPKINSON AND ADDISON. 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,

who are not lawyers, would be surprised to hear that theoretically there is nothing to prevent such a transaction as this: Any person might go before a grand jury without giving any notice of his intention to do so. He might there produce witnesses, who would be examined in secret, and of whose evidence no record would be kept, to swear, without a particle of foundation for the charge, that some named person had committed any atrocious crime. If the evidence appeared to raise a prima facie case, the grand jury, who can not adjourn their inquiries, who have not the accused person before them, who have no means of testing in any way the evidence produced, would probably find the bill. The prosecutor would be entitled to a certificate from the officer of the court that the indictment had been found. Upon this he would be entitled to get a warrant for the arrest of the person indicted, who, upon proof of his identity, must be committed to prison till the next assizes. The person so committed would not be entitled as of right to bail, if his alleged offense were felony. Even if he were bailed, he would have no means of discovering upon what evidence he was charged, and no other information as to his alleged offense than he could get from the warrant, as he would not be entitled by law to see the indictment or even to hear it read till he was called upon to plead. He would have no legal means of obtaining the least information as to the nature of the evidence to be given, or (except in cases of treason) even as to the names of the witnesses to be called against him; and he might thus be tried for his life without having the smallest chance of preparing for his defense, or the least information as to the character of the charge."

2 1 Opinions of Attorneys-General 22.

1 Wilson's Lectures on Law 361.

though in a style intended at the time more for popular than professional effect.[1] 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 offenses 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, outrages, 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."[2] As the learned judge, however, in the same charge, intimates an opinion that a grand jury is not to be permitted to summon 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 to the jurors by the court, or rest in their personal knowledge.

§ 1263. —— Other views. 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 is bound to give them its aid for this purpose.[1]

The same view has been taken in the Circuit Court of the United States in the District of Columbia.[2]

A similar question was raised in 1851, in the Circuit

[1] 1 Hopkinson's Works 194.

[2] Addison's Charges 47.

[1] Ward v. State, 2 Mo. 120, 22 Am. Dec. 449; see State v. Corson, 12 Mo. 404; State v. Terry, 30 Mo. 368.

[2] United States v. Tompkins, 2 Cr. 46, Fed. Cas. No. 16483; though see United States v. Lyles, 4 Cr. 469, Fed. Cas. No. 15,646.

As to informations, see United States v. Ronzone, 14 Blatch. 69, Fed. Cas. No. 16192.

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.[3]

[3] "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 offenses (and their perpetrators) that the jurors suppose to have been committed. If general inquiries could not be made by the grand jury, neither the offense 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

§ 1264. THEORY THAT GRAND JURIES ARE LIMITED TO CASES OF NOTORIETY, OR IN THEIR OWN KNOWLEDGE, AND TO CASES GIVEN TO THEM BY COURT OR PROSECUTING OFFICERS. A second view is that the grand jury may act upon and present such offenses 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. This is the view which may be now considered as accepted in the United States courts, and in most

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 offenses 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 offenses 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 states, as will be seen by the opinions of the Supreme Courts and circuit judges found in Whart. Crim. Law, 3d ed., ch. 6." See 1 Kerr's Whart. Crim. Law, §§ 175-192.

of the several states.[1] In Pennsylvania the annoyances and disorders attending the unlimited access of private prosecutors to the grand jury room have led a court of great respectability to hold it to be an indictable offense for a private citizen to address the grand jury unless when duly summoned.[2]

In accordance with this view, Judge King, in an 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.[3] This

1 Infra, §§ 1295, 1912.

2 Com. v. Crane, 3 P. L. J. 442; see State v. Wolvott, 21 Conn. 272; Ridgway's Case, 2 Ashm. (Pa.) 247.

Such interference is a contempt of court, see Harwell v. State, 78 Tenn. (10 Lea) 544; infra, § 1912.

For agents of the government to interfere is ground for quashing. See, infra, § 1325. And see, also, comments in Hartranft's App., 85 Pa. St. 433, 27 **Am. Rep.** 667.

3 **Judge King's decision.** "A warrant of arrest, founded on probable cause supported 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 offense charged against him. No system can present more efficient guarantees against the oppressions of power or prejudice, or the machinations of falsehood and fraud. The moral and legal responsibilities of a public oath, the

conclusion was, in 1870, emphatically sustained by 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 defense,—a thing of the hardest practicability if a preliminary hearing is not afforded to him. For how is an accused effectively to prepare his defense unless he is informed, not merely what is charged against him, but when, where, and how he is said to have violated the public law. It is not true that a bill of indictment found, without a preliminary hearing, furnishes him with this vital information. It practically neither describes the time, place, nor circumstances of the offense charged. Time is sufficiently described, if the day on which the crime is 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 offense is described according to certain technical formulæ. Hence the inestimable value of preliminary public investigations, by which the accused can be truly informed, before he comes to trial, what is the offense 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 gen-

Supreme Court of the state, by whom it was held that a

eral and 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 offense 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 aggrieved 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 are 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 offense, from their own knowledge or observation, without

grand jury can not indict, without a previous prosecution

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 indorsement 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 authori-

before a magistrate, except in offenses of public notoriety, ties, 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 can not 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 frenzies, 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 the 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 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 court, 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 can not, 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 con-

such as are within their own knowledge, or are given them

serves 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 may 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 offenses 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."

Remarks of the Commissioners to revise the Criminal Code of New York, appointed in 1870:

"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

in charge by the court, or are sent to them by the district attorney.[4] This, however, does not preclude a grand

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 private 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."

See report of English Commissioners, given in the 7th edition of this work, § 458; 4 Cr. Law Mag. 182; Report in 1870 of commissioners to revise criminal code of N. Y., p. 116.

In New York a binding over is not necessary if the case is under examination. See People v. Hyler, 2 Park. Cr. Rep. (N. Y.) 566; People v. Horton, 4 Park. Cr. Rep. (N. Y.) 222.

A grand jury, it seems, may of their own knowledge indict a person committing perjury before them.—State v. Terry, 30 Mo. 368.

4 McCullough v. Com., 67 Pa. St. 30; Com. v. Simons, 6 Phila. R. 167.

In McCullough v. Com., supra, it was said by the chief justice: "It has never been thought that the 9th section of the 9th article of the Constitution, commonly called the Bill of Rights, prohibits all modes of originating a criminal charge against offenders except that by a prosecution before a committing magistrate. Had it been so thought, the court, the attorney general, and the grand jury would have been stripped of power universally conceded to them. In that event the court could give no offense in charge to the grand jury, the attorney general could send up no bill, and the grand jury could make no presentment of their own knowledge, but all prosecutions would have to pass through the hands of inferior magistrates."

In Rowand v. Com., 82 Pa. St. 405, it was ruled that the district attorney, with the powers of the deputy attorney general conferred upon him by the Act of May 3, 1850 (P. L. 654), may prefer an

jury, when a bill sent to it by the prosecuting attorney contains a count as to which there was no specific binding over, from finding and returning such count.[5]

In Tennessee a presentment, found not on the knowledge of any of the grand jury, but upon information delivered to the jury by others, will be abated on a plea of the defendant.[6] But this does not preclude the grand jury from exercising inquisitorial power in respect to nuisances such as houses of ill-fame, and other matters of notoriety.[7]

In an authoritative charge of Justice Field, of the Supreme Court of the United States, delivered to a California grand jury, in August, 1872, is the following: "Your oath requires you to diligently inquire, and true presentment make, 'of such articles, matters, and things as shall be given you in charge, or otherwise come to your knowledge touching the present service.' The first designation of subjects of inquiry are those which shall be given you in charge; this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall

indictment before the grand jury without a preliminary hearing or previous commitment of the accused, and this even after a return of ignoramus to a previous indictment of the accused for the same offense; but this power is to be exercised under the supervision of the proper court of criminal jurisdiction, and its employment can only be justified by some pressing and adequate necessity. It was further said, that where the exercise of such power by the district attorney has been approved by the Court of Quarter Sessions, it will not be reviewed by the Supreme Court. See, infra, § 1301.

To the same effect, see Brown v. Com., 76 Pa. St. 319.

Compare: People v. Horton, 4 Park. Cr. Rep. (N. Y.) 222.

5 Nicholson v. Com., 96 Pa. St. 503. In Com. v. Lewis, 15 W. N. C. (Pa.) 205, it was held that in such a case there could be a continuance, if the defendant was surprised, to the next term.

6 State v. Love, 23 Tenn. (4 Humph.) 255. See, also, State v. Caine, 8 N. C. (1 Hawks) 352.

Infra, § 1285, note.

7 State v. Barnes, 73 Tenn. (5 Lea) 598. See Com. v. Wilson, 2 Chest. Co. Rep. (Pa.) 164; infra, § 1265.

'otherwise come to your knowledge touching the present service'; this means those matters within the sphere of and relating to your duties which shall come to your knowledge, other than those to which your attention has been called by the court, or submitted to your consideration by the district attorney. But how come to your knowledge? Not by rumors and reports, but by knowledge acquired from the evidence before you, or from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury. Some of you, also, may have personal knowledge of the commission of a public offense against the laws of the United States, or of facts which tend to show that such an offense has been committed, or possibly attempts may be made to influence corruptly or improperly your action as grand jurors. If you are personally possessed of such knowledge, you should disclose it to your associates; and if any attempts to influence your action improperly or corruptly are made, you should inform them of it also, and they will act upon the information thus communicated as if presented to them in the first instance by the district attorney. But, unless knowledge is acquired in one of these ways, it can not be considered as the basis for any action on your part. We, therefore, instruct you, that your investigations are to be limited: First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates. You will not allow private prosecutors to intrude themselves into your presence and present accusations. Generally such parties are actuated by private enmity, and seek merely the

gratification of their personal malice. If they possess any information justifying the accusation of the person against whom they complain, they should impart it to the district attorney, who will seldom fail to act in a proper case. But if the district attorney should refuse to act, they can make their complaint to a committing magistrate, before whom the matter can be investigated, and if sufficient evidence be produced of the commission of a public offense by the accused, he can be held to bail to answer to the action of the grand jury."[8]

It has been held in New York, that a grand jury may find a bill against parties who are under 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.[9]

§ 1265. THEORY THAT GRAND JURIES ARE RESTRICTED TO CASES RETURNED BY MAGISTRATES AND PROSECUTING OFFICER. The third view is 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.[1] If it should happen, under any contingencies of legislation,

[8] Pamph. Rep., p. 9. See 2 Sawy. 663-667; S. P. Lewis v. Commis., 74 N. C. 194.

[9] People v. Hyler, 2 Park. Cr. Rep. (N. Y.) 566.

The prosecuting attorney, according to the usual practice in the federal courts, may on his official responsibility send a bill to a grand jury without a prior arrest or binding over. — United States v. Fuers, 12 Int. Rev. Rec. 43, Fed. Cas. No. 15174.

[1] Advocating this view may be noticed a pamphlet entitled "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. That, as is the old federal practice, any citizen may institute a prosecution, see United States v. Skinner, 2 Wheel. Cr. Cas. 232, Brun. Cal. Cas. 446, Fed. Cas. No. 16309.

In Virginia there must, in felonies, be a prior examination before a justice, or a waiver of such examination.—Butler v. Com., 81 Va. 159; supra § 111.

that grand juries should be selected by the dominant political party, so as to be used by that party for political ends, then it is important that they should be restricted in the way which this limitation prescribes. An executive should have power, it is true, to institute, at his discretion, prosecutions, even though these prosecutions are aimed at political antagonists. But he should act, when exercising this power, responsibly, taking upon himself the burden, and challenging impeachment or popular condemnation should he do wrong. In this check he will move cautiously, and with due regards to constitutional and legal sanctions. It is otherwise, however, when he is authorized to act through a grand jury selected by himself or his dependents, and ready to execute, in every respect, his will. Such a body, irresponsible, servile to the political party whose creature it is, armed with inquisitorial powers of summoning before it whomsoever it will, examining them in secret, giving whatever interpretation it may choose to their evidence, finding whatever bills it chooses and ignoring all others, may become a dangerous engine of despotism, calculated to disgrace the government which acts through it, and provoke to revolution those on whom it acts. Under a system in which the grand jury is appointed by the executive, it is better that its functions should be limited in the terms here prescribed; and that in all cases in which the executive desires to initiate a prosecution, it should be by information or preliminary arrest before a magistrate. At common law, the right in a grand jury to institute prosecutions on its own motion is based on the assumption that it represents the people at large, and ceases to exist when it is not so constituted.[2]

[2] 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

§ 1266. POWER OF GRAND JURIES LIMITED TO COURT SUMMONING THEM. Under the federal constitution, Congress has invested the courts of the United States with criminal jurisdiction, and since this jurisdiction is chiefly exercised through the instrumentality of grand juries, the power of Congress to determine their functions results by necessary implication. As a rule, the powers of grand juries are co-extensive with, and are limited by, the criminal jurisdiction of the courts of which they are an appendage.[1] Hence, a presentment by a grand jury in the Circuit Court of the United States, of an offense of which that court 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.[2]

III. CONSTITUTION OF GRAND JURIES.

§ 1267. NUMBER MUST BE BETWEEN TWELVE AND TWENTY-THREE. Though twenty-four are usually summoned on grand juries, not more than twenty-three can be empanelled, as, otherwise, a complete jury of twelve might find a bill, when, at the same time, a complete jury of twelve

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 indorsed on the bill as prosecutor.—State v. Caine, 8 N. C. (1 Hawks) 352.

In Michigan there must be a preliminary binding over.—O'Hara v. People, 41 Mich. 623, 3 N. W. 161. See Shepherd v. State, 64 Ind. 43.

In Tennessee the grand jury can not originate prosecutions except when by statute they have inquisitorial power.—State v. Robinson, 70 Tenn. (2 Lea) 114.

They have the power in liquor cases. See State v. Staley, 71 Tenn. (3 Lea) 565.

See, supra, § 1264.

Prosecuting attorney is not limited by returns. See Com. v. Morton, 12 Phila. 595.

1 See Shepherd v. State, 64 Ind. 43.

2 See United States v. Hill, 1 Brock. 156, Fed. Cas. No. 15364; United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16134; United States v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 16429.

might dissent.[1] If of twenty-four, the finding is void.[2] And it appears that, at common law, a grand jury composed of any number from twelve to twenty-three is a legal grand jury.[3] If less than twelve the defect at common law is fatal.[4] A venire facias is an essential prerequisite.[5]

§ 1268. FOREMAN USUALLY APPOINTED BY COURT. 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.[1]

§ 1269. JURORS TO BE DULY SWORN. 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 swear (or affirm) that you will diligently inquire, and true presentment make, of such articles, matters, and things as shall be given you in

1 Cro. Eliz. 654; 2 Hale 121; 2 Hawk., ch. 25, § 16; Ridling v. State, 56 Ga. 601; Hudson v. State, 1 Blackf. (Ind.) 317; State v. Copp, 34 Kan. 522, 9 Pac. 233; Com. v. Wood, 56 Mass. (2 Cush.) 149.

As to statutes limiting number, see United States v. Reynolds, 1 Utah 319; United States v. Reynolds, 98 U. S. 145, 25 L. Ed. 244.

As to venire facias, see Jones v. State, 18 Fla. 889; United States v. Antz, 4 Woods 174, 16 Fed. 119.

2 People v. Thurston, 5 Cal. 69; R. v. Marsh, 6 Ad. & El. 236, 33 Eng. C. L. 143.

3 Norris v. State, 3 G. Greene (Iowa) 513; State v. Symonds, 36 Me. 128; Dowling v. State, 13 Miss. (5 Sm. & M.) 664; State v. Davis, 24 N. C. (2 Ired.) 153; Pybos v. State, 22 Tenn. (3 Humph.) 49.

In Missouri twelve jurors suffice. —State v. Green, 66 Mo. 631.

In other states special limitations exist. See State v. Swift, 14 La. Ann. 827.

In Texas the number must be exactly twelve.—Rainey v. State, 19 Tex. App. 479.

4 CAL.—People v. Butler, 8 Cal. 435. ME.—State v. Symonds, 36 Me. 128. MISS.—Barney v. State, 20 Miss. (12 Smed. & M.) 68. N. C.—State v. Davis, 24 N. C. (2 Ired.) 153. VA.—Com. v. Sayres, 35 Va. (8 Leigh) 722. ENG.—Clyncard's Case, Cro. Eliz. 654, 78 Eng. Rep. 893.

5 United States v. Antz, 4 Woods 174, 16 Fed. 119.

1 Smith's Laws of Pa., vol. 7, p. 685; Rev. St. N. Y., part 4, ch. 2, tit. 4, § 26; Davis' Prec., p. 9.

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)."[1] In Pennsylvania, after the words, "shall be given you in charge," in the foreman's oath occur the words, "or otherwise come to your knowledge, touching the present service." In Virginia the same expression is introduced; but the subsequent clause, enjoining secrecy, is omitted.[2] In Massachusetts the jury are sworn in a body, the foreman being afterwards elected, but the oath is the same as above.[3] The fact that the grand jury were sworn must appear on the record.[4] The terms of the oath, however, need not be set forth.[5]

§ 1270. Bound to secrecy. As has been just seen, grand jurors, according to the form generally used, are bound to secrecy; and this duty is made obligatory by statute in several states.[1] The obligation to secrecy, however, is enforced by the policy of the law, as well as by

1 See Cr. Cir. Com., p. 11, 6th ed.

2 Tate's Dig., tit. Juries. In the Crimes Act of 1866 the oath is given in full.—Pamph. L. 926.

3 Rev. Stats. Mass., ch. 136, § 5.

Where, on the first day of the term of a circuit superior court, a grand jury was empaneled 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.—Com. v. Burton, 31 Va. (4 Leigh) 645, 26 Am. Dec. 337. See Jetton v. State, 19 Tenn. (1 Meigs) 192; Lyman v. People, 7 Ill. App. 345.

4 Baker v. State, 39 Ark. 180.

5 Brown v. State, 74 Ala. 478.

1 See 16 West. Jur. 5.

the terms of this oath; and hence the obligation is binding, though not imposed by the oath locally in force.[2] The reasons for the rule are the importance of sheltering the action of the prosecuting authorities from premature disclosure by which such action could be frustrated; the importance of protecting accused parties from the disclosure, under the shelter of judicial procedure, of charges against them which may have been ignored.[3] How far this obligation is made to yield to the duty of giving testimony in subsequent litigation is hereafter discussed.[4] As will be hereafter seen, only sworn officers are usually permitted to attend the sessions of the grand jury.[5]

IV. DISQUALIFICATION OF GRAND JURORS, AND HOW IT MAY BE EXCEPTED TO.

§ 1271. IRREGULARITIES IN EMPANELLING TO BE MET BY CHALLENGE TO ARRAY OR MOTION TO QUASH OR PLEA. It may be laid down as a general rule that all material irregularities in selecting and empanelling the grand jury, which do not relate to the competency of individual jurors, may usually be objected to by challenge to array,[1]

2 Little v. Com., 66 Va. (25 Grat.) 921. Infra, § 1306.

3 See Com. v. Mead, 78 Mass. (12 Gray) 167, 71 Am. Dec. 741, and cases cited infra, § 1306.

That the court, in a strong case, may order the prosecution to furnish the defendant with the evidence used before the grand jury, see Eighmy v. People, 79 N. Y. 546; People v. Naughton, 7 Abb. Pr. N. S. (N. Y.) 431.

4 Infra, § 1306.

5 Infra, § 1295.

1 CAL.—People v. Earnest, 45 Cal. 29. GA.—United States v. Blodgett, 35 Ga. 336. MISS.—Barney v. State, 20 Miss. (12 Smed. & M.) 68; Boles v. State, 24 Miss. 445; James v. State, 45 Miss. 572; Chase v. State, 46 Miss. 683; Logan v. State, 50 Miss. 269. N. Y.—People v. Jewett, 3 Wend. 314. TENN.—State v. Duncan, 15 Tenn. (7 Yerg.) 271. TEX.—State v. Jacobs, 6 Tex. 99; Vanhook v. State, 12 Tex. 252; Reed v. State, 1 Tex. App. 1. FED.—United States v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 16429.

Not 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,

or by motion to quash.[2] This must, when possible,[3] be before the general issue.[4] Objections by plea are hereafter noticed.[5] In New York, under the Criminal Procedure Code, there can be no longer a challenge to the body of the grand jury on the ground that it is irregularly or defectively constituted.[6]

§ 1272. DISQUALIFIED JUROR MAY BE CHALLENGED. When a person who is disqualified is returned, it is a good cause of challenge to the poll, which may be made by any person

and put them in the wheels (Com. v. Lippard, 6 Serg. & R. 395); nor that two unqualified persons were inadvertently placed on a list of three hundred.—United States v. Rondeau, 4 Woods 185, 16 Fed. 109. See Billingslea v. State, 68 Ala. 486; State v. Glascow, 59 Md. 209; Com. v. Lippard, 6 Serg. & R. (Pa.) 395.

Strong personal bias on the part of the persons employed in drawing the jury may be a cause for challenge of the array.—State v. McQuaige, 5 S. C. 429.

2 Infra, §§ 1277 et seq., § 1315. See State v. Lawrence, 12 Ore. 297, 7 Pac. 116; State v. Champeau, 52 Vt. 313, 36 Am. Rep. 754; State v. Cox, 52 Vt. 471; United States v. Antz, 4 Woods 174, 16 Fed. 119.

Indictment may be quashed when a juror was personated by a stranger to the panel.—Nixon v. State, 68 Ala. 535; State v. Hughes, 58 Iowa 165, 11 N. W. 706; People v. Petrea, 92 N. Y. 128, 1 N. Y. Cr. Rep. 233, affirming 30 Hun 98, 64 How. Pr. 139, 1 N. Y. Cr. 198.

3 Infra, § 1277.

4 Infra, § 1277. See: ARK.—Dixon v. State, 29 Ark. 165. CAL.—People v. Southwell, 46 Cal. 141. ILL.—Barrows v. People, 73 Ill. 256. MISS.—State v. Borroum, 25 Miss. 203; James v. State, 45 Miss. 572. MO.—State v. Whitton, 68 Mo. 91. MINN.—State v. Greenwood, 23 Minn. 104, 23 Am. Rep. 678. OHIO—State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478. PA.—Brown v. Com., 73 Pa. St. 34. FED.—United States v. Gale, 109 U. S. 65, 27 L. Ed. 857, 3 Sup. Ct. 1.

In North Carolina plea is said to be the proper mode of exception.—State v. Haywood, 73 N. C. 437.

For former New York practice as to plea in abatement, see Dolan v. People, 64 N. Y. 485; People v. Tweed, 50 How. Pr. (N. Y.) 262, 273, 280, 286.

For practice in refusing a challenge to the array, see Carpenter v. People, 64 N. Y. 382; People v. Fitzpatrick, 30 Hun 493, 1 N. Y. Cr. Rep. 425; People v. Duff, 65 N. Y. Prac. 365, 1 N. Y. Cr. Rep. 307.

As to practice in summoning jury in federal courts.—United States v. Munford, 16 Fed. 164.

5 Infra, § 1277.

6 People v. Hoogkerk, 96 N. Y. 38.

For an examination of the federal statute in this relation see United States v. Richardson, 28 Fed. 61.

There can be no challenge to array for personal objection to particular jurors.—Id.

who is concerned in the business to come before the grand jury;[1] and in like manner a prejudiced grand juror may be challenged by an accused person against whom the prejudice works.[2] Although it is said an amicus curiæ may be sometimes allowed to intervene,[3] yet generally the right is limited to those who are at the time under a prosecution for an offense about to be submitted to the consideration of the grand jury or against whom a prosecution is threatened.[4] The burden of proof is on the challenger.[5]

Exemption is a personal privilege of the juror. If the exempted person serves, the defendant has no right to complain.[6]

§ 1273. PREADJUDICATION GROUND FOR CHALLENGE. It is therefore 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.[1] As will presently be

1 2 Hawk., ch. 25, § 16; Bac. Ab. Juries, A.; Burn, J., 29th ed. Jurors, A.; Mershom v. State, 51 Ind. 14; United States v. Richardson, 28 Fed. 61.

As to time of challenge, see People v. Geiger, 49 Cal. 643.

As to practice, see State v. Fowler, 52 Iowa 103, 2 N. W. 983.

As to plea, see Id. Infra, §§ 1277, 1347.

2 State v. Osborne, 61 Iowa 330, 16 N. W. 201.

3 Com. v. Smith, 9 Mass. 107.

4 ALA.—State v. Hughes, 1 Ala. 655; State v. Clarissa, 11 Ala. 57. GA.—United States v. Blodgett, 35 Ga. 336. IND.—Hudson v. State, 1 Blackf. 318; Ross v. State, 1 Blackf. 390; State v. Herndon, 5 Blackf. 75. MICH.—Thayer v. People, 2 Dougl. 418. MO.—State v. Corson, 12 Mo. 404. N. Y.—People v. Horton, 4 Park. Cr. Rep. 222.

But see contra, Tucker's Case, 8 Mass. 286.

5 State v. Haynes, 54 Iowa 109, 6 N. W. 156.

As to action after bail found, see infra, § 1277.

6 Infra, § 1627; Green v. State, 59 Md. 123, 43 Am. Rep. 542; United States v. Munford, 16 Fed. 164.

1 ALA.—State v. Clarissa, 11 Ala. 57. CAL.—People v. Manahan, 32 Cal. 68. ILL.—But see Musick v. People, 40 Ill. 268. IOWA—State v. Gillick, 7 Iowa 287; State v. Osborne, 61 Iowa 330. ME.—State v. Quimby, 51 Me. 395. MO.—State v. Holcomb, 86 Mo. 371. NEB.—Patrick v. State, 16 Neb. 330, 20 N. W. 121. N. J.—State v. Rickey, 10 N. J. L. (5 Halst.) 83. N. Y.—People v. Jewett, 3 Wend. 314. PA.—Rowand v. Com., 82 Pa. St. 306, 22

seen, the objection must be made, when there is opportunity to do so, before indictment found.[2]

§ 1274. —— SO OF CONSCIENTIOUS SCRUPLES. A conscientious inability to find a bill for a capital offense is a good ground for challenge.[1]

§ 1275. PERSONAL INTEREST A DISQUALIFICATION. In Massachusetts it was held, in an early case, that the court would not set aside a grand juror because he had originated a prosecution for a crime against a person whose case was to come under the consideration of the grand jury.[1] 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.[2] But these decisions can not be reconciled with the general tenor of authority, nor with the analogies of the English common law. It is a serious discredit as well as peril to a man to have a bill found against him; and if this is likely to be done corruptly, or through interested parties, he has a right to apply to arrest the evil at the earliest moment. Besides, it is far less pro-

Am. Rep. 758; Com. v. Clarke, 2 Browne 325. FED.—United States v. White, 5 Cr. 457, Fed. Cas. No. 16679.

2 Infra, § 1277. See Com. v. Clarke, 2 Browne (Pa.) 325.

1 IND.—Jones v. State, 2 Blackf. 477; Gross v. State, 2 Ind. 329. N. J.—State v. Rockafellow, 6 N. J. L. (1 Halst.) 332; State v. Ricey, 10 N. J. L. (5 Halst.) 83. TENN.—State v. Duncan, 15 Tenn. (7 Yerg.) 271. W. VA.—State v. Greer, 22 W. Va. 800.

See, infra, § 1600.

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.—People v. Jewett, 3 Wend. (N. Y.) 314, sed quære. See Com. v. Lippard, 6 Serg. & R. (Pa.) 395.

1 Com. v. Tucker, 8 Mass. 286. See United States v. Williams, 1 Dill. 485, Fed. Cas. No. 16716.

In Kock v. State, 32 Ohio St. 353, having subscribed funds to put down the liquor traffic does not exclude a grand juror in a liquor case.

2 Baldwin's Case, 2 Tyler (Vt.) 473.

ductive of injury to public justice for a jury to be purged, at the outset, of an incompetent member, than for the indictment, after the grand jury adjourns, to be set aside on account of such incompetency.[3] But interest, to sustain a challenge, must be actual and operative, not remote and inoperative.[4]

§ 1276. "VIGILANCE" MEMBERSHIP NO GROUND. It is no ground for challenge to a grand juror that he belongs to an association whose object is to detect crime.[1]

§ 1277. OBJECTION, WHEN IT CAN BE TAKEN, MUST BE MADE BEFORE GENERAL ISSUE. The question of the mode in which objections to the organization and constitution of the grand jury are to be taken depends so largely upon local statutes that it is impracticable to solve it by any tests which would be universally applicable. The following general rules, however, may be regarded as generally applicable:

1. If the body by whom the indictment was found was neither de jure nor de facto entitled to act as such, then the proceedings are a nullity, and the defendant, at any period when he is advised of such nullity, is entitled to attack them by motion to quash, or by plea in abatement, or, when the objection is of record, by motion in arrest of judgment. He is, in most jurisdictions, sheltered by

3 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.—2 R. S. 724, §§ 27, 28.

4 Com. v. Ryan, 9 Mass. 90, 6 Am. Dec. 40; Com. v. Strother, 3 Va. (1 Va. Cas.) 186; infra, § 1598.

In State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 818, which was a prosecution for embezzling from a bank, it was held that a juror was not disqualified because his wife was a depositor.

1 Musick v. People, 40 Ill. 268. See infra, § 1595.

constitutional provisions from prosecution except on indictment found by a grand jury; and when the body finding the indictment is not a grand jury either de jure or de facto, then its prosecution must fall whenever the question is duly raised.[1] But a de facto grand jury can not be deemed a nullity under this provision of the constitution.[2] It is otherwise with a grand jury which has no quorum in attendance.[3]

2. For such irregularities in drawing and constituting the grand jury as do not prejudice the defendant, he has no cause of complaint, and can take no exception.[4]

3. For irregularities of this class by which the defendant is prejudiced he is entitled to redress.[5] The way, however, in which this redress is to be sought depends upon local statute. It may be generally declared that the defendant must take the first opportunity in his power to make the objection. When, however, does this opportunity occur? In this relation the following distinctions may be recognized:

(a) Where the defendant is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, as hereafter stated.[6] If he lies by until bill is found, then the exception may be too late in all cases where, having prior opportunity and capacity to object, he has made no objection.[7]

1 Infra, § 1280. See 23 Alb. L. J. 324; 4 Cr. Law Mag. 174-175.

2 People v. Petrea, 92 N. Y. 128. See Kerr's Whart. Crim. Law, §§ 855, 1893, 2145.

3 Doyle v. State, 17 Ohio 222.

Indictment found without evidence will be quashed, the fact being proved by the district attorney.—See State v. Grady, 84 Mo. 220.

4 State v. Mellor, 13 R. I. 666.

5 Com. v. Barker, 19 Mass. (2 Pick.) 563, and cases cited infra, in this section.

6 See Kemp v. State, 11 Tex. App. 174.

7 CAL.—People v. Beatty, 14 Cal. 566. FLA.—Gallaher v. State, 17 Fla. 370. IOWA—State v. Gilbert, 7 Iowa 287; State v. Ruthven, 58 Iowa 121, 12 N. W. 235. LA.—State v. Watson, 31 La. Ann. 379; State v. Miles, 31 La. Ann. 825; State v. Wittington, 33 La. Ann. 1403. ME.—State v. Quimby, 51

(b) Where the defendant has no such opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash, or by plea in abatement, the latter, in all cases of contested fact, being the proper remedy. The objection, unless in extraordinary cases of surprise, is waived by pleading over.[8] But even where the

Me. 595, 81 Am. Dec. 593. MASS.—Com. v. Smith, 9 Mass. 107; Com. v. Moran, 130 Mass. 281. MO.—State v. Clifton, 78 Mo. 430. NEB.—Polin v. State, 14 Neb. 540, 16 N. W. 898. N. J.—State v. Rickey, 10 N. J. L. (5 Halst.) 83; Gibbs v. State, 45 N. J. L. (16 Vr.) 379, 46 Am. Rep. 782. N. Y.—People v. Jewett, 3 Wend. 314. N. C.—State v. Smith, 80 N. C. 410. PA.—Com. v. Morton, 12 Phila. 595. TENN. — Fitzhugh v. State, 81 Tenn. (13 Lea) 258, 350. TEX.—Douglass v. State, 8 Tex. App. 520. FED.—United States v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 6429; United States v. White, 5 Cr. 457, Fed. Cas. No. 16679.

By statute in Pennsylvania, pleading, or even standing mute, waives errors in precept, venire, drawing, summoning, and returning of jurors.—Brown v. Com., 76 Pa. St. 319; Com. v. Chauncey, 2 Ashm. (Pa.) 90; Dyott v. Com., 5 Whart. (Pa.) 67.

But this does not preclude advantage being taken of such defects by challenge, motion to quash, or plea in abatement, before issue joined.

8 ALA.—State v. Brooke, 9 Ala. 10; State v. Clarissa, 11 Ala. 57; Weston v. State, 63 Ala. 155. See Battle v. State, 54 Ala. 93. ARK.—Wilburn v. State, 21 Ark. 198. FLA.—Kitrol v. State, 9 Fla. 9; Gladen v. State, 12 Fla. 562. GA.—Terrill v. State, 9 Ga. 58; Thompson v. State, 9 Ga. 210; Reich v. State, 53 Ga. 73. IND.—Pointer v. State, 89 Ind. 255; Henning v. State, 106 Ind. 386, 55 Am. Rep. 756, 6 N. E. 803, 7 N. E. 4. LA.—State v. Price, 37 La. Ann. 215; State v. Griffin, 38 La. Ann. 502. ME.—State v. Burlinghame, 15 Me. 104; State v. Symonds, 36 Me. 128; State v. Carver, 49 Me. 588, 77 Am. Dec. 275; State v. Wright, 53 Me. 328; State v. Fleming, 66 Me. 142, 22 Am. Rep. 552. MISS. — McQuillan v. State, 16 Miss. (8 Smed. & M.) 587; Rawls v. State, 16 Miss. (8 Smed. & M.) 599; Barney v. State, 20 Miss. (12 Smed. & M.) 68; Boles v. State, 24 Miss. 445; State v. Borroum, 25 Miss. 728. NEV.—State v. Collier, 17 Nev. 275, 30 Pac. 891. N. H.—State v. Rand, 33 N. H. 216. N. J.—State v. Rockafellow, 6 N. J. L. (1 Halst.) 332; State v. Norton, 23 N. J. L. (3 Zab.) 33. N. Y.—People v. Griffin, 2 Barb. 427; People v. Harriot, 3 Park. Cr. Rep. 112. N. C.—State v. Martin, 24 N. C. (2 Ired.) 101; State v. Duncan, 28 N. C. (6 Ired.) 98; State v. Griffin, 74 N. C. 316; State v. Cannon, 90 N. C. 711; State v. Lanier, 90 N. C. 714; State v. Haywood, 94 N. C. 847. OHIO—Doyle v. State, 17 Ohio 222; Huling v. State, 17 Ohio 583. PA.—Com. v. Chauncey, 2 Ashm. 90. R. I.—State v. Maloney, 12 R. I.

defendant has been notified, by binding over or otherwise, that his case is to come before the grand jury, the courts will permit him, in all cases in which laches are not imputable to him, or in which the defect is not discovered until after bill found, to raise the objection by plea in abatement or motion to quash.[9]

4. The objection that a grand juror is prejudiced must be made, when there is opportunity, before indictment found, by challenge,[10] though where there is no such op-

257; State v. Davis, 12 R. I. 492, 34 Am. Rep. 704. TENN.—State v. Duncan, 15 Tenn. (7 Yerg.) 271; State v. Bryant, 18 Tenn. (10 Yerg.) 527. TEX. — Jackson v. State,. 11 Tex. 261; Vanhook v. State, 12 Tex. 252; State v. Mahan, 12 Tex. 283. VT.—State v. Newfane, 12 Vt. 422. VA.—Com. v. Williams, 46 Va. (5 Grat.) 702. FED.—United States v. Gale, 109 U. S. 65, 27 L. Ed. 857, 3 Sup. Ct. 1; United States v. Rondeau, 4 Woods 185, 16 Fed. 109;. United States v. Richardson, 28 Fed. 61.

As to New York, see Dolan v. People, 64 N. Y. 485, and cases cited, supra, § 1271; Whart. Prec., § 1158.

As to practice on plea, see Bird v. State, 53 Ga. 602.

Remedy is exclusively plea in abatement. See Wallace v. State, 70 Tenn. (2 Lea) 29; infra, § 746.

9 Ibid., infra, § 1784.

Remedy must be by plea. See Ford v. State, 112 Ind. 373, 14 N. E. 241.

In New York the rule as stated by Andrews, J., in Cox v. People, 80 N. Y. 500 (1880), is that "mere irregularity in the drawing of grand or petit jurors is not a ground for reversing a conviction, unless it appears that they operated to the injury or prejudice of the prisoner." But as to grand juries, see under Rev. Code, supra.

10 ALA.—Boyington v. State, 2 Port. 100. CONN.—State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54. GA.—Williams v. State, 69 Ga. 11; Lee v. State, 69 Ga. 705. ILL.—Mackin v. People, 115 Ill. 313, 56 Am. Rep. 167, 3 N. E. 222. LA.—State v. Washington, 33 La. Ann. 896; State v. Jackson, 36 La. Ann. 96; State v. McGee, 36 La. Ann. 207. N. J.—State v. Rickey, 10 N. J. L. (5 Halst.) 83. OHIO—State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478. PA.—Rolland v. Com., 82 Pa. St. 306, 22 Am. Rep. 758. FED.—United States v. Williams, 1 Dill. 485, Fed. Cas. No. 16716.

As to challenge, see, supra, § 1272.

CAL.—People v. Hidden, 32 Cal. 445. ME. — State v. Carver, 49 Me. 588, 77 Am. Dec. 275. N. Y.—People v. Griffin, 2 Barb. 427. N. C.—State v. Ward, 9 N. C. (2 Hawks) 443; State v. Lamon, 10 N. C. (3 Hawks) 175; State v. Seaborn, 15 N. C. (4 Dev.) 305; State v. Martin, 24 N. C. (2 Ired.) 101. PA.—Rolland v. Com., 82 Pa. St. 306, 22 Am. Rep. 758.

portunity, or where the delay is not caused by the defendant, the defect may be taken advantage of by plea in abatement, or by motion to quash, before general issue pleaded.[11]

5. A question that is reserved when raised before indictment found, can be heard as fully after indictment found as before.[12]

6. Irregularity in selecting and empanelling the grand jury may be met by challenge to the array or motion to quash;[13] though this, as we have just seen, does not preclude an exception being taken after bill found when the defendant had no previous opportunity of being heard. But the objection is ordinarily waived by pleading over.[14]

§ 1278. Plea should be special. It is necessary that the plea, in such case, should set forth sufficient to enable the court to give judgment on it on demurrer.[1] 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

See for form, Whart. Prec., § 1158.

In Indiana such is, by statute, no longer the law.—Ward v. State, 48 Ind. 289, overruling State v. Herndon, 5 Blackf. (Ind.) 75; Vattier v. State, 4 Blackf. (Ind.) 72.

11 Infra, § 1315. ALA.—State v. Middleton, 5 Port. 484; State v. Ligon, 7 Port. 167; State v. Clarissa, 11 Ala. 57. GA.—Reich v. State, 53 Ga. 73, 21 Am. Rep. 265. ILL.—Musick v. People, 40 Ill. 268. N. C.—State v. Watson, 86 N. C. 624. OHIO — Doyle v. State, 17 Ohio 222. PA.—Com. v. Clarke, 2 Browne 325. VA.—Com. v. Cherry, 4 Va. (2 Va. Cas.) 20; Com. v. St. Clair, 42 Va. (1 Gratt.) 556. FED.—United States v. Gale, 109 U. S. 65, 27 L. Ed. 857, 3 Sup. Ct. 1.

Intoxication of a grand juror can not be taken advantage of by plea in abatement. See Allen v. State, 61 Miss. 627.

12 People v. Duff, 65 N. Y. Pr. 365; 1 N. Y. Cr. Rep. 307.

13 Supra, § 1271.

14 Hasley v. State, 14 Tex. App. 217.

Discharge of a grand jury in one case may operate generally. See People v. Fitzpatrick, 30 Hun (N. Y.) 493, 1 N. Y. Cr. Rep. 425.

1 IND.—Ward v. State, 48 Ind. 289; McClary v. State, 75 Ind. 260. NEB.—Priest v. State, 10 Neb. 393, 6 N. W. 468; Baldwin v. State, 12 Neb. 61, 10 N. W. 463. VT.—State v. Emery, 39 Vt. 84. FED.—United States v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16550.

put on the panel, who 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 bad.[2] But that a sufficient number of jurors did not concur in its finding may be tested by plea in abatement.[3]

§ 1279. ALIENS NOT NECESSARY IN PROSECUTIONS AGAINST ALIENS. It is not necessary, at common law, that any part of a grand jury finding a bill against an alien should be aliens.[1] Such, it has been determined, is also the rule in Pennsylvania.[2] The doctrine, that all the grand jurors should be inhabitants of the county for which they are sworn to inquire, admits, it would seem, of no modification.[3]

§ 1280. AS TO RECORD JURISDICTIONAL OBJECTIONS THERE MAY BE ARREST OF JUDGMENT. As we have already seen, objections to the grand jury, when such objections are not of record, must be taken before trial of the general issue; and in some states even record defects are cured by verdict.[1] It is otherwise, at common law, as to objections of record showing want of jurisdiction. In absence of statutory impediment, a motion in arrest may be entertained.[2]

2 Com. v. Thompson, 31 Va. (4 Leigh) 667, 26 Am. Dec. 339.

Plea in abatement, that the grand jurors who found the indictment were 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.—State v. Newer, 7 Blackf. (Ind.) 307.

3 Infra, § 1304.

1 Hawk., b. 2, ch. 43, § 36.

2 Respublica v. Mesca, 1 U. S. (1 Dall.) 73, 1 L. Ed. 42.

3 Roll. Abr. 82; 2 Inst. 32, 33, 34; Hawk., b. 2, ch. 25.

1 Supra, § 1277; infra, § 1699.

2 State v. Harden, 2 Rich. L. (S. C.) 533. See, also, Floyd v. State, 30 Ala. 511; State v. Watson, 34 La. Ann. 669; State v. Connell, 49 Mo. 282; State v. Vahl, 20 Tex. 779.

Infra, § 1699.

Objection not taken before verdict, can not be taken on motion for new trial.—Potsdamer v. State, 17 Fla. 895.

But mere irregularities in summoning the jury can not be thus excepted to.[3]

Where the error is of record, its existence must be determined by inspection.[4]

V. INDICTMENT MUST BE SANCTIONED BY THE PROSECUTING ATTORNEY.

§ 1281. ORDINARILY BILL MUST BE SIGNED BY PROSECUTING OFFICER. 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;[1] and it is even said that his signature is necessary before such submission,[2] though the point has been doubted;[3] and in several jurisdictions it has been expressly decided that an indictment need not be so signed.[4] In any view, the name of the prosecuting officer need not appear in the body of the indictment.[5]

3 Supra, § 1277; United States v. Gale, 109 U. S. 65, 27 L. Ed. 857, 3 Sup. Ct. 1.

4 Smith v. State, 28 Miss. (14 Smed. & M.) 728.

1 McCullough v. Com., 67 Pa. St. 30; Com. v. Simons, 6 Phil. 167; Foote v. State, 4 Tenn. (3 Hayw.) 98; Hite v. State, 17 Tenn. (9 Yerg.) 198.

2 Ibid.; State v. Bruce, 77 Mo. 193; Teas v. State, 26 Tenn. (7 Humph.) 174.

3 Holley v. State, 75 Ala. 14; Cooper v. State, 63 Ga. 515; State v. Vincent, 4 N. C. (1 Car. Law Repos.) 493.

4 ALA.—Ward v. State, 22 Ala. 16; Harrall v. State, 26 Ala. 53. ARK.—Anderson v. State, 4 Ark. (5 Pike) 444. IDA.—People v. Butler, 1 Ida. 231. IOWA—State v. Ruby, 61 Iowa 86, 15 N. W. 848 (under statute); State v. Wilmoth, 63 Iowa 380, 19 N. W. 249. ME.—State v. Reed, 67 Me. 127. MISS.—Thomas v. State, 6 Miss. (5 How.) 20; Keithler v. State, 18 Miss. (10 Smed. & M.) 192. N. C.—State v. Mace, 86 N. C. 668. S. C.—State v. Colman, 8 S. C. 237. VT.—State v. Pratt, 54 Vt. 484. FED.—See United States v. McAvoy, 4 Blatchf. 418, Fed. Cas. No. 15654.

Contra: Jackson v. State, 4 Kan. 150.

5 State v. Pratt, 54 Vt. 484.

In Indiana it would seem now necessary that the bill should come to court signed by the prosecuting attorney.—Heacock v. State, 42 Ind. 393; though see McGregg v. State, 4 Blackf. (Ind.) 101.

In Texas, signature is unnecessary by statute.—Campbell v. State, 8 Tex. App. 84.

Mere formal variances in the title of the prosecuting officer, or abbreviations which can be explained by the record, will not be

§ 1282. NAME MAY BE SIGNED AFTER FINDING. Even where the signature is necessary, the prosecuting attorney will be ordinarily allowed, at any subsequent period when the objection is made, to sign an indictment found without his signature being appended thereto, and a motion to quash for want of such signature will then be overruled.[1]

§ 1283. PROSECUTING OFFICER'S SANCTION NECESSARY. The proceedings in bringing an indictment before the court must be conducted by the prosecuting attorney in person, even where the trial before court and jury may be conducted by other counsel.[1] The indictment being

regarded as affecting the validity of the signature. — Supra, §§ 322 et seq.; infra, § 1281. Also: CAL.—People v. Ashnauer, 47 Cal. 98. IND.—Vanderkarr v. State, 51 Ind. 91. KAN.—State v. Tannahill, 4 Kan. 117. MONT.—See Territory v. Harding, 6 Mont. 323. NEV.—State v. Salge, 2 Nev. 321. TENN.—State v. Brown, 27 Tenn. (8 Humph.) 89; State v. Evans, 27 Tenn. (8 Humph.) 110; Greenfield, v. State, 66 Tenn. (7 Baxt.) 18; State v. Myers, 85 Tenn. 203, 5 S. W. 377.

—A title in itself unknown to the laws will be fatal.—Teas v. State, 26 Tenn. (7 Humph.) 174.

Signature of the proper officer may be affixed by his authorized deputy or other official representative: CAL.—People v. Darr, 61 Cal. 588. IND.—Choen v. State, 85 Ind. 209; Stout v. State, 93 Ind. 150. KAN.—State v. Nulf, 15 Kan. 404. PA.—Com. v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808. TEX.—State v. Gonzales, 26 Tex. 197. UTAH—People v. Lyman, 2 Utah 30. FED.—United States v. Nagle, 17 Blatch. 258, Fed. Cas. No. 15852.

Variance in name of prosecuting officer is not ground for reversal.—State v. Kinney, 81 Mo. 101.

—Nor will variance as to his title be material.—State v. Myers, 85 Tenn. 203, 5 S. W. 377.

[1] Knight v. State, 84 Ind. 73; State v. Ruby, 61 Iowa 86, 15 N. W. 848; Com. v. Lenox, 2 Brewst. (Pa.) 249.

In Alabama indictments are not usually drawn until the evidence is heard by the grand jury, and the character of the case determined.—Banks v. State, 78 Ala. 14.

[1] Infra, §§ 1488 et seq.; Byrd v. State, 2 Miss. (1 How.) 247; Rush v. Cavanaugh, 2 Pa. St. 187; Jarnagin v. State, 18 Tenn. (10 Yerg.) 529.

See Bemis' Webster Case, where this practice is reported to have been sustained.

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 can not take just exception.—State v. Hays, 23 Mo. 287.

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.[2]

VI. SUMMONING OF WITNESSES AND INDORSEMENT OF THEIR NAMES ON BILL.

§ 1284. Witnesses for prosecution to be bound to appear. 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 guarded exceptions, the sole way of putting an offender on his trial, the prosecutor, if there be any, and the witnesses, are ordinarily put 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.[1] The presence of witnesses not under recognizance to attend is obtained by the ordinary means of a subpœna.[2]

§ 1285. Names of witnesses usually placed on bill. The practice is, for the prosecuting attorney, or, in England, the clerk of the assizes, to mark on the back of each bill the witnesses supporting it; though it has been held both in England and in this country that the omission to

[2] Isham v. State, 33 Tenn. (1 Sneed.) 112 (a capital case). See, infra, § 1488.

In Pennsylvania, by the first section of the Act of May 3, 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, which arise in the county for which he is elected.—Pamph. 1850, 654; Com. v. Lenox, 3 Brewst. (Pa.) 249.

[1] 2 Hale P. C. 52, 282; 3 M. & S. 1.

For cases, see 1 Whart. Crim. Ev. (Hilton's ed.), § 352.

[2] See 1 Whart. Crim. Ev., (Hilton's ed.), § 345.

make such indorsement is not fatal.[1] Nor, even when required by statute, is the prosecution afterward pre-

[1] ARK.—State v. Scott, 25 Ark. 107; State v. Johnson, 33 Ark. 174. N. Y.—People v. Naughton, 7 Abbott Pr. N. S. 421, 38 How. Pr. 430. WYO. — Wyoming Ter. v. Anderson, 1 Wyo. Ter. 20. FED.—United States v. Shepard, 12 Int. Rev. Rec. 10, Fed. Cas. No. 16273.

In Arkansas, the name of the prosecutor need not be indorsed on a bill for passing counterfeit coin, that offense not being a trespass less than felony upon the person or property of another.—Gabe v. State, 1 Eng. (Ark.) 519.

In Illinois, under the statute, it is enough if the names are entered after that of the prosecuting attorney.—Scott v. People, 63 Ill. 508. See, as to practice, Andrews v. People, 117 Ill. 195, 7 N. E. 265.

In Iowa, witnesses testifying to immaterial facts need not be indorsed.—State v. Little, 42 Iowa 51; and see State v. Flynn, 42 Iowa 164.

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.—Harriman v. State, 2 G. Greene (Iowa) 270.

In Kentucky, it is held that the omission of the name of the prosecutor, his addition, and residence, in cases of trespass, is fatal.—Bartlett v. Humphreys, 3 Ky. (Hardin) 513; Com. v. Gore, 33 Ky. (3 Dana) 474.

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.—Com. v. Knapp, 26 Mass. (9 Pick.) 498, 20 Am. Dec. 491.

In Mississippi, though the want of the name of the prosecutor indorsed on the back of the bill is fatal (Peter v. State, 4 Miss. (3 How.) 433), it is not necessary that the grand jury should return, with the indictment, the names of the witnesses examined, or the evidence.—King v. State, 6 Miss. (5 How.) 730.

In Missouri, the name of the prosecutor is required to be indorsed upon an indictment for any trespass not amounting to a felony (Rev. Code, 1835, § 451), and under this statute the prosecutor's name must be indorsed upon an indictment for petty larceny (State v. Hurt, 7 Mo. 321), or riot.—State v. McCourtney, 6 Mo. 649; McWaters v. State, 10 Mo. 167.

—But it need only be indorsed in cases of trespass on the person or property of another (State v. Goss, 74 Mo. 592; see Lucy v. State, 8 Mo. 134); hence not on an indictment for a disturbance by making loud noises (State v. Moles, 9 Mo. 685), and it is a sufficient indorsement if the prosecutor's name be written on the face of the bill.—Williams v. State, 9 Mo. 270.

In Pennsylvania, the Act of 1705 provides that no person or persons shall be obliged to answer to any

cluded, in cases of surprise, from calling non-indorsed witnesses,[2] and, in some states, they can be indorsed on

indictment or presentment, unless the prosecutor's name be indorsed thereupon (1 Smith's Laws, 56), 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. —Respublica v. Lukens, 1 U. S. (1 Dall.) 5, 1 L. Ed. 13.

It is further provided in Pennsylvania by the Revised Act of 1860, that "No person shall be required to answer to an indictment for any offense 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."—§ 27, Bright. Supp. 1376.

—A similar provision exists in Virginia.—Com. v. Dever, 10 Leigh (Va.) 685.

In Tennessee, the name of the prosecutor must, by statute, be marked on the back of the bill, and an omission to do so need not be pleaded in abatement, but may be taken advantage of at any time. —Medaris v. State, 18 Tenn. (10 Yerg.) 239.

—Name of prosecutor need not be indorsed on the bill if the indictment be founded on a presentment.—State v. McCann, 19 Tenn. (1 Meigs) 91.

In Virginia, the usual practice is to indorse the names.—Haught v. Com., 4 Va. (2 Va. Cas.) 3; Com. v. Dove, 4 Va. (2 Va. Cas.) 29.

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.—Wortham v. Com., 26 Va. (5 Rand.) 669.

In the United States courts it is not the practice, it is said, that the name of the prosecutor should be written on the indictment (United States v. Mundel, 6 Call. 245, Fed. Cas. No. 15834; United States v. Flamikin, Hemp. 30, Fed. Cas. No. 15119a; see State v. Lupton, (63 N. C. 483), though this depends on the local practice.

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.—Arch. C. P. by Jervis, 13; Barbour's Cr. Treatise, 272.

Grand jury act irregularly in introducing witnesses without the action of the attorney general, the proper course is to move to quash. The irregularity can not be pleaded in bar.—Jillard v. Com., 26 Pa. St. 169.

Omission can not be taken advantage of after verdict.—Rodes v. State, 78 Tenn. (10 Lea) 414.

2 Bulliner v. People, 95 Ill. 394; see State v. Fowler, 52 Iowa 103,

the bill after finding, or even after trial has begun, if due notice is given.[3]

As a rule, it may be said that whenever by statute such an indorsement is required, its omission can be taken advantage of by motion to quash, demurrer, or plea in abatement.[4] But after verdict the objection, if it could have been previously taken, comes too late.[5]

VII. EVIDENCE.

§ 1286. WITNESSES MUST BE DULY SWORN. By the old practice, witnesses to be sent to the grand jury must be previously sworn in open court.[1] If a witness who is sent to a grand jury be thus sworn, though not in the imme-

2 N. W. 983; Hill v. People, 26 Mich. 496; State v. Pagels, 92 Mo. 300, 4 S. W. 931; State v. Leohr, 93 Mo. 103, 5 S. W. 695.

Prosecution is not required to call all the witnesses so indorsed, though they should be produced in court, as will be hereafter seen. See, infra, § 1500.

3 People v. Hall, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665; State v. Cook, 30 Kan. 82, 1 Pac. 32; State v. Teissedre, 30 Kan. 210, 476, 2 Pac. 108, 650.

4 FLA.—Towle v. State, 3 Fla. 262. KY.—Com. v. Gore, 33 Ky. (3 Dana) 474. MICH.—People v. Quick, 58 Mich. 321, 25 N. W. 302. MISS.—King v. State, 6 Miss. (5 How.) 730; Moore v. State, 21 Miss. (13 Smed. & M.) 259. MO.—State v. Courtney, 6 Mo. 649; McWaters v. State, 10 Mo. 167; State v. Joiner, 19 Mo. 224; State v. Roy, 83 Mo. 268. TENN.—Medaris v. State, 18 Tenn. (10 Yerg.) 239, and cases cited above.

Contra: State v. Hughes, 1 Ala. 655.

In California it is said that a misnomer of a witness is ground for quashing.—Kalloch v. San Francisco Court, 56 Cal. 229.

In Pennsylvania, as has been seen, the objection can not be taken after verdict.—Jillard v. Com., 26 Pa. St. 169; S. P., Hayden v. Com., 49 Ky. (10 B. Mon.) 125.

In Tennessee, if the only witness indorsed is incompetent, the indictment is defective.—State v. Tankersly, 74 Tenn. (6 Lea) 582.

See, infra, § 1291.

5 State v. Wilkinson, 76 Me. 317; Skipworth v. State, 8 Tex. App. 135.

1 Harriman v. State, 2 G. Greene (Iowa) 270.

In South Carolina, so.—State v. Kilcrease, 6 Rich. L. (S. C.) 444.

In England, the omission is fatal.—Middlesex Commis., 6 Car. & P. 90, 25 Eng. C. L. 336.

When the record avers a swearing this will be presumed to be regular. See Lumpkin v. State, 68 Ala. 56.

diate presence of the judge, or even in his momentary absence from the bench, it is good.[2] 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 the court; and this is pronounced a lawful mode of administering the oath.[3] In the United States Circuit Courts, the practice has been to summon a justice of the peace as one of the grand jury, and permit him to swear the witnesses in the jury room.[4] In many of the states power is given to the foreman to swear witnesses whose names are given to him by the prosecuting officer.[5] This power, however, may be viewed as cumulative, not doing away with the right to swear in open court.[6]

§ 1287. Defects in this respect may be met by plea. In England, it has been held that a conviction will not be shaken, although the bill was found on illegal testimony, if on the trial the evidence against the prisoner is 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,[1] but at the same time unanimously made application for a pardon, recognizing, in fact, the irregularity of the finding, though regarding the plea as a waiver of the technical error. In this coun-

2 Jetton v. State, 19 Tenn. (1 Meigs) 192.

3 State v. Fassett, 16 Conn. 457.

4 7 Smith's Laws 686.

5 See Bird v. State, 50 Ga. 585; Allen v. State, 77 Ill. 484.

In Pennsylvania, by the Act of April 5, 1826, as incorporated in the revised Act of 1860, 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. See Jillard v. Com., 26 Pa. St. 169.

Contra: Ayers v. State, 45 Tenn. (5 Cold.) 26.

6 State v. Allen, 83 N. C. 680; State v White, 88 N. C. 698.

1 R. v. Dickinson, Russ. & R. C. C. 401.

try it has been several times determined that a motion in arrest of judgment can not 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.[2] But where the objection is taken before plea, on a motion to quash, it has in England been sustained.[3] 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;[4] but this limitation has not been always applied in England,[5] and has not been recognized in this country. 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.[6] Where a defendant was called before a grand jury, and required to testify on a prosecution against himself, the indictment found on such testimony was properly quashed.[7] 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

[2] MISS.—King v. State, 6 Miss. (5 How.) 730. N. C.—State v. McEntire, 4 N. C. (1 Car. Law Repos.) 287; State v. Roberts, 19 N. C. (2 Dev. & B. L.) 540; State v. Sheppard, 97 N. C. 401, 1 S. E. 879. PA.—See Jillard v. Com., 26 Pa. St. 169. TENN.—Gilman v. State, 20 Tenn. (1 Humph.) 59.

[3] Middlesex Commis., 6 Car. & P. 90, 25 Eng. C. L. 336.

[4] State v. Hatfield, 40 Tenn. (3 Head) 231; R. v. Russell, 1 Carr. & M. 247, 41 Eng. C. L. 139.

[5] R. v. Dickinson, R. & R. 401. See Middlesex Commis., 6 Car. & P. 90, 25 Eng. C. L. 336.

[6] United States v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14858. Infra, § 1291.

[7] State v. Froiseth, 16 Minn. 296. Infra, § 1291.

was essential that the prosecuting juror should be regularly sworn, and so noted.[8] But a bill will not be quashed when supported by one competent witness.[9]

§ 1288. EVIDENCE CONFINED TO THE PROSECUTION. The question before the grand jury being whether a bill is to be found, the general rule is that they should hear no other evidence but that adduced by the prosecution.[1] The practice, however, is, that as they are sworn to "inquire," they may, 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.[2] Under such a suggestion, it would become the duty of the prosecuting officer to cause the requisite witnesses to be summoned; and it is his duty in any view to bring before the grand jury all competent witnesses to the res gestæ.[3] But it is not the usage to introduce, in matters of confession and avoidance, witnesses for the defense, unless their testimony becomes incidentally necessary to the prosecution.[4]

§ 1289. PROBABLE CAUSE ENOUGH. The question was in former times much considered whether the sole inquiry of a grand juror should not be whether sufficient ground has been adduced by the prosecution to require a defend-

8 State v. Cain, 8 N. C. (1 Hawks) 352.

9 Washington v. State, 63 Ala. 189.

Due swearing of witness presumed.—United States v. Murphy, 1 McArth. & Mac. (D. C.) 375, 48 Am. Rep. 754; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460.

1 United States v. Palmer, 2 Cr. 11, Fed. Cas. No. 15989; United States v. Lawrence, 4 Cr. 514, Fed. Cas. No. 15576.

2 1 Chitty C. L. 318. See Dickenson's Quar. Ses. 174, 175.

3 Infra, § 1500.

4 Supra, §§ 112-114; 1 B. & C. 37, 51; 3 B. & A. 432; 1 Chit. Rep. 214; Addison's Charges, 42; Respublica v. Schaeffer, 1 U. S. (1 Dall.) 236, 1 L. Ed. 116; United States v. Blodgett, 35 Ga. 336, Fed. Cas. No. 14611, Fed. Cas. No. 18312; United States v. Palmer, 2 Cr. 11, Fed. Cas. No. 15989; United States v. White, 2 Wash. 29, Fed. Cas. No. 16685.

See, infra, §§ 1289, 1290.

ant 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,[1] 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."[2] The same position is taken by Professor J. A. G. Davis, in his elaborate examination of criminal law in Virginia.[3] 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."[4] Such, also, was the standard adopted by the first learned editor of the laws of Pennsylvania,[5] of Mr. Daniel Davis, for many years solicitor general of Massachusetts, to whose excellent treatise on grand juries allusion has more than once been made,[6] 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.[7] And this rule has been adopted by statute in California,[8] and has been accepted by Field, J., in the practice of the Federal Circuit Court in that state.[9]

1 4 St. Tr. 183; 4 Bl. Com. 303; Lord Somers on Grand Juries, etc.; People v. Hyler, 2 Park. Cr. Rep. (N. Y.) 570.

This question is examined in relation to the duty of committing magistrates, supra, §§ 112-114.

2 2 Wilson's Works 365.

3 Davis' C. L. in Va. 426.

4 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.

5 Smith's Laws, vol. 7, p. 687.

6 Davis' Prec. 25. See, also, 1 Chit. Cr. L. 318.

7 1 Hopkinson's Works 194.

8 People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77.

9 See Treason Cases, Pamphlet, 28; 2 Sawyer 660-7.

§ 1290. —— SIR MATTHEW HALE'S VIEW, AND OTHERS. 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,"[1] and such is the conclusion we may draw from the initiatory proceedings before magistrates.[2] The arguments which lead to such a position were recapitulated with great force by McKean, C. J., in an early charge to a grand jury in Pennsylvania; where he said, among other things, on the question whether witnesses for the defense should be called, that "by the law it is declared that no man should be twice put in jeopardy for the same offense; and yet it is certain that the inquiry now proposed by the grand jury would necessarily introduce the oppression of a double trial.[3] 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 defense, 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

1 2 Hale P. C. 157. See, supra, § 114; and see, to same effect, R. v. Hodges, 8 Car. & P. 195, 34 Eng. C. L. 686.

2 Supra, § 114.

3 See, supra, § 114.

is the legal acceptance 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 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 defense."[4] This view derives much countenance from the English rule, that a grand jury has 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.[5]

§ 1291. LEGAL PROOF ONLY TO BE RECEIVED. Grand jurors are bound to take the best legal proof of which the case

4 ALA.—Sparrenberger v. State, 53 Ala. 481, 25 **Am. Rep.** 643. KY.—Parker v. Com., 75 Ky. (12 Bush) 191. MO.—Spratt v. State, 8 Mo. 247. N. Y.—People v. Hyler, 2 Park. Cr. Rep. 570. S. C.—State v. Boyd, 2 Hill L. 288, 27 **Am. Dec.** 376. TENN.—State v. Cowan, 38 Tenn. (1 Head) 280. FED.—United States v. Blodgett, 35 Ga. 336, Fed. Cas. No. 14611, Fed. Cas. No. 18312; Respublica v. Schaeffer, 1 U. S. (1 Dall.) 237, 1 **L. Ed.** 116.

See Judge Addison's remarks, Addison's Charges 39.

5 R. v. Hodges, 8 Car. & P. 195, 34 Eng. C. L. 686.

In Connecticut, such was the course taken in 1879, in State v. Lounsbury, a case in which the wife of a clergyman, in an insane paroxysm, killed him by a pistol shot. The grand jury found the bill for murder in the first degree, on evidence on which the prosecuting officers afterwards advised an acquittal. The evidence made a prima facie case of guilt, and the bill was therefore properly found; but this case was one on which no conviction could be based, and on which an acquittal was proper. In no other way could the defendant be protected from subsequent prosecutions, and the case exhibited in such a way as to satisfy the public sense of justice.

admits; and it is the duty of the prosecuting officer of the state to take care that no evidence is submitted to them which would not be admissible at trial.[1] It is impossible, however, to impose on such a body the technical limitations which are only insisted on by courts when required by counsel; and the inquiries of grand jurors, therefore, are analogous more to the examinations of courts sitting without juries than of courts sitting with juries.[2] Hence it has been held that 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.[3] It seems, however, that if a bill is found solely on incompetent testimony it will be quashed before plea, though the objection will be too late after conviction.[4] And so, in a case already noticed, where a defendant was compelled to testify against himself.[5]

On the other hand, the fact that one of several witnesses, who testified to an offense 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 wit-

1 1 Leach 514; 2 Hawk., ch. 25, §§ 138, 139; Davis' Precedents 25; 1 Chitty Cr. L. 318; United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16134; R. v. Willett, 6 T. R. 294.

2 **Mere reception of some evidence** that was incompetent does not avoid the finding. — Jones v. State, 81 Ala. 79; State v. Fassett, 16 Conn. 457; State v. Wolcott, 21 Conn. 272; State v. Fulker, 20 Iowa 509; Turk v. State, 7 Ohio (Pt. II) 242; State v. Boyd, 2 Hill L. (S. C.) 509.

See: IOWA—State v. Huston, 50 Iowa 512. MASS.—Com. v. Knapp, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491. N. Y.—People v. Naughton, 7 Abb. Pr. N. S. 421, 38 How. Pr. 430; People v. Briggs, 60 How. Pr. 17; People v. Moore, 65 How. Pr. 177. N. C. — State v. Fellows, 3 N. C. (2 Hayw.) 340; State v. Cain, 8 N. C. (1 Hawks) 352. TENN.—See State v. Tankersly, 74 Tenn. (6 Lea) 582 (cited, supra, § 1285). FED. — United States v. Farrington, 5 Fed. 343.

3 R. v. Dodd, 1 Leach 155.

4 2 Hawk., ch. 25, § 145, in notis.

5 State v. Froiseth, 16 Minn. 296; see People v. Singer, 18 Abb. (N. Y.) N. C. 96, 5 N. Y. Cr. Rep. 1. Supra, §§ 1287, 1288.

ness alone.[6] And as a general rule, the court will not inquire into the sufficiency or technical admissibility of the evidence before the grand jury.[7] How far jurors may be examined to impeach their finding is hereafter considered.[8]

The practice where there has been irregularity in swearing of witnesses has been already discussed.[9]

§ 1292. GRAND JURY MAY ASK ADVICE OF COURT. 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;[1] 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.[2]

§ 1293. NEW BILL MAY BE FOUND ON OLD TESTIMONY. Where a bill has been withdrawn or quashed, a new bill may be found as a substitute, by the same grand jury, without examining witnesses.[1]

VIII. POWERS OF PROSECUTING ATTORNEY.

§ 1294. PROSECUTING OFFICER USUALLY ATTENDS DURING EVIDENCE. In England, as a general rule, the clerk of the

6 State v. Tucker, 20 Iowa 508; Bloomer v. State, 35 Tenn. (3 Sneed) 66; supra, §§ 1287, 1288.

7 IOWA — Fowler v. State, 52 Iowa 103, 2 N. W. 983. MISS.—Smith v. State, 61 Miss. 754. NEV.—State v. Logan, 1 Nev. 509. N. J.—State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270. N. Y.—People v. Hulbert, 4 Den. 133, 47 Am. Dec. 244; Hope v. People, 83 N. Y. 418, 38 Am. Rep. 460. OHIO — Turk v. State, 7 Ohio (Pt. II) 240. TEX.—Terry v. State, 15 Tex. App. 66. WIS.—State v. Cole, 19 Wis. 129, 88 Am. Dec. 678. FED.—United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16134.

8 Infra, § 1307.

9 Supra, §§ 1287, 1288.

1 Dalton, J., ch. 185, § 9; 4 Bl. 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.

2 Davis' Precedents 21; 7 Cowen 563; Davis' Virg. Crim. Law 425; Lung's Case, 1 Conn. 428; Kel. 8; 1 Chitty Cr. L. 816.

1 IOWA — State v. Clapper, 59 Iowa 279, 13 N. W. 294. MASS.—Com. v. Woods, 76 Mass. (10 Gray) 477. NEV.—State v. Logan, 1 Nev. 509. TEX.—Steel v. State, 1 Tex. 142; infra, § 1300.

assizes is the attendant of the grand jury, and is expected not only to aid them in their examination of evidence, but to place before them each several item of business as it successively arises, retiring when they proceed to their deliberations.[1] In those cases which by the old practice were under the control of private prosecutors, such prosecutors were sometimes permitted to present their cases to the grand jury. This, however, was 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.[2] In state prosecutions the attorney-general, or his representative, was sometimes, on special invitation, and by permission of the court, in attendance for the presentation of evidence; but this was at the election of the jury, and was sometimes refused.[3] 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 them-

1 1 Chitty Cr. L. 816; R. v. Hughes, 1 Car. & K. 519, 526, 47 Eng. C. L. 518, 525, where it is held also that a police officer may be stationed in the room.

2 4 Bl. Com. 126, note by Christian; Dick. Q. S., 6th ed., 1837.

3 R. v. Crossfield, 8 How. St. Tr. 773, note.

selves. 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."[4]

This is the uniform practice in Pennsylvania. In the United States courts the same practice obtains,[5] and is thus stated by Justice Field in a charge delivered to a California grand jury in August, 1872:[6] "The district attorney has the right to be present at the taking of testimony before you for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you, but he has no right to be present pending your deliberations on the evidence. When your vote is taken upon the question whether an indictment shall be found or a presentment made, no person beside yourselves should be present."[7] The privilege of attendance should be strictly limited to the prosecuting officer officially clothed with this high trust, and to his permanent deputies,[8] and not extended to mere temporary assistants; and indictments have been properly quashed when attorneys temporarily representing the prosecuting authorities entered the room of the grand jury when they were deliberating as to the bill, and advised them as to their action.[9] It is proper in this connection to keep in mind the fact, already noticed,[10] that the

[4] Davis' Precedent 21. See, also, M'Lellan v. Richardson, 13 Me. 82, where it appears that the same usage exists in Maine.

[5] United States v. Reed, 2 Blatch. 435, 455, Fed. Cas. No. 16134.

[6] See Pamph. Rep. 9 et seq.; 2 Sawyer 663-7.

[7] See, to same effect, United States v. Schumann, 7 Sawy. C. C. 439, Fed. Cas. No. 16235, where, however, it is said that he can not prevent an investigation by saying the government will not prosecute the case. Infra, § 383.

[8] See Shattuck v. State, 11 Ind. 473; Crittenden, Ex parte, Hemp. 176, Fed. Cas. No. 3393a.

[9] Durr v. State, 53 Miss. 425; State v. Addison, 2 S. C. 356; United States v. Kilpatrick, 16 Fed. 765.

[10] Supra, § 1265.

only valid basis on which the institution of grand juries rests is that they are an independent and impartial tribunal between the prosecution and the accused; and it is the duty of the courts to refuse to tolerate any practice which conflicts with this independence and impartiality. The rule in the text was disastrously departed from in the Star Route cases, tried in Washington in 1883-4, in which private counsel, appointed to assist the district attorney, were permitted to advise the grand jury during their deliberations. The consequences of this course, however, have not been such as to encourage its adoption in other cases. And in any view, the presence of counsel for the prosecution, public or private, during the deliberations of the jury, should be ground for quashing the bill, unless it appear that there was no interference by such counsel in any degree with the freedom of such deliberations.[11] The purpose of the institution of grand juries was, as we have seen, to interpose a check upon the sovereign; and they would cease to answer this purpose, and would increase the danger they were intended to avert, if they should be put under the official direction of the prosecuting authorities of the state.[12]

§ 1295. DEFENDANT AND OTHERS NOT ENTITLED TO ATTEND. In England, and in the courts of each of the several states, neither the defendant, nor any person representing him, is permitted to attend the examination of the grand jury.[1]

11 **Charge of Field, J., ut sup. See:** CONN.—Lung's Case, 1 Conn. 428. IOWA—State v. Kimball, 29 Iowa 267. N. C.—Lewis v. Wake Co., 74 N. C. 194. S. C.—State v. Addison, 2 S. C. 356. TEX.—State v. McNinch, 12 S. C. 89, 95; Rothschild v. State, 7 Tex. App. 519.

Compare: Shattuck v. State, 11 Ind. 473.

12 The reader is referred to an excellent article on this topic by Mr. Merriam in 16 West. Jurist (January, 1882), pp. 1 et seq.

1 1 B. & C. 37, 51; 3 B. & A. 432; 1 Ch. R. 217; 1 Ch. C. L. 317. CONN.—State v. Fassett, 16 Conn. 458; State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54, modifying Lung's Case, 1 Conn. 428. PA.—McCullough v. Com., 67 Pa. St. 30; Com. v. Simons, 6 Phil. 167. FED.—United States v. Blodgett, 35 Ga. 336, Fed. Cas. No. 14611, Fed. Cas.

And Judge King, in an opinion marked with his usual good sense, 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 contempt of court, and a misdemeanor at common law.[2] Any vol-

No. 18312; United States v. Palmer, 2 Cr. 11, Fed. Cas. No. 15989; supra, § 1264.

Compare: State v. Whitney, 7 Ore. 386.

[2] Com. v. Crans, 3 Penn. L. J. 443. Infra, § 1309.

Judge Field's remarks: "There has hardly been a session," said Justice Field, of the Supreme Court of the United States, in addressing a grand jury in California in 1872 (Pamph. Rep. 2 Sawyer 663-7), "of the grand jury of this court for years, at which instances have not occurred of personal solicitation to some of its members to obtain or prevent the presentment or indictment of parties. And communications to that end have frequently been addressed to the grand jury, filled with malignant and scandalous imputations upon the conduct and acts of those against whom the writers entertained hostility, and against the conduct and acts of former and present officers of this court, and of previous grand juries of this district.

"All such communications were calculated to prevent and obstruct the due administration of justice, and to bring the proceedings of the grand jury into contempt. 'Let any reflecting man,' says a distinguished judge, 'be he layman or lawyer, consider of the consequences which would follow, if every individual could, at his pleasure, throw his malice or his prejudice into the grand jury room, and he will, of necessity, conclude that the rule of law which forbids all communication with grand juries, engaged in criminal investigations, except through the public instructions of courts and the testimony of sworn witnesses, is a rule of safety to the community. What value could be attached to the doings of a tribunal so to be approached and influenced? How long would a body, so exposed to be misled and abused, be recognized by freemen as among the chosen ministers of liberty and security? The recognition of such a mode of reaching grand juries would introduce a flood of evils, disastrous to the purity of the administration of criminal justice, and subversive of all public confidence in the action of these bodies.'—Judge King, in Commonwealth v. Crans, in 3 Pa. Law Jour, pp. 459-464."

"Eaves-dropping" on a grand jury is said to be indictable at common law.—State v. Pennington, 40 Tenn. (3 Head) 299, 75 Am. Dec. 771.

By an act of Congress, passed in 1872, such solicitations are indictable.—Infra, §§ 1664, 1912.

In New York, such appeal to a grand jury is, under statute, only a contempt when marked by contemptuous action to the court in its presence.—Bergh's Case, 16 Abb. Pr. N. S. (N. Y.) 266.

unteer attendance is by the same rule subject to the same law.[3]

In Maine, it is said that the presence of a stranger does not vitiate an indictment if he does not interfere,[4] but the better opinion is that such presence is ground for quashing a bill,[5] and, when shown on record, has been held ground for arrest of judgment.[6]

IX. FINDING AND ATTESTING OF BILL.

§ 1296. Twelve must concur in bill. 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,[1] the return is "ignoramus," or, as is more commonly the case, "ignored," or "not found." If the finding be by less than twelve, the indictment may be quashed by motion made before plea.[2] The objection can not, it has been said, be taken advantage of by plea in abatement.[3]

§ 1297. Foreman usually attests the bill. In those states in which it is the practice for indictments to be prepared complete by the prosecuting attorney and submitted as such to the grand jury for their action, the assent of the grand jury is signified by the indorsing on the bill of the words "true bill," with the foreman's name attached, while an ignoring of the bill is signified

3 McCullough v. Com., 67 Pa. St. 30. See United States v. Farrington, 2 Cr. L. Mag. 525, 5 Fed. 343.

4 State v. Clough, 49 Me. 573.

5 Com. v. Dorwart, 7 Luz. Bar 121.

6 State v. Watson, 34 La. Ann. 669. But see State v. Justus, 11 Ore. 17, 8 Pac. 337.

1 Sayer's Case, 35 Va. (8 Leigh) 722.

As to United States courts, see, supra, § 1266.

If twelve jurymen are present and concur, the absence of others is not ground for exception.—People v. Hunter, 54 Cal. 65. See State v. Brainerd, 56 Vt. 532, 48 Am. Rep. 818.

2 People v. Shattuck, 6 Abb. (N. Y.) N. C. 33.

As to whether juror may be examined to this, see, infra, § 1307.

3 State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

by indorsing of the word "ignoramus," with the foreman's name attached. When this is the practice, or when the foreman's signature is required by statute, the omission of the words "true bill" with the foreman's name, is fatal if the objection is made before verdict.[1] The omission, however, of the word "true" before "bill" has been held not fatal.[2] Nor, a fortiori, are clerical mistakes in the indorsement,[3] and in any view exceptions of this class must be taken before verdict.[4] In some states the signature of the foreman is held sufficient without any other indorsement,[5] even though the title "foreman" be left out.[6]

[1] 1 Ch. C. L. 324; Archibald's C. P. by Jervis 39. See: ALA.—Garraway v. State, 23 Ala. 772. FLA.—Alden v. State, 18 Fla. 187; Tilley v. State, 21 Fla. 242. ILL.—Nomague v. People, 1 Ill. (Breese) 109; Gardner v. People, 4 Ill. (3 Scam.) 83. IND.—Johnson v. State, 23 Ind. 32; Cooper v. State, 79 Ind. 206; Strange v. State, 110 Ind. 354, 11 N. E. 357. IOWA—Wan-kon-Chaw-Neck v. United States, 1 Morris 332; Harriman v. State, 2 G. Greene 270. KY.—Com. v. Walters, 36 Ky. (6 Dana) 290. LA.—State v. Onnmacht, 10 La. 198; State v. Morrison, 30 La. Ann. (Pt. II) 817. ME.—State v. Webster, 5 Me. (5 Greenl.) 373. MASS.—Com. v. Hamilton, 81 Mass. (15 Gray) 480; Com. v. Gleason, 110 Mass. 66; Com. v. Sargent, Thatch. C. C. 116. MISS.—Smith v. State, 28 Miss. 728. MO.—Spratt v. State, 8 Mo. 247; McDonald v. State, 8 Mo. 283. PA.—Hopkins v. Com., 50 Pa. St. 9, 88 Am. Dec. 518. TENN.—State v. Elkins, 19 Tenn. (Meigs) 109; Bennett v. State, 27 Tenn. (8 Humph.) 118. VT.—State v. Davidson, 12 Vt. 300.

Objection is too late after verdict.—Benson v. State, 68 Ala. 544; People v. Johnston, 48 Cal. 549; Weaver v. State, 19 Tex. App. 547, 53 Am. Rep. 389.

[2] State v. Mertens, 14 Mo. 94; Sparks v. Com., 9 Pa. St. 354.

[3] State v. Chandler, 9 N. C. (2 Hawks) 439; White v. Com., 70 Va. (29 Gratt.) 294.

[4] Cooper v. State, 79 Ind. 206; Com. v. Betton, 59 Mass. (5 Cush.) 427; Burgess v. Com., 4 Va. (2 Va. Cas.) 483.

[5] IND.—State v. Heaton, 95 Ind. 773; State v. Bowman, 103 Ind. 69, 2 N. E. 289. IOWA—State v. Axt, 6 Iowa 511. MASS.—Com. v. Smyth, 65 Mass. (11 Cush.) 473. MINN.—State v. McCartney, 17 Minn. 76. N. H.—State v. Freeman, 13 N. H. 488. N. Y.—Brotherton v. People, 75 N. Y. 159, 2 Cow. Cr. Rep. 520, affirming 14 Hun 486. N. C.—State v. Chandler, 9 N. C. (2 Hawks) 539. VA.—Price v. Com., 62 Va. (21 Gratt.) 846; White v. Com., 70 Va. (29 Gratt.) 824.

[6] GA.—McGuffle v. State, 17 Ga. 497. IND.—Walls v. State, 23 Ind. 150; Wassels v. State, 26 Ind. 30.

In those states, on the other hand, in which the action of the grand jury approving of the principle of a bill is prior to the presentation of the bill to them, then the attestation of the foreman is not the primary proof of approval, and may be omitted.[7] In other states the practice has grown up, there being no statutory prescription, of treating the formal return of the bill into court as a "true bill" as a sufficient verification of its finding.[8]

§ 1298. Bill to be brought into court. When the bill has been verified, it is brought publicly into court, and the clerk of the court calls all the jurymen by name, who sev-

N. C.—State v. Chandler, 9 N. C. (2 Hawks) 439. VT.—State v. Brown, 31 Vt. 603.

Foreman may sign through a clerk.—See Benson v. State, 68 Ala. 544.

Foreman pro tem. will be held to be duly appointed.—State v. Collins, 65 Tenn. (6 Baxt.) 151.

Indorsement of the foreman's name, followed by filing, is sufficient evidence of finding.—See Hubbard v. State, 72 Ala. 164; State v. Gouge, 80 Tenn. (12 Lea) 132.

Name may be omitted.—See State v. Sopher, 35 La. Ann. 976.

Signature by initials is enough.—See State v. Taggart, 38 Me. 338; Com. v. Hamilton, 81 Mass. (15 Gray) 480; Com. v. Gleason, 110 Mass. 66.

Surplusage will be disregarded.—See Thompson v. Com., 61 Va. (20 Gratt.) 724.

"True bill" is enough if copied into the transcript immediately after the indictment.—Green v. State, 79 Ind. 537.

Variances in the foreman's name are not fatal.—State v. Stedman, 7 Port. (Ala.) 496; Jackson v. State, 74 Ala. 557; State v. Collins, 14 N. C. (3 Dev.) 117; State v. Calhoun, 18 N. C. (1 Dev. & B.) 374.

[7] See State v. Magrath, 44 N. J. L. (15 Vr.) 227; State v. Creighton, 1 N. & McC. (S. C.) 256.

[8] CAL.—People v. Roberts, 6 Cal. 214. FLA.—Cherry v. State, 6 Fla. 479, 63 Am. Dec. 217. KY.—Com. v. Walter, 36 Ky. (6 Dana) 290. LA.—State v. Tinney, 26 La. Ann. 460. MINN.—State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70. N. H.—State v. Freeman, 13 N. H. 488. N. J.—State v. Magrath, 44 N. J. L. (15 Vr.) 227. N. Y.—Brotherton v. People, 75 N. Y. 159, 2 Cow. Cr. Rep. 520, affirming 14 Hun 486. N. C.—State v. Cox, 28 N. C. (6 Ired.) 440. S. C.—State v. Creighton, 1 Nott. & McC. L. 256. TEX.—Jones v. State, 10 Tex. App. 552; Weaver v. State, 19 Tex. App. 547, 53 Am. Rep. 389.

Indorsement of the name of the offense on the indictment is no part of the finding of the grand jury.—State v. Rehfrischt, 12 La. Ann. 382.

erally answer to signify that they are present,—the grand jury attending in a body.[1] Then the clerk proceeds in order to ask the jury whether they have agreed upon any bills, and bids them present them to the court;[2] 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.[3] 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.[4] The bringing of the indictment into court may be inferred from the fact of reception with proper indorsements.[5]

§ 1299. FINDING MUST BE RECORDED. The finding should then be recorded by the clerk, ignoramus,[1] as well as true bill, and an omission in that respect can not 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, nor by the minutes of the judge.[2] It can not be intended that

1 State v. Bordeaux, 93 N. C. 560.

Compare: Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480.

As to polling, see, infra, § 1304.

2 4 Bla. Com. 366; Cro. C. C. 7. See form, Cro. C. C. 7; Clare v. State, 68 Ind. 17; State v. Heaton, 23 W. Va. 773.

3 Cro. C. C. 7; Dick. Sess. 158. See form, Cro. C. C. 7; Dick. Sess. 158, last vol. London ed.

As to Alabama statutes, see Wesley v. State, 52 Ala. 182.

4 R. T. H. 203; 1 Ch. C. L. 324; R. v. Pewtress, 2 Str. 1026, 93 Eng. Rep. 1011. See Willey v. State, 46 Ind. 363.

Return may be inferred.—See State v. Gratz, 68 Mo. 22.

5 FLA.—Willingham v. State, 21 Fla. 761. ILL.—Fitzpatrick v. People, 98 Ill. 269. IND.—Reeves v. State, 84 Ind. 116. IOWA—State v. McIntyre, 59 Iowa 267, 13 N. W. 287. LA.—State v. Manson, 32 La. Ann. 1018; State v. DeServant, 33 La. Ann. 979. MISS.—Cooper v. State, 59 Miss. 257. UTAH—People v. Lee, 2 Utah 441.

1 State v. Brown, 81 N. C. 516.

2 ILL.—Sattler v. People, 59 Ill. 68. IND.—Heacock v. State, 42 Ind. 393. MISS.—Fitzcox v. State, 53 Miss. 585. TEX.—Terrell v. State, 41 Tex. 463; Rasberry v. State, 1 Tex. App. 664. W. VA.—Crookham v. State, 5 W. Va. 510.

Compare: State v. Gratz, 68 Mo. 22.

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.[3]

§ 1300. BILL MAY BE AMENDED BY GRAND JURY. 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.[1] 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.[2]

§ 1301. FINDING MAY BE RECONSIDERED. In England, if the grand jury at the assizes or sessions has ignored a bill, they can not find another bill against the same person for the same offense at the same assizes; and if such other bill is sent them, it has been said that they should take no notice of it.[1] But the better view is that a bill may be sent up if the emergency require, after an ignoramus, at the discretion of the court.[2] An ignoramus may be reconsidered before, but not after, the return of the bill to the court.[3]

[3] IOWA—State v. Glover, 3 G. Greene 249. LA.—State v. Shields, 33 La. Ann. 991. N. C.—State v. Cox, 28 N. C. (6 Ired. L.) 440; State v. Brown, 81 N. C. 516. TENN.—State v. Davidson, 42 Tenn. (2 Coldw.) 184. VA.—Com. v. Cawood, 4 Va. (2 Va. Cas.) 527.

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.—Friar v. State, 4 Miss. (3 How.) 422; Peter v. State, 4 Miss. (3 How.) 433.

Record not showing that the grand jury returned the indictment into court, it was held that the judgment was erroneous and should be reversed.—Rainey v. People, 8 Ill. (3 Gilm.) 71; Chappel v. State, 16 Tenn. (8 Yerg.) 166; Brown v. State, 26 Tenn. (7 Humph.) 155.

[1] State v. Allen, Charlt. (Ga.) 518.

[2] 1 Chitty Cr. L. 335. See State v. Davidson, 42 Tenn. (2 Cold.) 184; supra, § 1293.

[1] R. v. Humphreys, Carr. & M. 601, 41 Eng. C. L. —; R. v. Austin, 4 Cox C. C. 385.

Contra: R. v. Newton, 2 M. & Rob. 506.

See, infra, §§ 1317, 1382.

[2] Rowand v. Com., 82 Pa. St. 405; supra, § 1259; infra, § 1376.

[3] State v. Brown, 81 N. C. 568;

§ 1302. JURY CAN NOT USUALLY FIND PART ONLY OF A COUNT. Usually the jury can not find one part of the same count 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,[1] though there is no reason why, when a count contains a lower offense inclosed in a higher, the grand jury should not ignore the higher offense and find the lower. Where there are several counts, they can find any one count and ignore the others.[2] So in an indictment against several, they can distinguish among the defendants, and find as to some and reject as to the rest.[3]

§ 1303. INSENSIBLE FINDING IS BAD. If the finding be incomplete or insensible, it is bad.[1]

§ 1304. GRAND JURY MAY BE POLLED, OR FINDING TESTED BY PLEA IN ABATEMENT. When the grand jury are in session, they are under the control of the court, and the court may at any time recommit an imperfect finding to them,[1] or may poll them, or take any other method, on the suggestion of a defendant, of determining whether twelve

but see State v. Harris, 91 N. C. 656.

1 2 Hale 162; Bac. Ab. Indictment, D. 3; Bulst. 206; 2 Hawk., ch. 25, § 2; 5 East 304; 2 Camp. 134, 584; 2 Leach 708; Com. v. Keenan, 67 Pa. St. 203; State v. Wilburne, 2 Brev. L. (S. C.) 296; State v. Creighton, 1 Nott. & McC. (S. C.) 256; State v. Wilhite, 30 Tenn. (11 Humph.) 602; State v. Cowan, 38 Tenn. (1 Head) 280.

2 1 Chitty Cr. L. 323.

3 2 Hale 158; 1 Chitty Cr. L. 323.

1 2 Hawk., ch. 25, § 2; 1 Chitty Cr. L. 323.

Where grand jury returned 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 where, after the case for the prosecution had concluded, the prisoner's counsel pointed this out, the finding was held bad, and the grand jury was discharged; in such case the court will not allow one of the grand jurors to be called as a witness to explain their finding.—R. v. Cooke, 8 Car. & P. 582, 34 Eng. C. L. 903. See People v. Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

1 State v. Squire, 10 N. H. 558. See Byers v. State, 63 Md. 209.

assented to the bill.[2] The question of concurrence of sufficient number of the jurors may be tested by plea in abatement.[3]

X. MISCONDUCT OF GRAND JUROR.

§ 1305. GRAND JUROR MAY BE PUNISHED BY COURT FOR CONTEMPT, BUT IS NOT OTHERWISE RESPONSIBLE. In case of criminal misconduct or neglect of duty on the part of a grand juror, when on duty, an indictment may be maintained against him, or he may be proceeded against by the court for contempt.[1] His official decisions, however, can not be made the ground of a civil action against him by a party offended; nor can he be subsequently indicted for such decisions.[2]

XI. HOW FAR GRAND JURORS MAY BE COMPELLED TO TESTIFY.

§ 1306. GRAND JUROR MAY BE EXAMINED AS TO WHAT WITNESS SAID. Whatever may have been the old rule,[1] it is now settled that a witness may be indicted for perjury on account of false testimony before a grand jury,[2] and

2 Lowe's Case, 4 Me. (4 Greenl.) 448, 16 Am. Dec. 271; State v. Symonds, 36 Me. 128.

Contra: State v. Baker, 20 Mo. 338. Infra, § 1307.

3 State v. McNeill, 93 N. C. 552; supra, § 1277.

1 Pa. v. Keffer, Addison (Pa.) 290.

2 1 Chitty Cr. L. 323, 324; Lloyd v. Carpenter, 5 Pa. L. J. 60, 3 Clark Phila. 196, where it was said by King, J.: "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." And again: "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." See, to same effect, Turpin v. Booth, 56 Cal. 65, 38 Am. Rep. 48; Hunter v. Mathis, 40 Ind. 357, also cited in 16 West. Jur. 70.

1 See 16 West. Jur. 8.

2 4 Black. Com. 126, note; 1 Whart. Crim. Ev. (Hilton's ed.), § 510; 1 Chitty C. L. 322. See, also: CAL.—People v. Young, 31 Cal. 564. CONN.—State v. Fassett, 16 Conn. 457. ILL.—Mackin v. People, 115 Ill. 313, 36 Am. Rep. 167, 3 N. E. 222. IND.—State v. Offutt, 4 Blackf. 355. PA.—Huidekoper

grand jurors are competent witnesses to prove the facts;[3] and so may be the prosecuting attorney.[4] 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,[5] though the contrary is now the general and better opinion.[6] And a grand juror may be called to sustain a witness.[7]

§ 1307. CAN NOT BE ADMITTED TO IMPEACH FINDING. But the affidavit of a grand juror will not be received to impeach or affect the finding of his fellows,[1] even for the

v. Cotton, 3 Watts 56. VA.—Thomas v. Com., 41 Va. (2 Rob.) 795. ENG.—Sykes v. Dunbar, 2 Selw. N. P. 1059, and cases cited infra.

3 Ibid.; Com. v. Hill, 65 Mass. (11 Cush.) 137; Crocker v. State, 19 Tenn. (Meigs) 127; R. v. Hughes, 1 Car. & K. 519, 47 Eng. C. L. 518, and cases cited infra, § 1307, footnote 6.

4 State v. Van Buskirk, 59 Ind. 384; infra, § 1308.

5 Imlay v. Rogers, 7 N. J. L. (2 Halst.) 347. See State v. Baker, 20 Mo. 338.

6 2 Whart. Crim. Ev. (Hilton's ed.), § 510. See: CAL.—People v. Young, 31 Cal. 564. CONN.—State v. Fassett, 16 Conn. 457. ILL.—Granger v. Warrington, 8 Ill. (3 Gilm.) 299. IND.—Burnham v. Hatfield, 5 Blackf. 21; Perkins v. State, 4 Ind. 222; Burdick v. Hunt, 43 Ind. 384. KY.—White v. Fox, 4 Ky. (1 Bibb) 369, 4 Am. Dec. 643. ME.—State v. Benner, 64 Me. 267. MASS.—Com. v. Hill, 65 Mass. (11 Cush.) 137; Com. v. Mead, 78 Mass. (12 Gray) 167, 71 Am. Dec. 741; Way v. Butterworth, 106 Mass. 75. MISS.—Sands v. Robison, 20 Miss. (12 Smed. & M.) 704, 51 Am. Dec. 132; Rocco v. State, 37 Miss. 357. MO.—Beam v. Link, 27 Mo. 261. N. H.—State v. Wood, 53 N. H. 484. N. Y.—People v. Hulbut, 4 Den. 133, 47 Am. Dec. 244. N. C.—State v. Broughton, 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507. PA.—Gordon v. Com., 92 Pa. St. 216, 37 Am. Rep. 672; Huidekoper v. Cotton, 3 Watts 56. S. C.—State v. Boyd, 2 Hill L. 288, 27 Am. Dec. 376. TENN.—Crocker v. State, 19 Tenn. (Meigs) 127; Jones v. Turpin, 53 Tenn. (6 Heisk.) 181. VA.—Thomas v. Com., 41 Va. (2 Rob.) 795; Little v. Com., 66 Va. (25 Grat.) 921. FED.—United States v. Reed, 2 Blatch. 435, 466, Fed. Cas. No. 16134; United States v. Charles, 2 Cr. 76, Fed. Cas. No. 14786. ENG.—R. v. Gibson, 1 Car. & M. 672, 41 Eng. C. L. 364; Sykes v. Dunbar, 2 Selw. N. P. 1059.

Regulated by statute: In several states, e. g., Missouri, the privilege is regulated by statute.

7 Perkins v. State, 4 Ind. 222; People v. Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

1 GA. — State v. Doon, R. M. Charl. 1. IOWA—State v. Gibbs, 39 Iowa 318; State v. Davis, 41

purpose of showing how many jurors were present when the bill was found, which jurors voted in its favor, what were their views,[2] or that the bill was found without evidence.[3] 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.[4] And a grand juror may be examined to prove, on a motion to quash a bill, who were the witnesses on whose evidence it was found;[5] to show who was the prosecutor;[6] and to

Iowa 311. MINN.—State v. Beebe, 17 Minn. 241. MO.—State v. Baker, 20 Mo. 338. N. C.—State v. McLeod, 8 N. C. (1 Hawks) 344. ENG.—R. v. Marsh, 6 Ad. & El. 236, 33 Eng. C. L. 143, 1 N. & P. 187.

As to jurors generally, see, infra, § 1787.

2 ALA.—Spigener v. State, 62 Ala. 383. CONN.—State v. Fassett, 16 Conn. 457. IOWA—State v. Mewherter, 46 Iowa 88, affirming State v. Gibbs, 39 Iowa 318. MO.—State v. Baker, 20 Mo. 238. N. Y.—People v. Hulbut, 4 Den. 133, 47 **Am. Dec.** 244, but **contra** People v. Shattuck, 6 Abb. N. C. 33. N. C.—State v. Broughton, 29 N. C. (7 Ired.) 98, 45 **Am. Dec.** 507. PA.—Gordon v. Com., 92 Pa. St. 216, 37 **Am. Rep.** 672; Huidekoper v. Cotton, 3 Watts 56. TEX.—State v. Oxford, 20 Tex. 428. W. VA.—State v. Baltimore & O. R. R., 15 W. Va. 362, 36 **Am. Rep.** 803.

Compare: Infra, § 1787; supra, § 1296.

3 State v. Grady, 34 Mo. 220.

4 Pa. v. Keffer, Addis (Pa.) 390.

On trial of an indictment for selling liquor without a license, which charged five offenses 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 offense was sworn to before that body, it was held that the evidence was inadmissible.—People v. Hulbut, 4 Den. (N. Y.) 133, 47 **Am. Dec.** 244. See R. v. Cooke, 8 Car. & P. 582, 34 Eng. C. L. 903.

In Missouri, it is provided by statute that no grand juror shall disclose any evidence given before the grand jury.—See State v. Baker, 20 Mo. 338.

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.—State v. Brewer, 8 Mo. 373; Tindle v. Nichols, 20 Mo. 326; Beam v. Link, 27 Mo. 261.

5 People v. Briggs, 60 How. Pr. (N. Y.) 17.

6 Freeman v. Arkell, 1 Car. & P. 135, 12 Eng. C. L. 89; Sykes v. Dunbar, Selwyn N. P. 1091.

prove, also, that less than twelve concurred in the finding.[7] Where, also, the allegation is that the bill was found on testimony totally incompetent, and where this is ground for quashing, it would follow that grand jurors should be admitted to prove such fact. But the right of revision in such cases should be exercised within narrow limits, since if the action of grand juries is open to be overhauled and supervised by courts, not only would the secrecy of the grand jury as a protective institution be impaired and the solemnity of its proceedings destroyed by being subjected to the subsequent parol attacks of its members, but its findings would take the place of the verdicts of petit juries, and become not certificates of probable cause, but adjudications under the direction of the court on the merits.[8]

§ 1308. PROSECUTING OFFICER OR OTHER ATTENDANT INADMISSIBLE TO IMPEACH FINDING. As a grand juror ought not to be received to testify to any fact which may invalidate the finding of his fellows, a prosecuting attorney is incompetent to testify to the same effect.[1] But, as has been already seen, he should be received to state what was the issue before the jury, and what was testified to by witnesses.[2] The same distinctions apply to clerks and other attendants on the grand jury.[3]

7 Low's Case, 4 Me. (4 Greenl.) 430; State v. Baker, 20 Mo. 338; State v. Womack, 70 Mo. 410; People v. Shattuck, 6 Abb. N. C. (N. Y.) 33; State v. Oxford, 30 Tex. 428.

Contra: R. v. Marsh, 6 Ad. & El. 236, 33 Eng. C. L. 143.

8 See remarks of Nelson, J., in United States v. Reed, 2 Blatchf. C. C. 435, 466, Fed. Cas. No. 16134; also People v. Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

1 1 Bost. Law Rep. 4; McClellan v. Richardson, 13 Me. 82; Clark v. Field, 12 Vt. 485.

2 See 1 Whart. Crim. Ev. (Hilton's ed.), § 513; State v. Van Buskirk, 59 Ind. 384; White v. Fox, 4 Ky. (1 Bibb) 369, 4 Am. Dec. 643.

3 State v. Fassett, 16 Conn. 470; State v. Van Buskirk, 59 Ind. 384; Knott v. Sargent, 125 Mass. 95; Beam v. Link, 27 Mo. 261; United States v. Farrington, 5 Fed. 343.

XII. TAMPERING WITH GRAND JURY: IMPEACHING FINDING.

§ 1309. To tamper with grand jury is an indictable offense. It is not only a contempt of court, punishable summarily, but it is a misdemeanor at common law, punishable by indictment, for volunteers to approach a grand jury for the purpose of influencing its action.[1]

1 Com. v. Crans, 3 Pa. L. J. 442; 2 Clark Phil. 172; Greenl. on Ev., § 252; and see, supra, § 1264; infra, §§ 1664, 1912, and charge of Justice Field, cited supra, § 1295, footnote 2.

CHAPTER LXXXIV.

NOLLE PROSEQUI.

§ 1310. Nolle prosequi a prerogative of sovereign.
§ 1311. Nolle prosequi will be granted in vexatious suits.

§ 1310. NOLLE PROSEQUI A PREROGATIVE OF SOVEREIGN. A nolle prosequi is the voluntary withdrawal by the prosecuting authority of present proceedings on a particular bill, and at common law is a prerogative vested in the executive,[1] by whom alone it can be exercised.[2] At com-

[1] Com. v. Tuck, 37 Mass. (20 Pick.) 356; Com. v. Smith, 98 Mass. 10; State v. Tufts, 56 N. H. 137; State v. Thompson, 10 N. C. (3 Hawks) 613; United States v. Watson, 7 Blatchf. 60, Fed. Cas. No. 16652.

See 5 Crim. Law Mag. 1.

In Campbell's Lives of the Chancellors, II, 173, we are told that Lord Holt having committed some of a party of fanatics, called "Prophets," for seditious language, he was visited by Lacy, one of their friends, when the following conversation took place: "Servant: 'My lord is unwell today, and can not see company.' Lacy (in a very solemn tone): 'Acquaint your master that I must see him, for I bring a message to him from the Lord God.' The Chief Justice, having ordered Lacy in, and demanded his business, was thus addressed: 'I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a nolle prosequi for John Atkins, his servant, whom thou hast cast into prison.' Chief Justice Holt: 'Thou art a false prophet, and a lying knave. If the Lord God had sent thee it would have been to the attorney-general, for he knows that it belongeth not to the Chief Justice to grant a nolle prosequi; but I, as Chief Justice, can grant a warrant to commit thee to bear him company.'"

Power to enter belongs to the prosecuting officer who represents the government, not to the court.—State v. Maligan, 48 Ind. 416, 1 Am. Cr. Rep. 542.

As to power of public prosecutor to enter, see note 35 L. R. A. 701-716.

Material part of indictment can not be quashed, having remainder of allegations standing intact.—Duty v. State, 54 Tex. Cr. Rep. 613, 22 L. R. A. (N. S.) 469, 114 S. W. 817.

As to right to quash part of indictment, see note 22 L. R. A. (N. S.) 469.

[2] Ibid.; R. v. Dunn, 1 Car. & K. 730, 47 Eng. C. L. 728; R. v. Colling, 2 Cox 184.

mon law it may be at any time retracted, and is not only no bar to a subsequent prosecution on another indictment,[3] but it must become a matter of record in order to preclude a revival of proceedings on the original bill.[4] It may, at common law, be entered at any time before judgment;[5] and it may be entered on objectionable counts

3 **Nolle prosequi as to a count in** an indictment, or of an indictment as a whole works no acquittal, but leaves the prosecution as though no such count had been inserted, or no such indictment found.—Dealy v. United States, 152 U. S. 539, 38 **L. Ed.** 545, 14 Sup. Ct. Rep. 680, 9 **Am. Cr. Rep.** 161.

After a nolle prosequi, the indictment on which it is entered is extinct.—R. v. Allen, 1 Best & S. 850, 101 Eng. C. L. 849; R. v. Mitchell, 3 Cox C. C. 93.

Compare: State v. Thompson, 10 N. C. (3 Hawks) 613; State v. Howard, 15 Rich. L. (S. C.) 274.

— But a new indictment may ordinarily be found for the same offense.—Infra, § 1377.

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 entering of a nolle prosequi could not have the legal effect of a retraxit by reason of the agreement.—State v. Lopez, 19 Mo. 254; infra, § 1377.

4 ALA.—State v. Blackwell, 9 Ala. 79. MASS.—Com. v. Wheeler, 2 Mass. 172; Com. v. Tuck, 37 Mass. (20 Pick.) 356. MISS.—Clark v. State, 23 Miss. 261. N. C.—State v. McNeill, 10 N. C. (3 Hawks) 183. PA.—Com. v. Miller, 2 Ashm. 61. S. C.—State v. Hasket, 3 Hill 95. VA.—Com. v. Lindsay, 4 Va. (2 Va. Cas.) 345; Wortham v. Com., 26 Va. (5 Rand.) 669. FED.—United States v. Shoemaker, 2 McL. 114, Fed. Cas. No. 16279.

As to position of attorney-general on trial, see, infra, § 1481.

As to law, see, infra, § 1483.

5 East P. C. 307. ARK.—Levi v. State, 54 Ark. 520. ME.—State v. Burke, 38 Me. 574. MASS.—Com. v. Briggs, 24 Mass. (7 Pick.) 179; Com. v. Tucker, 37 Mass. (20 Pick.) 356; Com. v. Jenks, 67 Mass. (1 Gray) 490. N. H.—State v. Smith, 49 N. H. 155, 6 **Am. Rep.** 480. VT.—State v. Roe, 12 Vt. 93. FED.—5 Opinions Atty.-Gen. 729.

Before impanelment of jury prosecuting attorney may demand entering of a nolle prosequi.—State v. Wear, 145 Mo. 225, 46 S. W. 1099.

Can not be entered after prosecution completed and pardoning power is operative.—State ex rel. Butler v. Moise, 48 La. Ann. 109, 35 **L. R. A.** 701, 18 So. 943.

But it may be after the indictment has been upheld by the trial court where the prosecutor be-

so as to confine the verdict to those which are good.[6] It may be entered, also, at common law, on a portion of a divisible count;[7] or as to one of several defendants.[8] Courts have, it is true, frequently 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 empaneled and witnesses called, to withdraw the case without their sanction.[9] In some states no nolle

lieves it would not be upheld by the supreme court.—State v. Ayles, 120 La. 688, 45 So. 540.

6 ALA.—Barnett v. State, 54 Ala. 579; Lacey v. State, 58 Ala. 385. IND.—Wright v. State, 5 Ind. 290, 61 Am. Dec. 90. ME.—State v. Bruce, 24 Me. 71; Anonymous, 31 Me. 592; State v. Burke, 38 Me. 524. MASS.—Com. v. Briggs, 24 Mass. (7 Pick.) 177; Com. v. Cain, 102 Mass. 487; Jennings v. Com., 105 Mass. 586; Com. v. Wallace, 108 Mass. 512; Com. v. Dean, 109 Mass. 349. N. H.—State v. Merrill, 44 N. H. 624. N. Y.—People v. Porter, 4 Park. Cr. Rep. 524. OHIO—Mount v. State, 14 Ohio 295, 45 Am. Dec. 542. PA.—Com. v. Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475, though see Agnew v. Commissioners, 12 Serg. & R. 94. TENN.—State v. Fleming, 26 Tenn. (7 Humph.) 152, 46 Am. Dec. 73; Grant v. State, 42 Tenn. (2 Coldw.) 216. VT.—State v. Roe, 12 Vt. 93; State v. Lockwood, 58 Vt. 378, 3 Atl. 539. FED.—United States v. Shoemaker, 2 McL. 114, Fed. Cas. No. 16279; United States v. Peterson, 1 Woodb. & M. 305, Fed. Cas. No. 16037. ENG.—R. v. Rowlands, 2 Den. C. C. 367, 17 Ad. & E. N. S. (17 Q. B.) 671, 79 Eng. C. L. 670; R. v. Hempstead, R. & R. 344; R. v. Butterworth, R. & R. 520.

After verdict prosecuting attorney may enter nolle prosequi against defendant as to one count. —State v. Jones, 82 N. C. 685.

With consent of court, one or more counts may be dismissed by nolle prosequi, and judgment entered upon remaining ones.—State v. Perry, 116 La. 233, 4 So. 686.

7 Ibid. IOWA—State v. Buck, 59 Iowa 382, 13 N. W. 342. LA.—State v. Christian, 30 La. Ann. (Pt. I) 367. MASS.—Com. v. Briggs, 24 Mass. (7 Pick.) 179; Com. v. Stedman, 53 Mass. (12 Met.) 444; Lanning v. Com., 105 Mass. 586. N. H.—State v. Merrill, 44 N. H. 624. FED.—United States v. Keen, 1 McL. 429, Fed. Cas. No. 15510.

This was allowed after verdict. —See, infra, § 1675.

8 State v. Woulfe, 58 Ind. 17.

9 ALA.—State v. Kreps, 8 Ala. 951. GA.—Statham v. State, 41 Ga. 507. MASS.—Com. v. Briggs, 24 Mass. (7 Pick.) 179; Com. v. Tuck, 37 Mass. (20 Pick.) 356; Jennings v. Com., 103 Mass. 586; Com. v. Scott, 121 Mass. 33. MO.—Donaldson, Ex parte, 44 Mo. 149. N. C.—State v. Moody, 69 N. C. 529. OHIO—Mount v. State, 14 Ohio 295, 45 Am. Dec. 542. S. C.—

prosequi is operative by statute without such consent.[10] Be this as it may, if the case be withdrawn when on trial, without the defendant's consent, this operates as an acquittal in all cases in which the defendant was in jeopardy at the trial.[11] Such, also, is the case when part of a

State v. McKee, 1 Bail. L. 651, 21 Am. Dec. 499. VT.—State v. I. S. S., 1 Tyl. 178. FED.—United States v. Corrie, 1 Brun. Col. Cas. 686, Fed. Cas. No. 14869; United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409; United States v. Shoemaker, 2 McL. 114, Fed. Cas. No. 16279.

As to duties of prosecuting attorney, see, infra, §§ 1489 et seq. See 5 Crim. Law Mag. 1.

That federal district attorney has not absolute power over a case while pending before a commission or grand jury, is maintained in United States v. Schumann, 7 Sawy. 439, 2 Abb. U. S. 523, Fed. Cas. No. 16235.

As to New Jersey, see Appar v. Woolston, 43 N. J. L. (14 Vr.) 65; State v. Hickling, 45 N. J. L. (16 Vr.) 154.

10 People v. McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; State v. Taylor, 84 N. C. 773-775.

11 Infra, § 1377. See McGehee v. State, 58 Ala. 360; State v. McKee, 1 Bail. (S. C.) 651, 21 Am. Dec. 499.

Can not be claimed when the indictment is defective.—Infra, § 1444.

As to Connecticut, see State v. Garvey, 42 Conn. 232.

As to Georgia, see Doyal v. State, 70 Ga. 384.

In Maine, a nolle prosequi can be withdrawn during the term when entered.—State v. Nutting, 39 Me. 359.

In Massachusetts, a nolle prosequi may be entered after the empaneling of the jury, against the objection of the defendant, if he does not demand a verdict.—See Com. v. McMonagle, 1 Mass. 517; Com. v. Tuck, 37 Mass. (20 Pick.) 356; Charlton v. Com., 46 Mass. (5 Met.) 532; Kite v. Com., 52 Mass. (11 Met.) 581; Com. v. Kimball, 73 Mass. (7 Gray) 328; Com. v. Cain, 102 Mass. 214.

But if the defendant objects, and demands a verdict, no nolle prosequi can be entered.—Com. v. Scott, 121 Mass. 33.

In New Hampshire, in prosecutions instituted in the name of the state, a general discretionary power exists in the prosecuting officer to enter a nolle prosequi. Before a jury is empaneled, or, after a verdict in favor of the state, this power may be exercised without the respondent's consent, and with his consent at any time during the trial, and before the verdict of the jury.—State v. Smith, 49 N. H. 155, 6 Am. Rep. 480.

In New Jersey the practice has grown up of requiring the assent of court to a nolle prosequi on a pending indictment.—State v. Hickling, 45 N. J. L. (16 Vr.) 152.

In Pennsylvania, by the Revised Act of 1860: "Nolle prosequi.—No district attorney shall, in any

divisible charge is withdrawn.[12] On the other hand, the defendant, by not insisting on a verdict, may lose his right to set up the nolle prosequi as a bar.[13]

§ 1311. NOLLE PROSEQUI GRANTED IN VEXATIOUS SUITS. A nolle prosequi may be granted either where in cases of misdemeanor a civil action is depending for the same cause;[1] or where any improper or vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offense;[2] or if it be clear that an indictment be not sustainable against the defendant;[3] or if the prosecution desire to withdraw a part of a divisible charge.[4] And where an

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." Rev. Act, 1860, Pamph. 437.—See Com. v. Seymour, 2 Brewst. (Pa.) 567.

Before the Revised Act it was held permissible, as it still continues to be with leave of court, to enter a nolle prosequi even after conviction.—Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

In the last case, a nolle prosequi was entered on a particular count of an indictment, after conviction, judgment being rendered on the other counts.

Compare: Agnew v. Commissioners, 12 Serg. & R. (Pa.) 94, where the power of the attorney-general, in case of perjury, under the Act of 29th March, 1819, to enter nolle prosequi, even with leave of court, is doubted.

— **So in New York.**—People v. McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328.

In Wisconsin, it is said that an agreement by a public prosecutor, without the sanction of the court, for immunity to several defendants, on condition of one of them becoming state's evidence in other cases, is void as against the policy of the law.—Wight v. Rindskopf, 43 Wis. 344. See, infra, § 1473.

In the United States courts, the attorney-general or district attorney has only power to dismiss a prosecution, or enter a nolle prosequi after indictment found.—United States v. Schumann, 7 Sawy. 439, 2 Abb. U. S. 523, Fed. Cas. No. 16235.

12 State v. Bean, 77 Me. 486.

13 State v. Garvey, 42 Conn. 233; Com. v. Kimball, 73 Mass. (7 Gray) 328.

Infra, § 1423.

1 Jones v. Clay, 1 Bos. & Pul. 191, 126 Eng. Rep. 853.

2 R. v. Guerchy, 1 Black. 545, 96 Eng. Rep. 315.

3 Com. Rep. 312; 1 Chitty Crim. Law 479.

4 Jackson v. State, 76 Ga. 551; State v. Bean, 77 Me. 486; supra, § 200.

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 may, 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.[5] It has been held, also, that an indict-

"**Where an offense is not without aggravating circumstances**, which enlarge the offense, he (the prosecuting officer) may enter a nolle prosequi as to the aggravation, and obtain a conviction for the lesser offense, which is well charged" (Morton, C. J., in Com. v. Dunster, 145 Mass. 101, 102, 13 N. E. 350). But "the prosecuting officer can not, by means of a nolle prosequi, put the defendant on trial for an offense differing from any offense with which he is formally charged in the complaint or indictment."

5 2 Burr. 270; 1 Chitty Crim. Law 479. See, infra, §§ 1383, 1384.

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 offenses.

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.—Cro. C. C. 25. 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.—R. v. Fielding, 2 Burr. 719; Jones v. Clay, 1 Bos. & P. 191. 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.—R. v. Guerchy, 1 Bla. 545, 96 Eng. Repr. 315; Archbold's C. P. (13th ed.) 92, 93.

ment for adultery should not be pressed against the earnest appeals of the only injured party.[6]

The effect of a nolle prosequi, as a bar, is hereafter discussed.[7]

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. — Archbold's C. P. (13th ed.) 92.

As to practice in Massachusetts, see, infra, § 1485.

6 People v. Dalrymple, 55 Mich. 519, 22 N. W. 20.

7 Infra, § 1377.

CHAPTER LXXXV.

MOTION TO QUASH.

§ 1312. Indictment will be quashed when no judgment can be entered on it.
§ 1313. Quashing refused except in clear case.
§ 1314. Quashing usually matter of discretion.
§ 1315. Extrinsic facts usually no ground for quashing.
§ 1316. Defendants may be severed in quashing.
§ 1317. When two indictments are pending one may be quashed.
§ 1318. Quashing ordered in vexatious cases.
§ 1319. —— And so where finding is defective.
§ 1320. Bail may be demanded after quashing.
§ 1321. Pending motion nolle prosequi may be entered.
§ 1322. One count may be quashed.
§ 1323. Quashing may be on motion of prosecution.
§ 1324. Time usually before plea.
§ 1325. Motion should state grounds.

§ 1312. Indictment will be quashed when no judgment can be entered on it. The court will quash an indictment when it is plain no judgment can be rendered in case of conviction.[1] Thus, an indictment found in a court having no jurisdiction will be quashed in a superior court;[2] and so where the finding is on its face bad,[3] or the bill charges an offense excluded by a statute of limitation.[4] The same course will be taken where the offense is

1 State v. Albin, 50 Mo. 419; State v. Robinson, 29 N. H. 274; State v. Roach, 3 N. C. (2 Hayw.) 352, 2 Am. Dec. 626; State v. Williams, 2 Hill (S. C.) 382; State v. Sloan, 67 N. C. 357.

Supra, §§ 141, 148.

2 R. v. Bainton, 2 Str. 1088, 93 Eng. Repr. 1050; R. v. Heane, 4 Best & S. 947, 116 Eng. C. L. 945; 9 Cox 433; R. v. Hewitt, R. & R. 158.

3 Supra, §§ 1277 et seq.; State v. Kilcrease, 6 Rich. L. (S. C.) 444.

4 State v. English, 2 Mo. 182; State v. Robinson, 29 N. H. 274; contra, State v. Howard, 15 Rich. L. (S. C.) 274; State v. J. P., 1 Tyl. (Vt.) 283.

Contra: Supra, §§ 178, 369 et seq.,

charged to have been committed on a day which is yet to come, or where no time is laid; such an error being as fatal as if there were no day laid;[5] and so of indictments alleging time as "on or about."[6] Where there is no Christian name given, or no addition, 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.[7] An information, also, unsupported by oath or affirmation, will be quashed.[8] There are several instances, also, where indictments have been quashed because the facts stated in them did not amount to an offense punishable by law;[9] 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.[10] In cases of this general class, the trial judge may quash the indictment on his own motion.[11]

§ 1313. QUASHING REFUSED EXCEPT IN CLEAR CASE. 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

and this can not be regarded as settled law.

5 State v. Sexton, 10 N. C. (3 Hawks) 184, 14 Am. Dec. 584.

Supra, § 176.

6 United States v. Crittenden, 1 Hemp. 61, Fed. Cas. No. 14890a.

7 Gardner v. State, 4 Ind. 632; Prell v. McDonald, 7 Kan. 454, 12 Am. Rep. 423; State v. McGregor, 41 N. H. 407.

Supra, § 140.

8 Eichenlaub v. State, 36 Ohio St. 140.

9 Huff's Case, 55 Va. (14 Gratt.) 648; R. v. Burkett, Andr. 230, 95 Eng. Repr. 375; R. v. Sarmon, 1 Burr. 516, 97 Eng. Repr. 426.

10 R. v. Leafe, Andr. 226, 95 Eng. Repr. 273.

In United States Circuit Court for Michigan it has been ruled, under the special procedure prescribed in federal courts, that a motion will be sustained to quash on the allegation that no evidence whatever was adduced in support of the application for a warrant of arrest; though the court will not inquire into the sufficiency of such evidence if any was produced.—United States v. Shepard, 1 Abbott U. S. 431, Fed. Cas. No. 16273; but see, infra, § 1315.

11 United States v. Pond, 2 Curt. 265, 268, Fed. Cas. No. 16067; R. v. Wilson, 6 Ad. & E. N. S. (6 Q. B.) 620, 51 Eng. C. L. 619; R. v. James, 12 Cox C. C. 127.

refused.[1] The court will not quash an indictment except in a very clear case;[2] and this reluctance is peculiarly strong in cases of crimes such as treason, felony,[3] forgery, perjury, or subornation.[4] The courts have also refused to quash indictments for cheats,[5] for selling flour by false weights,[6] for extortion,[7] for not executing a magistrate's warrant[8] against overseers for not paying money over to their successors,[9] and the like; and a party in such cases will be left to his demurrer for demurrable defects.[10] An indictment for not repairing highways or bridges, or for other public nuisances, will not be quashed,[11] unless there be a certificate that the nuisance is removed.[12] The same rule applies to indictments for a

1 IDA.—People v. Nash, 1 Ida. 206. ME.—State v. Putnam, 38 Me. 296; State v. Burke, 38 Me. 574. MD.—Horne v. State, 39 Md. 552. MASS.—Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596. MO.—State v. Wishon, 15 Mo. 503. N. J.—State v. Rickey, 9 N. J. L. (4 Halst.) 293; State v. Hageman, 13 N. J. L. (1 Gr.) 314; State v. Dayton, 23 N. J. L. (3 Zab.) 49, 53 Am. Dec. 270; State v. Beard, 25 N. J. L. (1 Dutch.) 384; State v. Zeigler, 46 N. J. L. 307. N. Y.—Lambert v. People, 7 Cow. 166; People v. Eckford, 7 Cow. 535; People v. Davis, 56 N. Y. 95, 2 Cow. Cr. Rep. 39. TEX.—Click v. State, 3 Tex. 282. FED.—United States v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409.

2 ARK.—State v. Mathis, 3 Ark. 84. IND.—Stoner v. State, 80 Ind. 89. N. C.—State v. Baldwin, 18 N. C. (1 Dev. & B. L.) 198. PA.—Respublica v. Cleaver, 4 Yeat. 69. VA.—Bell v. Com., 49 Va. (8 Gratt.) 726. FED.—Resp. v. Buffington, 1 U. S. (1 Dall.) 61, 1 L. Ed. 37.

3 Com. Dig. Indictment (H.); State v. Colbert, 75 N. H. 368; People v. Waters, 5 Park. Cr. Rep. 661; R. v. Johnson, 1 Wils. 325, 95 Eng. Repr. 643.

4 R. v. Belton, 1 Salk. 372, 91 Eng. Repr. 323, 1 Sid. 54; 1 Vent. 370; R. v. Thomas, 3 Den. & C. 290.

5 R. v. Orbell, 6 Mod. 42, 87 Eng. Repr. 804.

6 R. v. Crookes, 3 Burr. 1841, 97 Eng. Repr. 1127.

7 R. v. Wadsworth, 5 Mod. 13, 87 Eng. Repr. 489.

8 R. v. Bailey, 2 Str. 1211, 93 Eng. Repr. 1134.

9 R. v. King, 2 Str. 1268, 93 Eng. Repr. 1173.

10 Maguire v. State, 47 Md. 485.

11 R. v. Belton, 1 Salk. 372, 91 Eng. Repr. 323, 1 Vent. 370; R. v. Bishop, Andr. 220, 95 Eng. Repr. 271.

12 R. v. Leyton, Cro. Car. 584, 79 Eng. Repr. 1102; R. v. Wigg, 2 Salk. 460, 91 Eng. Repr. 397, 2 Ld. Raymond 1165.

forcible entry,[13] unless, perhaps, where the possession has been afterwards given up.[14]

§ 1314. QUASHING USUALLY MATTER OF DISCRETION. It has been frequently ruled that as quashing is a discretionary act, error does not lie on its refusal.[1] Even granting the motion has been held a matter of discretion as to which there is no revision.[2] But an examination of the cases will show that error has been sustained in numerous instances to such quashing, either directly or indirectly,[3]

13 R. v. Dyer, 6 Mod. 96, 87 Eng. Repr. 854.

14 R. v. Brotherton, 2 Str. 702, 93 Eng. Repr. 794. See Com. Dig. Indictment (H.); 3 Bac. Abr. 116.

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," etc.—Rev. Stat., ch. 138, § 14.

1 ALA.—White v. State, 74 Ala. 31. IND.—Stout v. State, 96 Ind. 407. ME.—State v. Putnam, 38 Me. 296; State v. Hurley, 54 Me. 562. MASS.—Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; Com. v. Davis, 77 Mass. (11 Gray) 457; Com. v. Gould, 78 Mass. (12 Gray) 171; Com. v. Duleay, 157 Mass. 386, 32 N. E. 356. MO.—State v. Conrad, 21 Mo. 271. N. J.—Moschell v. State, 53 N. J. L. 498, 22 Atl. 50. N. Y.—People v. Sharp, 45 Hun 460, 5 N. Y. Cr. Rep. 388. PA.—Com. v. Swallow, 8 Pa. Sup. Ct. Rep. 598. R. I.—State v. McCarthy, 4 R. I. 82. S. C.—State v. Shiver, 20 S. C. 392. VT.—State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

See, infra, § 1711.

Exception does not lie to refusal to quash; defendant has his remedy by demurrer.—State v. Putnam, 38 Me. 296; Com. v. Davis, 77 Mass. (11 Gray) 457; Com. v. Duleay, 157 Mass. 386, 32 N. E. 356; Moschell, 53 N. J. L. 498, 22 Atl. 50; Com. v. Swallow, 8 Pa. Super. Ct. Rep. 598; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559.

That this is the case after plea, see Richards v. Com., 81 Va. 110.

2 State v. Jones, 5 Ala. 666; State v. Hurley, 54 Me. 562; State v. McWilliams, 7 Mo. App. 99.

Infra, § 1711.

This is so when the quashing is on motion of the prosecution.—See State v. Cooper, 96 Ind. 33.

Supreme court United States will not take cognizance of a division of opinion on motion to quash. —United States v. Avery, 80 U. S. (13 Wall.) 251, 20 L. Ed. 610; United States v. Hamilton, 109 U. S. 63, 27 L. Ed. 857, 3 Sup. Ct. 9.

3 ME.—State v. Barnes, 29 Me. 561. MO.—State v. Wall, 15 Mo. 208. N. Y.—People v. Stone, 9

and that such a rule is usually only applied to quashing on extrinsic proof of an improper finding.[4] And it would be monstrous to assume that an inferior court could defeat revision by putting its judgment in the shape of quashing.[5] And the reason for review is peculiarly strong in those states in which defendants are required to avail themselves of certain formal defects exclusively in motion to quash.[6]

§ 1315. EXTRINSIC FACTS USUALLY NO GROUND FOR QUASHING. It is error to quash for matter of defense not apparent in the indictment or in the caption.[1] Hence the illegal selection of the grand jurors, when the fact does not appear on record, is no cause for quashing an indictment on motion,[2] and an indictment will not be quashed on the ground of irregularities in the arrest or preliminary hearing,[3] nor for technical irregularities in the conduct of the grand jury.[4] It is otherwise when there is gross impro-

Wend. 182. PA.—Com. v. Church, 1 Pa. St. 105, 44 **Am. Dec.** 112; Com. v. Wallace, 114 Pa. St. 405, 60 **Am. Rep.** 353, 6 Atl. 685. R. I.—State v. Maloney, 12 R. I. 251.

4 Green v. State, 73 Ala. 36.

5 State v. McNally, 55 Md. 559.

6 Com. v. McGovern, 92 Mass. (10 Allen) 193; Com. v. Walton, 93 Mass. (11 Allen) 238.

1 CAL.—People v. More, 68 Cal. 500, 9 Pac. 461. CONN.—Wickwire v. State, 19 Conn. 477. N. J.—State v. Rickey, 9 N. J. L. (4 Halst.) 293. PA.—Com. v. Church, 1 Pa. St. 105, 44 **Am. Dec.** 112. TEX.—State v. Foster, 9 Tex. 65. FED.—United States v. Shepard, 1 Abb. U. S. 431, Fed. Cas. No. 16273; United States v. Pond, 2 Curt. 265, Fed. Cas. No. 16067.

Supra, § 1312.

By consent, however, extraneous matter may be brought in.—State v. Cain, 8 N. C. (1 Hawks) 352; R. v. Heane, 4 Best & S. 947, 116 Eng. C. L. 945, 9 Cox C. C. 433.

Affidavits denying material averments can not be read without the consent of the prosecuting officers.—People v. Clews, 57 How. Pr. (N. Y.) 245.

2 State v. Hensley, 7 Blackf. (Ind.) 324; but see, supra, §§ 1271, 1277.

3 People v. Rodrigo, 69 Cal. 601, 11 Pac. 481; People v. Rowe, 4 Park. Cr. Rep. (N. Y.) 253.

Supra, § 59. But see, supra, § 1312.

4 State v. Tucker, 20 Iowa 508; State v. Logan, 1 Nev. 509; State v. Cole, 19 Wis. 129, 88 **Am. Dec.** 678; State v. Fee, 19 Wis. 562.

Provision of Massachusetts, in the Rev. Sts., ch. 136, § 9, that a list of all witnesses, sworn before the grand jury during the term,

priety in the action of the grand jury,[5] or material defects in its constitution.[6] In such case the burden of proof is on the party making the motion.[7]

§ 1316. DEFENDANTS MAY BE SEVERED IN QUASHING. Wherever an indictment is divisible as to defendants, it may be quashed as to one defendant, remaining in force as to the others.[1] It is otherwise where, as in conspiracy, there can be no such severance.[2]

§ 1317. WHEN TWO INDICTMENTS ARE PENDING ONE MAY BE QUASHED. If a prior indictment be pending in the same court, the course is to quash one before the party is put to plead on the other.[1] If in different courts, the defendant may abate the latter, by plea that another court has cognizance of the case by a prior bill.[2] 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.[3]

§ 1318. QUASHING ORDERED IN VEXATIOUS CASES. Quashing is also sometimes ordered in vexatious cases, as where an indictment contains an unnecessarily cumbrous combination of counts, or where incongruous offenses are im-

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.—Com. v. Edwards, 70 Mass. (4 Gray) 1.

5 Supra, § 1291; infra, § 1319; Green v. State, 73 Ala. 36.

6 Supra, § 1271; infra, § 1319.

7 DeOlles v. State, 20 Tex. App. 145.

1 Supra, § 351; State v. Compton, 13 W. Va. 852.

2 People v. Eckford, 7 Cow. (N. Y.) 535.

1 In New York, if there be at any time pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be superseded by such second indictment, and shall be quashed.—Rev. Stat., part 4, ch. 2, tit. 4, art. 2, § 42; infra, § 1382.

2 State v. Tisdale, 22 N. C. (2 Dev. & B. L.) 159; infra, § 1371.

3 Ibid.; Dutton v. State, 5 Ind. 533; Com. v. Drew, 57 Mass. (3 Cush.) 279.

Supra, §§ 1300, 1301; infra, § 1382.

properly joined;[1] or where, after a return of ignoramus, a second bill, without special ground laid, is sent in by the prosecution.[2]

§ 1319. —— AND SO WHERE FINDING IS DEFECTIVE. When the finding of an indictment is grossly defective and irregular, it may be quashed on motion of the prosecution.[1]

§ 1320. BAIL MAY BE DEMANDED AFTER QUASHING. On quashing an indictment on formal grounds, when no second indictment has been found, the court will continue the defendant on bail to meet the finding of the second.[1]

§ 1321. PENDING MOTION NOLLE PROSEQUI MAY BE ENTERED. After a motion to quash an indictment containing two counts, one of which is defective, the prosecutor 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.[1]

§ 1322. ONE COUNT MAY BE QUASHED. In clear cases, a judge may, at his discretion, quash a defective count in an indictment, without quashing the entire indictment.[1] But if there be one good count, the motion to quash, as a general rule, will not be sustained in those states in which a single good count will sustain a verdict.[2]

1 Supra, § 340; Weinzorplin v. State, 7 Blackf. (Ind.) 186.

2 Rowand v. Com., 82 Pa. St. 405.

1 Supra, §§ 1277, 1291, 1315; Finley v. State, 61 Ala. 201; State v. Tilleys, 67 Tenn. (8 Baxt.) 381.

Compare: McElhanon v. People, 92 Ill. 409.

1 Crumpton v. State, 43 Ala. 31; Graves, Ex parte, 61 Ala. 381; Smith, In re, 4 Colo. 532.

1 State v. Buchanan, 23 N. C. (1 Ired. L.) 59; supra, §§ 1310, 1311.

1 State v. Woodward, 21 Mo. 266; Scott v. Com., 55 Va. (14 Gratt.) 687.

2 ARK.—State v. Mathis, 3 Ark. 84. IND.—State v. Staker, 3 Ind. 570; Jarrell v. State, 58 Ind. 293; Dantz v. State, 87 Ind. 398. MASS.—Com. v. Hawkins, 69 Mass. (3 Gray) 463; Com. v. Pratt, 137 Mass. 98. MO.—State v. Wishon, 15 Mo. 503; State v. Woodward, 21 Mo. 265. N. Y.—Kane v. People, 3 Wend. 364. N. C.—State v. Buchanan, 23 N. C. (1 Ired. L.) 59.

§ 1323. QUASHING MAY BE ON MOTION OF PROSECUTION. The practice is to prefer a new bill against the same defendant, before an application to quash is made on the part of the prosecution;[1] an indictment quashed before jeopardy attaches on trial being no bar.[2] And 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;[3] that the second indictment shall stand in the same condition to all intents and purposes that the first would have stood if it were not quashed;[4] and particularly where there has been any vexatious delay upon the part of the prosecutor,[5] that the prosecutor be put on terms.[6] And, at all events, as has been seen, the court, when the exceptions are technical, will hold the defendant to bail to await a second indictment.[7]

§ 1324. TIME USUALLY BEFORE PLEA. The application, if made by the defendant, must for formal defects, which would be cured by verdict, be made before plea pleaded and must be prompt.[1] Should the application be made

TEX. — State v. Rutherford, 13 Tex. 24.

1 R. v. Wynn, 2 East 226.

2 Infra, § 1272.

3 R. v. Webb, 3 Burr. 1469, 97 Eng. Rep. 931.

4 R. v. Glenn, 3 Barn. & Ald. 373, 5 Eng. C. L. 219; R. v. Webb, 3 Burr. 1468, 97 Eng. Rep. 931, 1 W. Bl. 460, 96 Eng. Rep. 265.

5 R. v. Webb, 3 Burr. 1468, 97 Eng. Rep. 931, 1 W. Bl. 460, 96 Eng. Rep. 265.

6 R. v. Glenn, 3 Barn. & Ald. 372, 5 Eng. C. L. 219.

For exceptions, see Mentor v. People, 30 Mich. 91.

7 Supra, §§ 125, 1320; Crumpton v. State, 43 Ala. 31.

1 Fost. 261. GA.—Thomasson v. State, 22 Ga. 499. IND.—Weinzorpflin v. State, 7 Blackf. 186. ME.—State v. Burlingham, 15 Me. 104. MASS.—Com. v. Chapman, 65 Mass. (11 Cush.) 422. N. J.—Nicholls v. State, 5 N. J. L. (2 South.) 539. N. C. — State v. Jarvis, 63 N. C. 556; State v. Barbee, 93 N. C. 498. VA. — Richards v. Com., 81 Va. 110. W. VA. — State v. Riffe, 10 W. Va. 794. FED.—United States v. Bartow, 20 Blatchf. 349, 351, 10 Fed. 874. ENG.—R. v. Heane, 4 Best & S. 947, 116 Eng. C. L. 945, 9 Cox C. C. 433; R. v. Rookwood, 1 Holt 684, 4 St. Tr. 577.

In England, where the indict-

upon the part of the prosecution, it would seem that it may be made at any time before the defendant has been actually tried upon the indictment;[2] and the right as to formal defects continues until after arraignment and the empaneling of the jury.[3] After empaneling, for formal defects it may be too late.[4] But in cases where the indictment is plainly bad, as where there is clearly no jurisdiction, or where there are other plain substantial defects, the court will quash at any time, even after plea.[5]

§ 1325. MOTION SHOULD STATE GROUNDS. The motion should specifically state the ground of objection.[1]

ment 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.—Anonymous, 1 Salk. 380, 91 Eng. Rep. 331.

In **State v. Morris**, 1 Houst. (Del.) 124, 63 **Am. Dec.** 187, it was said that the motion could be made before the defendant was in court.

2 See R. v. Webb, 3 Burr. 1468, Eng. Rep. 931.

3 Clark v. State, 23 Miss. 261.

4 Com. v. Fitchburg R. Co., 126 Mass. 472, in which case it was held that if a jury has once been empaneled in a criminal case, it is too late, under the Statute of 1864, ch. 250, § 2, to move to quash the indictment for formal defects apparent on its face, although the motion is made before the empaneling of the jury for a new trial of the case, the former verdict having been set aside.

5 Wider v. State, 47 Ga. 522; Com. v. Chapman, 65 Mass. (11 Cush.) 422; Nicholls v. State, 5 N. J. L. (2 South.) 539; R. v. Wilson, 6 Ad. & E. N. S. (6 Q. B.) 620, 51 Eng. C. L. 619; R. v. Heane, 4 Best & S. 947, 116 Eng. C. L. 945, 9 Cox C. C. 433; R. v. James, 12 Cox C. C. 127.

1 State v. Van Houten, 37 Mo. 357. See, under statute, State v. Berry, 62 Mo. 595.

CHAPTER LXXXVI.

DEMURRER.

§ 1326. Demurrer reaches defects of record.
§ 1327. Demurrer may be to particular counts, but not to parts of counts.
§ 1328. Demurrer brings up the validity of all prior pleadings.
§ 1329. Demurrer admits facts well pleaded.
§ 1330. In England, judgment on general demurrer for prosecution may be final.
§ 1331. —— Otherwise in this country.
§ 1332. Ordinarily judgment against prosecution not final.
§ 1333. Demurrer to evidence brings up sufficiency of prosecution's whole case.
§ 1334. Joinder in demurrer formal.
§ 1335. Must be prompt.

§ 1326. Demurrer reaches defects of record. Demurrer, from "demorare," is a mode by which a defendant may object to an indictment as insufficient in point of law.[1] Wherever an indictment is defective in substance

[1] Co. Lit. 71b; 4 Bl. Com. 333; Burn's Just., 29th ed., tit. Demurrer; Chitty C. L. 439.

So as to defective averment of jurisdiction.—People v. Craig, 59 Cal. 370.

As to form of demurrer, see State v. Weeks, 77 Mo. 496.

Court illegally held at time indictment was found and returned, because it had not been adjourned and reconvened according to law, is not a matter that may be taken advantage of by demurrer; it must be by plea.—McRea v. State, 71 Ga. 96, 5 Am. Cr. Rep. 622.

Demurrer supported by affidavit of person verifying information, denying personal knowledge of the facts, should be overruled.—Vickers v. People, 31 Colo. 491, 12 Am. Cr. Rep. 631, 73 Pac. 845.

Ruling on demurrer may be made the subject of exceptions pendente lite, and error may be assigned on such exceptions in a bill of exceptions sued out in due time, complaining of the final judgment in the case.—Brown v. State, 116 Ga. 559, 15 Am. Cr. Rep. 429, 42 S. E. 795, distinguishing Banks v. State, 114 Ga. 115, 39 S. E. 947, in which no exceptions were taken pendente lite.

or in form, it may be thus met;[2] 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. 4, ch. 64, §§ 20, 21, by which all defects, purely technical, must be taken advantage of before verdict.[3] In this country, demurrers, except under similar statutes, are in but little use,[4] and are of little practical use when the offense is set forth with substantial accuracy.[5] When flaws demurred to are merely formal, they are readily cured, if not by amendment, in any view, by finding a new bill.[6]

§ 1327. Demurrer may be to particular counts, but not to parts of counts. A demurrer may be sustained as to a bad count without in any way affecting a good count in the same indictment;[1] though if a demurrer be general to the whole indictment, one good count will prevent a general judgment for the defendant.[2] That a part of a count is defective is, however, no ground for demurrer, if the residue of the count sets forth an indictable offense. Hence, where a count contains two offenses, one of which is properly stated, and the other of which can be rejected as surplusage, there must be a judgment on demurrer for the prosecution.[3]

2 Lazier v. Com., 51 Va. (10 Gratt.) 708.

3 People v. Markham, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620; Com. v. Hughes, 11 Phila. (Pa.) 430.

4 See, supra, § 131.

Demurrer will not be sustained for defects in indorsing and filing indictment.—See State v. Brandon, 28 Ark. 410.

As to limits of Massachusetts statute, see Com. v. Kennedy, 131 Mass. 584.

5 Minor v. State, 63 Ga. 318; Deckard v. State, 38 Md. 186; Harne v. State, 39 Md. 352, 17 Am. Rep. 568; United States v. Moller, 16 Blatchf. 65, Fed. Cas. No. 15794.

6 Jackson v. State, 64 Ga. 344; State v. Millsop, 69 Mo. 359; United States v. Moller, 16 Blatchf. 65, Fed. Cas. No. 15794.

1 Turner v. State, 40 Ala. 21.

2 Ingram v. State, 39 Ala. 247, 84 Am. Dec. 782; infra, § 1848.

3 Wheeler v. State, 42 Md. 563.

In Pennsylvania, by the revised act, objections to indictment must be made before the jury is sworn

§ 1328. DEMURRER BRINGS UP THE VALIDITY OF ALL PRIOR PLEADINGS. A demurrer puts the legality of the whole proceedings in issue, and compels the court to examine the validity of the whole record;[1] 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.[2]

Judgment is to be rendered against the party committing the first error in pleading.[3]

§ 1329. DEMURRER ADMITS FACTS. Although a demurrer admits the facts demurred to and refers their legal sufficiency to the court,[1] it does not admit allegations of the legal effect of the facts therein pleaded.[2] Nor does it admit any facts that are not well pleaded.

§ 1330. IN ENGLAND, JUDGMENT ON GENERAL DEMURRER FOR PROSECUTION MAY BE FINAL. Whether a judgment for the prosecution, on a demurrer, is final, depends upon whether the demurrer admits the facts charged in the indictment in such a way as to constitute a confession of guilt. If a defendant virtually says: "I did this, but in doing it I did not break the law," then, if the conclusion of the court is that if he did break the law, judgment is to be entered against him.[1] On the other hand, when the demurrer is special, pointing out particular alleged flaws in the indictment, and not confessing that the facts charged as constituting the offense are true, then, if the judgment is for the prosecution, the defendant is entitled

—Rev. Act 1860, 433; Com. v. Frey, 50 Pa. St. 245.

A similar provision exists in Massachusetts. — Gen. Stat. 1864, ch. 250, § 2.

1 Saund. 285, n. 5; Com. v. Trimmer, 84 Pa. St. 65.

2 R. v. Haddock, Andr. 137, 95 Eng. Rep. 333; R. v. Fearnley, 1 Leach C. C. 425, 1 T. R. 316, 99 Eng. Rep. 1115.

3 State v. Sweetsir, 53 Me. 438.

1 Holmes v. State, 17 Neb. 73, 22 N. W. 232.

2 Com. v. Trimmer, 84 Pa. St. 18.

1 Burn's Just., 29th ed., tit. Demurrer; 2 Hale 225, 257, 315; 2 Inst. 178; 2 Hawk., ch. 31, § 5; 4

to plead over.[2] In England, it is true, judges at nisi prius have 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;[3] and a demurrer was said to rest on the same principle.[4] In 1850, however, the question was finally put to rest by a judgment of the English Court of Criminal Appeal, that a judgment for the crown on a general (as distinguished from a special) demurrer interposed by the defendant, under such circumstances, is final.[5] 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.[6]

Bla. Com. 334; Starkie's C. P. 297; 2 Leach 603; Chitty Cr. L. 439.

2 Dyer 38, 39, Hawk. b. 2, ch. 31, § 6; People v. Biggins, 65 Cal. 564, 4 Pac. 570; Foster v. Com., 8 Watts & Serg. (Pa.) 77; Cro. Eliz. 196, 78 Eng. Rep. 451; 1 Salk. 59, 91 Eng. Rep. 56; R. v. Faderman, 1 Den. C. C. 360, T. & M. 286, 3 Car. & K. 359, overruling R. v. Duffy, 4 Cox C. C. 326.

3 Archbold, by Jervis, 9th ed., 429; 2 Hale 225, 257; 4 Bla. Com. 334.

4 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, 298; R. v. Phelps, 1 Car. & M. 180, 41 Eng. C. L. 103; R. v. Purchase, 1 Car. & M. 617, 41 Eng. C. L. 335; R. v. Duffy, 4 Cox C. C. 326.

In R. v. Odgers, 2 Moo. & R. 479, and the cases there cited in note, it was held that it is within the discretion of the court, even in felonies, to refuse a respondeat ouster.

5 R. v. Faderman, 4 Cox C. C. R. 357, 3 Car. & K. 359, 1 Den. C. C. 565.

6 R. v. Birmingham & G. R. Co., 3 Ad. & E. N. S. (3 Q. B.) 223, 43 Eng. C. L. 708; R. v. Brown, 1 Den. C. C. 293, 2 Car. & K. 503, 509, 61 Eng. C. L. 503; R. v. Houston, 2 Craw. & Dix 310; R. v. Smith, 4 Cox C. C. 42.

See 1 Bennett & Heard's Lead. Cas. 336.

A distinction, however, has been taken 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, it is said that he shall not have judgment to answer over, but the decision will operate as a conviction.—8 East 112; Hawk., b. 2, ch. 31; though see R. v. Birming-

§ 1331. —— OTHERWISE IN THIS COUNTRY. In this country the distinction above taken is not recognized, and the practice has been in all cases where there is on the face of the pleading no admission of criminality on the part of the defendant, to give judgment, quod respondeat ouster, and the English distinction does not seem to be recognized.[1] In some jurisdictions, however, it has been held, that when a general 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.[2] 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 final judgment for the People on the demurrer, and pass sentence on the defendant; and that he could not be permitted to withdraw the demurrer and plead.[3] But this is now corrected by stat-

ham & G. R. Co., 3 Ad. & E. N. S. (3 Q. B.) 223, 43 Eng. C. L. 708, where the defendant was allowed to withdraw the demurrer.

By act of Congress of May 23, 1872, the judgment is respondeat ouster.—Rev. Stat., § 1026, 2 Fed. Stats. Ann., 1st ed., p. 343; 2 Fed. Stats. Ann., 2d ed., p. 687.

1 MASS.—Com. v. Goddard, 13 Mass. 456; see Evans v. Com., 44 Mass. (3 Met.) 453; sed quære, Com. v. Eastman, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596. MISS.—McGuire v. State, 35 Miss. 366, 72 Am. Dec. 124. MO.—Ross v. State, 9 Mo. 687; Meader v. State, 11 Mo. 363; Austin v. State, 11 Mo. 366; Lewis v. State, 11 Mo. 366. N. C.—State v. Polk, 92 N. C. 652. PA.—Com. v. Barg, 3 Pen. & W. 262, 23 Am. Dec. 81; Foster v. Com., 8 Watts & S. 77. TENN.—Fulkner v. State, 50 Tenn. (3 Heisk.) 33.

See for other cases, infra, §§ 1347-1349.

2 CAL.—People v. King, 28 Cal. 265; People v. Jocelyn, 29 Cal. 562. CONN. — Wickwire v. State, 19 Conn. 478. ME.—State v. Merrill, 37 Me. 329; State v. Dresser, 54 Me. 569. TENN.—Bennett v. State, 10 Tenn. (2 Yerg.) 472; State v. Rutlidge, 27 Tenn. (8 Humph.) 32. VT.—State v. Wilkins, 17 Vt. 151. VA.—Com. v. Foggy, 35 Va. (6 Leigh) 638.

See, infra, § 1347.

3 People v. Taylor, 3 Denio (N. Y.) 91, but see People v. Corning, 2 Comst. (N. Y.) 1, cited infra, § 1706.

"In Stearns v. People, 21 Wend.

ute, and the proper course, even independently of statutes, is, in such case, to permit a plea in bar, and a trial by jury.[4] And now, even where the disposition is to treat the judgment on a general 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.[5]

§ 1332. ORDINARILY JUDGMENT AGAINST PROSECUTION NOT FINAL. Where the prosecution demurs to the plea of autrefois convict, or other special plea of confession and avoidance to an indictment, and the demurrer is overruled, the defendant is not entitled to be discharged, and the prosecution may rejoin.[1] But if the defendant plead in abatement in matter of form, and the plea is demurred to, and the demurrer overruled, the judgment of the court is that the prosecution abate, reserving the right to bring in an amended bill.[2]

Judgment against the prosecution on a special demurrer to the indictment is not final, when the defects are

(N. Y.) 409, the prisoner was indicted for a felony. He demurred to the indictment, and judgment was given upon the demurrer against him to answer over. He refused to do so, when the court directed a plea of not guilty to be entered for him, and a trial upon the plea of not guilty was had. Upon error the court seems to have held, and it seems to us properly, that as he had not voluntarily pleaded over he had not waived the right to review the judgment on his demurrer, but could take advantage of the error, if any, in overruling it. This, it seems to us, is a very proper course for a fair-minded court to take in a case where a demurrer is interposed in good faith."—Note to 13 Eng. Rep. 662.

For practice in writ of error in such cases, see, infra, § 1706.

4 R. v. Houston, 2 Crawf. & Dix 310.

5 Evans v. Com., 44 Mass. (3 Met.) 453; Bennett v. State, 10 Tenn. (2 Yerg.) 472; State v. Wilkins, 17 Vt. 152.

See, infra, §§ 1347, 1413, 1414, 1706.

When there are several special pleas, two of which are demurred to, there can be no judgment of guilty based on a sustaining of the demurrer to these counts alone.—See Sipple v. People, 10 Ill. App. 144.

1 State v. Nelson, 7 Ala. 610; State v. Barrett, 54 Ind. 434; Barge v. Com., 2 Pen. & W. (Pa.) 262.

2 Rawls v. State, 16 Miss. (8 Smed. & M.) 590.

merely formal, but a new bill may be sent in, with the defect cured.[3] And the defendant, in cases of this class, will be held over to await a second indictment.[4] A writ of error lies to a judgment against the prosecution.[5]

But where the demurrer is general, going to the merits of the offense, then a judgment for the defendant relieves him from further prosecution.[6]

§ 1333. Demurrer to evidence brings up sufficiency of prosecution's whole case. By the practice of several states, the defendant may demur to the evidence, though it is optional for the prosecutor to join or not.[1] 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.[2] In such cases a judgment against the defendant is a final judgment for the prosecution.[3]

§ 1334. Joinder in demurrer formal. The omission of the record to show a joinder of issue can not be objected to after the determination of the issue of law.[1]

§ 1335. Must be prompt. A demurrer should be promptly made, and it is too late after plea is entered; though there may be cases of substantial error in which, when a plea has been entered inadvertently, it may in the discretion of the court be withdrawn, in order to enable

3 State v. Barrett, 54 Ind. 434; State v. Dresser, 54 Me. 569; United States v. Watkyns, 3 Cr. 441, Fed. Cas. No. 16649.

Infra, §§ 1353, 1423; though see, supra, § 1330.

4 Crumpton v. State, 43 Ala. 31.

5 Infra, § 1706.

6 Infra, § 1388.

1 Brister v. State, 26 Ala. 108; Com. v. Parr, 5 Watts & S. (Pa.) 345; Com. v. Wilson, 9 W. N. C. (Pa.) 291; Doss v. Com., 42 Va. (1 Gratt.) 557.

2 Bryan v. State, 26 Ala. 65.

See cautions in Martin v. State, 62 Ala. 240; confer State v. Marshall, 37 La. Ann. 26.

3 Hutchison v. Com., 82 Pa. St. 472.

1 1 Chitty Cr. L. 481, 482; Com. v. McKenna, 125 Mass. 397; United States v. Gibert, 2 Sumn. 19, 66, Fed. Cas. No. 15204.

the question of law to be determined in advance of the trial of the issue on the plea of not guilty.[1]

1 People v. Villarino, 66 Cal. 228, 5 Pac. 154; Com. v. Chapman, 65 Mass. (11 Cush.) 422; R. v. Purchase, 1 Car. & M. 617, 41 Eng. C. L. 335.

See, supra, § 1324.

For Pennsylvania statute, see, supra, § 1327.

CHAPTER LXXXVII.

PLEAS.

I. Guilty or Not Guilty.

§ 1336. Plea of not guilty is general issue.
§ 1337. Plea is essential to issue.
§ 1338. Omission of similiter not fatal.
§ 1339. In felonies pleas must be in person.
§ 1340. Pleas must be several.
§ 1341. Plea of guilty should be solemnly made, and reserves motion in arrest and error.
§ 1342. —— May at discretion be withdrawn.
§ 1343. Mistakes in can be corrected.
§ 1344. Plea of guilty, ascertaining degree.
§ 1345. Plea of not guilty may be entered by order of court.
§ 1346. Plea of nolo contendere equivalent to guilty.

II. Special Pleas.

§ 1347. Repugnant pleas can not be pleaded simultaneously.
§ 1348. In practice special plea is tried first.
§ 1349. Judgment against defendant on special plea is respondeat ouster.

III. Plea to the Jurisdiction.

§ 1350. Jurisdiction may be excepted to by plea.

IV. Plea in Abatement.

§ 1351. Error as to defendant's name may be met by plea in abatement.
§ 1352. —— And so of error in addition.
§ 1353. Judgment for defendant no bar to indictment in right name.
§ 1354. After not guilty plea in abatement is too late.
§ 1355. Plea to be construed strictly.
§ 1356. Defendant may plead over.

V. OTHER SPECIAL PLEAS.

§ 1357. Plea of non-identity only allowed in cases of escape.
§ 1358. Plea of insanity allowed under special statute.
§ 1359. Plea to constitution of grand jury must be sustained in fact.
§ 1360. Pendency of other indictment no bar.
§ 1361. Plea of law is for court.
§ 1362. Ruling for prosecution on special plea is equivalent to judgment on demurrer.

VI. AUTREFOIS ACQUIT OR CONVICT.

§ 1363. In general.

1. *As to Nature of Judgment.*

§ 1364. Acquittal without judgment a bar, but not always conviction.
§ 1365. Judgment arrested or new trial granted on defendant's application no bar.
§ 1366. Arbitrary discharge may operate as an acquittal.
§ 1367. Record of former judgment must have been produced.
§ 1368. Court must have had jurisdiction.
§ 1369. Judgment by court-martial no bar.
§ 1370. —— And so of police and municipal conviction or acquittal.
§ 1371. Of courts with concurrent jurisdiction, the court first acting has control.
§ 1372. Offense having distinct aspects separate governments may prosecute.
§ 1373. —— Absorptive character of federal statutes—Conspiracy.
§ 1374. Proceedings for contempt no bar.
§ 1375. —— Nor proceedings for habeas corpus.
§ 1376. Ignoramus and quashing no bar.
§ 1377. —— Nor is nolle prosequi or dismissal.
§ 1378. After verdict nolle prosequi a bar.
§ 1379. Discharge for want of prosecution not a bar.
§ 1380. Foreign statutes of limitation when a bar.
§ 1381. Fraudulent prior judgment no bar.

§ 1382. ——Nor is pendency of prior indictment.
§ 1383. ——Nor is pendency of civil proceedings.
§ 1384. Civil suit as ground for nolle prosequi.
§ 1385. After conviction of minor, indictment is barred as to major.
§ 1386. Specific penalty imposed by sovereign may be exclusive.

2. *As to Form of Indictment.*

§ 1387. If former indictment could have sustained a verdict, judgment is a bar.
§ 1388. Judgment on defective indictment is no bar.
§ 1389. —— Same test applies to acquittal of principal or accessary.
§ 1390. Acquittal on one count does not affect other counts; but otherwise as to conviction.
§ 1391. Acquittal from misnomer or misdescription no bar.
§ 1392. —— Nor is acquittal from variance as to intent.
§ 1393. —— Otherwise as to variance as to time.
§ 1394. Acquittal on joint indictment a bar if defendant could have been legally convicted.
§ 1395. Acquittal from merger at common law no bar.
§ 1396. Where an indictment contains a minor offense inclosed in a major, a conviction or acquittal of minor bars major.
§ 1397. Conviction or acquittal of major offense bars minor when on first trial defendant could have been convicted of minor.
§ 1398. Prosecutor may bar himself by selecting a special grade.

3. *As to Nature of Offense.*

§ 1399. When one unlawful act operates on separate objects, conviction as to one object does not extinguish prosecution as to other; *e. g.*, when two persons are simultaneously killed.
§ 1400. —— (1) Concurrent negligent injuries.
§ 1401. —— (2) Concurrent malice and negligence.
§ 1402. —— (3) Concurrent malicious acts.

§ 1403. —— Application of the rules.
§ 1404. —— Otherwise as to two batteries at one blow.
§ 1405. —— —— As to arson.
§ 1406. —— So where several articles are simultaneously stolen.
§ 1407. When one act has two or more indictable aspects, if the defendant could have been convicted of either under the first indictment he can not be convicted of the two successively.
§ 1408. —— So in liquor cases.
§ 1409. Severance of identity by place.
§ 1410. Severance of identity by time.
§ 1411. But continuous maintenances of nuisances can be successively indicted, aliter as to bigamy.
§ 1412. Conviction of assault no bar, after death of assaulted party, to indictment for murder.

4. *Practice under Plea.*

§ 1413. Plea must be special.
§ 1414. Autrefois acquit must be pleaded first.
§ 1415. Verdict must go to the plea.
§ 1416. Identity of offender and of offense to be established.
§ 1417. Identity may be proved by parol.
§ 1418. Plea, if not identical, may be demurred to.
§ 1419. Burden of proof is on defendant.
§ 1420. When replication is nul tiel record issue is for court.
§ 1421. A replication of fraud is good on demurrer.
§ 1422. On judgment against defendant he is usually allowed to plead over.
§ 1423. Prosecution may rejoin on its demurrer being overruled.
§ 1424. Issue of fact is for jury.
§ 1425. Novel assignment not admissible.

VII. ONCE IN JEOPARDY.

§ 1426. Constitutional limitation taken from common law.
§ 1427. —— But in some courts held more extensive.

§ 1428. Rule may extend to all infamous crimes.
§ 1429. —— In Pennsylvania, any separation in capital cases, except from actual necessity, bars further proceedings.
§ 1430. —— In Virginia.
§ 1431. —— In North Carolina.
§ 1432. —— In Tennessee.
§ 1433. —— In Alabama.
§ 1434. —— In California.
§ 1435. —— Rule elsewhere.
§ 1436. In the federal courts a discretionary discharge is no bar.
§ 1437. —— So in Massachusetts.
§ 1438. —— So in New York.
§ 1439. —— So in Maryland.
§ 1440. —— So in Mississippi and Louisiana.
§ 1441. —— So in Illinois, Ohio, Indiana, Michigan, Iowa, Nebraska, Nevada, Texas, and Arkansas.
§ 1442. —— So in Kentucky, Georgia, and Missouri.
§ 1443. —— So in South Carolina.
§ 1444. No jeopardy on defective indictment.
§ 1445. Generally, illness or death of juror forms sufficient ground for discharge.
§ 1446. Discharge of jury from intermediately discovered incapacity of juror no bar.
§ 1447. Conviction no bar when set aside on defendant's motion.
§ 1448. —— And so of discharge from sickness or escape of defendant.
§ 1449. Discharge from surprise a bar.
§ 1450. Discharge from statutory close of court no bar.
§ 1451. —— And so from sickness of judge.
§ 1452. —— And so from death of judge.
§ 1453. —— But not from sickness or incapacity of witness.
§ 1454. Until jury are "charged," jeopardy does not begin.
§ 1455. Waiver by motion for new trial, writ of error, and motion in arrest.

§ 1456. In misdemeanors, separation of jury permitted.
§ 1457. Plea must be special; record must specify facts.

VIII. PLEA OF PARDON.
§ 1458. Pardon is a relief from the legal consequences of crime.
§ 1459. Pardon before conviction to be rigidly construed.
§ 1460. Pardon after conviction more indulgently construed.
§ 1461. Rehabilitation is restoration to status.
§ 1462. Amnesty is addressed to a class of people, and is more in nature of compact.
§ 1463. Executive pardon must be specially pleaded; otherwise amnesty.
§ 1464. Pardons can not be prospective.
§ 1465. Pardon before sentence, remits costs and penalties.
§ 1466. —— Limited in impeachments.
§ 1467. —— —— And so as to contempts.
§ 1468. —— Must be delivered and accepted, but can not be revoked.
§ 1469. —— Void when fraudulent.
§ 1470. Conditional pardons are valid.
§ 1471. Pardon does not reach second conviction.
§ 1472. Pardon must recite conviction.
§ 1473. Calling a witness as state's evidence is not pardon.
§ 1474. Foreign pardons operative as to crimes within sovereign's jurisdiction.

I. GUILTY AND NOT GUILTY.

§ 1336. PLEA OF NOT GUILTY IS GENERAL ISSUE. When brought to the bar, in capital cases, and at strict practice in all offenses whatever, the defendant is formally arraigned, by the reading of the indictment, and the calling on him for a plea.[1] The clerk, immediately after the reading, asks, "How say you, A. B., are you guilty or not

[1] No ground for refusal to plead that the copy of the indictment required by statute to be delivered to the accused charged with a capital offense, or to his counsel, is certified by the clerk without

guilty?"[2] Upon this, if the defendant confess to the charge, the confession is recorded, and nothing is done until judgment.[3] But if he deny it, he answers, "Not guilty," upon which the clerk of assize, or clerk of the arraigns, replies, that the defendant is guilty, and that the State (or Commonwealth) is ready to prove the accusation.[4] After issue is thus joined, the clerk usually proceeds to ask the defendant, "How will you be tried?" to which the defendant replies, "By God and my country"; to which the clerk rejoins, "God send you a good deliverance."[5] The plea of not guilty contests all the material averments of the indictment.[6]

§ 1337. PLEA IS ESSENTIAL. The right of arraignment on a criminal trial may in some cases be waived, but a

attaching the seal of the court thereto.—State v. Carey, 56 Kan. 84, 42 Pac. 371.

The court, after quoting the statute, say: "There is no specific requirement of a certificate by the clerk under the seal of the court to the correctness of the copy, although it is the better practice to attach such certificate and seal. The certificate here was in good form, except that the seal was not affixed. . . . There is no claim that the copy delivered to the defendant was not full, true, and correct, as certified by the clerk; and, if it was irregular to omit the seal, the error was immaterial, and not prejudicial to the defendant."

2 2 Hale 119; R. v. Hensey, 1 Burr. 643, 97 Eng. Rep. 489; Cro. C. C. 7; infra, § 1481.

As to arrangement, see fully, infra, § 1633.

3 4 Harg. St. Trials 779; Dalt., c. 185; infra, §§ 1480, 1633.

4 4 Bla. Com. 339; 4 Harg. St. Trials 779; Whart. Prec. 1138.

5 2 Hale 219; 4 Bla. Com. 341; Cro. C. C. 7; infra, §§ 1480, 1633.

Though the defendant 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. (R. v. Davis, Gow's R. N. P. 219, and notes there given.) When, however, the clerk of the court, upon the arraignment of the defendants, 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 defendants upon the country, by a sufficient issue, without any further express words.—United States v. Gibert, 2 Sumn. 20, Fed. Cas. No. 15204.

6 Ibid.; People v. Aleck, 61 Cal. 137.

plea is always essential.[1] The court can not at common law[2] supply an issue after verdict where there has been no plea, notwithstanding the defendant consented to go to trial.[3] And a failure of the record to show a plea is a fatal defect.[4]

1 Ray v. People, 6 Colo. 231; Warren v. State, 13 Tex. App. 348.

In a criminal case there is no issue formed, and can be no valid trial until the respondent has pleaded. Where a conviction has been had, without a plea having been entered, the conviction must be set aside, and the cause remanded, with directions to arraign the prisoner and proceed to a new trial, although the record shows that prior to the former trial, the respondent waived arraignment.—Hoskins v. People, 84 Ill. 87, 25 Am. Rep. 433, 2 Am. Cr. Rep. 484.

Issue not formally made, objection must be made in the trial court, otherwise it is deemed to have been waived.—Reed v. State, 66 Neb. 184, 14 Am. Cr. Rep. 556, 92 N. W. 321.

Trial without plea, objection must be made in the trial court or it will be deemed to have been waived. — Billings v. State, 107 Ind. 54, 57 Am. Rep. 77, 7 Am. Cr. Rep. 188, 6 N. E. 914, 7 N. E. 763.

Defendant having gone to trial without a plea, can not avail himself of that fact after verdict.—State v. Cassady, 12 Kan. 550, 1 Am. Cr. Rep. 567. See, also, Eisenman v. State, 49 Ind. 520, 1 Am. Cr. Rep. 605; Grigg v. People, 31 Mich. 471, 1 Am. Cr. Rep. 602; Davis v. State, 38 Wis. 487, 1 Am. Cr. Rep. 606.

Where a defendant is put on trial without plea to the indictment having been entered, it is a mere technical error or irregularity which does not affect any of the substantial rights of the defendant, and affords no ground for reversal.—State v. Hayes, 67 Iowa 27, 6 Am. Cr. Rep. 335, 24 N. W. 575.

Entry nunc pro tunc: After verdict, the court has no power to have a plea entered nunc pro tunc for the defendant without his consent.—Davis v. State, 38 Wis. 487, 1 Am. Cr. Rep. 606.

Verification of plea: "The defendant makes oath that the statements in the above plea are true," is a good verification.—Armstrong v. State, 101 Tenn. 389, 11 Am. Cr. Rep. 1, 47 S. W. 492.

2 As to nunc pro tunc order, see Long v. People, 102 Ill. 331.

3 ARK.—Lacefield v. State, 34 Ark. 275, 36 Am. Rep. 8. CAL.—People v. Gaines, 52 Cal. 480. ILL.—Hoskins v. State, 84 Ill. 87, 25 Am. Rep. 433; Gould v. People, 89 Ill. 216. IND.—Bowen v. State, 108 Ind. 411, 9 N. E. 378. TEX.—Melton v. State, 8 Tex. App. 619; Bates v. State, 12 Tex. App. 139. WIS.—Douglass v. State, 3 Wis. 820.

Infra, § 1633.

As to effect of announcing readiness for trial.—See Spicer v. People, 11 Ill. App. 294.

4 Bates v. State, 12 Tex. App. 139; Huddleston v. State, 14 Tex. App. 73.

The practice in respect to arraignment will be hereafter more fully detailed.[5]

§ 1338. OMISSION OF SIMILITER NOT FATAL. An omission to insert the similiter, in joining issue in criminal cases, may be corrected, as it is usually only added when the record is made up.[1] In any view, going to trial without a joinder of issue by the prosecution to a plea in bar waives any objection to such non-joinder.[2]

§ 1339. IN FELONIES PLEAS MUST BE IN PERSON. A plea by an attorney of a party indicted for a felony is a nullity; the defendant must plead in person.[1] It is otherwise, however, in misdemeanors.[2]

§ 1340. PLEAS MUST BE SEVERAL. The pleas of joint defendants are to be regarded as several; and a general plea of not guilty by all the defendants is, in law, a several plea.[1]

§ 1341. PLEA OF GUILTY SHOULD BE SOLEMNLY MADE, AND RESERVES MOTION IN ARREST AND ERROR. 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 offense against the law, none is confessed.[1] Hence in such cases there may be motions for arrest of

5 Infra, § 1633.

1 Com. v. McCormack, 126 Mass. 258; Berrian v. State, 22 N. J. L. (2 Zab.) 9; State v. Swepson, 81 N. C. 571; infra, § 1633.

2 Com. v. McCauley, 105 Mass. 69.

1 McQuillan v. State, 16 Miss. (8 Smed. & M.) 587; State v. Conkle, 16 W. Va. 736.

See, infra, §§ 1477, 1633.

Under the statutes of Colorado (Gen. Stats., § 954) it is immaterial whether the prisoner's plea, upon arraignment, be made by the prisoner himself or his counsel.—Minich v. People, 8 Colo. 440, 5 Am. Cr. Rep. 20, 9 Pac. 4.

2 United States v. Mayo, 1 Curt. 433, Fed. Cas. No. 15754. See fully, infra, §§ 1477, 1486, 1633, 1852.

1 State v. Smith, 25 N. C. (3 Ired. L.) 402; supra, § 360.

1 Fletcher v. State, 12 Ark. (7 Eng.) 169; Arbintrode v. State, 67 Ind. 267, 33 Am. Rep. 86; Com. v. Kennedy, 13 Mass. 584; State v. King, 71 Mo. 551.

Plea of guilty to homicide goes to the lowest grade in homicide.—See Garvey v. People, 6 Colo. 559,

judgment or writ of error.[2] But formal defects may be cured by this plea.[3]

§ 1342. —— MAY AT DISCRETION BE WITHDRAWN. The court may, at its discretion, allow a plea of guilty to be withdrawn,[1] even after the overruling of a motion in arrest of judgment.[2] This is not subject for error,[3] unless by refusal of the application great injustice has been

45 Am. Rep. 531. But see, infra, § 1675.

2 Infra, § 1715.

3 Carper v. State, 27 Ohio St. 572; supra, § 131. See, infra, § 1692.

As to Massachusetts practice, see Com. v. Chiavaro, 129 Mass. 489.

1 ALA. — State v. Hubbard, 72 Ala. 176. ILL.—Gardner v. People, 106 Ill. 76. IOWA—State v. Buck, 59 Iowa 382, 13 N. W. 342. MISS.—Mastronada v. State, 60 Miss. 86. MO.—State v. Stephens, 71 Mo. 535. NEV.—State v. Salge, 2 Nev. 321. N. H.—State v. Cotton, 24 N. H. (4 Foster) 143. FED.—United States v. Bayaud, 21 Blatchf. 217, 15 Rep. 200. ENG.—R. v. Brown, 17 L. J. M. C. 145.

Absence of a showing of cause, the granting or withholding leave to withdraw a plea of not guilty rests in the discretion of the trial court.—Epps v. State, 102 Ind. 539, 5 Am. Cr. Rep. 517, 1 N. E. 491.

Motion to withdraw plea of guilty, and to substitute therefor one of not guilty, is addressed to the discretion of the court, and, consequently, the court's action is not the subject of error.—Clark v. State, 57 N. J. L. 489, 31 Atl. 979.

On appeal to circuit court from criminal conviction before a justice of the peace on a plea of guilty, it is the right of the accused to withdraw his plea of guilty and have the case retried upon the merits.—People v. Richmond, 57 Mich. 399, 7 Am. Cr. Rep. 541, 24 N. W. 124.

2 R. v. Brown, 17 L. J. M. C. 145.

3 Ibid.

Defendant accused of murder withdrew his plea of not guilty voluntarily, and pleaded guilty, and thereupon the degree of the crime was fixed by the court as murder in the first degree, and he was sentenced to be hung. Held, too late for him then, though before the judgment is entered by the clerk in the record, to withdraw his plea of guilty, and to plead not guilty, on the ground that he was misled in withdrawing his plea of not guilty and pleading guilty, in that he had done so on the belief expressed by his attorney and others, that if he pleaded not guilty, and was tried by a jury, the jury would find him guilty, and affix the death penalty, while, if he pleaded guilty, the court might, in the exercise of its judgment, fix the punishment at imprisonment for life. The refusal of the court to allow such course is not error.—People v. Lennox, 67 Cal. 113, 6 Am. Cr. Rep. 542, 7 Pac. 260.

done.[4] Hence a plea of guilty drawn out by the court by telling the defendant that if he do not plead guilty he will be heavily punished, will be treated as a nullity by the court in error.[5] Whether the defendant is to be warned of the consequences of a plea of guilty, is a matter usually of judicial discretion.[6]

4 People v. Scott, 59 Cal. 341.

5 O'Hara v. People, 41 Mich. 623, 3 N. W. 161.

Compare article in London Law Times, Dec. 14, 1879.

In pleading guilty to an indictment, the defendant confesses himself guilty in manner and form as charged in the indictment, and, if the indictment charges no offense against the law, none is confessed.—State v. Watson, 41 La. Ann. 588, 8 **Am. Cr. Rep.** 543, 7 So. 125.

Forced plea of guilty: When a court gives a prisoner the alternative of either submitting to a severe sentence or withdrawing a plea of not guilty, pleading guilty, paying a heavy fine and estopping himself from bringing error, a plea of guilty so extorted will not sustain a conviction.—O'Hara v. People, 41 Mich. 623, 3 **Am. Cr. Rep.** 308.

Plea made in consequence of any intimation from the judge that the sentence would be more severe in case of conviction upon a trial, the rule applies. It is otherwise, however, if the judge, in answer to importunities, has only shown a disposition to inflict a milder punishment on confession of guilt, and has done so.—People v. Brown, 54 Mich. 15, 19 N. W. 571.

In People v. Lennox, 67 Cal. 113, 7 Pac. 260, it was held that where a defendant in a murder trial advisedly pleaded guilty, and was sentenced to be hung, he could not afterwards withdraw the plea.

As discussing point in text, see 4 Crim. Law Mag. 881, 23 Central Law J. 76.

Refusal to allow withdrawal of plea of guilty. An appellate court will not review the action of the trial court in refusing to allow the withdrawal of a plea of guilty, unless there was an abuse of discretion.—People v. Lewis, 64 Cal. 401, 1 Pac. 490; Conover v. State, 86 Ind. 99; Mostranda v. State, 60 Miss. 87.

Writ of coram nobis will lie to vacate a plea of guilty entered into through fear of a mob.—See Saunders v. State, 85 Ind. 318, 44 **Am. Rep.** 29; infra, § 1715.

6 **In Michigan** the statute requiring such warning applies to all cases.—Edwards v. People, 39 Mich. 393; Hunning v. People, 40 Mich. 733; Bayliss v. People, 46 Mich. 221, 9 N. W. 257.

—**The court must be satisfied** that the plea was voluntary.—People v. Lewis, 51 Mich. 172, 16 N. W. 326; People v. Lepper, 51 Mich. 196, 16 N. W. 377.

—**The warning in such cases** should be private.—People v. Stickney, 50 Mich. 99, 14 N. W. 880.

In Texas this is obligatory in cases of felonies.—Berliner v. State, 6 Tex. App. 181; Saunders v. State, 10 Tex. App. 336.

§ 1343. MISTAKES IN CAN BE CORRECTED. Pleas entered by mistake, in plain cases, can be amended by court. Thus, where a defendant, against whom several indictments have 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.[1] But it is otherwise as to a mistake made as to the nature of the punishment.[2]

§ 1344. PLEA OF GUILTY, ASCERTAINING DEGREE. When there is a plea of guilty the court may ascertain by witnesses the degree of the offense.[1]

§ 1345. PLEA OF NOT GUILTY CAN BE ENTERED BY ORDER OF COURT. At common law, when a prisoner stood mute, 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.[1] In England, and in all jurisdictions in this country, 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.[2] Such a refusal to

As to federal practice, see United States v. Hare, 1 Brun. Col. Cas. 449, 2 Wheel. Cr. Cas. 299, Fed. Cas. No. 15304.

1 Davis v. State, 20 Ga. 674.

2 State v. Buck, 59 Iowa 382, 13 N. W. 342. See People v. Brown, 54 Mich. 15, 19 N. W. 571.

1 Infra, §§ 1858, 1890.

Plea of guilty of the acts alleged in an information charging no offense is not a plea of guilt of the crime attempted to be charged, and the sufficiency of the information and the authority and jurisdiction of the court to pronounce sentence of imprisonment may properly be challenged by a motion in arrest of judgment. — Smith v. State, 68 Neb. 204, 14 Am. Cr. Rep. 146, 94 N. W. 106.

1 1 Chitty Cr. L. 425; Com. v. Moore, 9 Mass. 402; Turner's Case, 5 Ohio St. 542, 67 Am. Dec. 312.

2 Weaver v. State, 83 Ind. 289; People v. Bringard, 39 Mich. 22, 33 Am. Rep. 344; Brown v. Com., 76 Pa. St. 319; Dyott v. Com., 5 Whart. (Pa.) 67; R. v. Schleter, 10 Cox C. C. 409.

Such course cures other defects. —See Com. v. McKenna, 125 Mass. 397.

Waives jury defects.—Brown v. Com., 76 Pa. St. 319.

Order may be made when the

plead, however, does not admit in any way the jurisdiction of the court.[3]

A plea may in this way be entered on informations, though the statute is silent as to informations.[4]

The entry must be made before the trial opens,[5] though not necessarily before empaneling of jury.[6]

§ 1346. Plea of nolo contendere equivalent to guilty. 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 offense for which he is indicted.[1]

defendant refuses to plead either guilty or not guilty unconditionally.—See State v. Kring, 74 Mo. 612.

In R. v. Bernard, 1 F. & F. 240, the finding of the jury that the defendant was mute from nature, was dispensed with.—See R. v. Whitfield, 3 Car. & K. 121.

For pleas of lunatics, see 1 Kerr's Whart. Cr. Law, § 86; United States v. Hare, Brun. Col. Cas. 449, 2 Wheel. Cr. Cas. 283, 299, Fed. Cas. No. 15304.

In Massachusetts a deaf and dumb prisoner was arraigned through a sworn interpreter, his incapacity having been first suggested to the court by the solicitor-general, and the trial then proceeded as on a plea of not guilty.—Com. v. Hill, 14 Mass. 207.

In an English case, where a dumb person was to be tried for a felony, the judge ordered a jury to be empaneled, 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 empaneled 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 defense, to challenge the jurors, and to comprehend the details of the evidence, and that if they thought he had not, they should find him of non-sane mind.—R. v. Pritchard, 7 Car. & P. 303, 32 Eng. C. L. 626, 1 W. & S. Med. J., § 95. See further for English practice, R. v. Berry, 13 Cox C. C. 189.

[3] People v. Gregory, 30 Mich. 371.

[4] United States v. Borger, 19 Blatchf. 249, 7 Fed. 193; Smith, In re (Lowell, J.), 3 Crim. Law Mag. 835.

[5] Davis v. State, 38 Wis. 387.

[6] Dillard v. State, 58 Miss. 368. **Compare:** State v. Chenier, 32 La. Ann. 103.

[1] See Buck v. Com., 107 Pa. St. 486.

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.[2]

It is held within the discretion of the court to accept such a plea, or to require a plea of guilty or not guilty.[3]

II. SPECIAL PLEAS.

§ 1347. REPUGNANT PLEAS CAN NOT BE PLEADED SIMULTANEOUSLY. Can a defendant plead simultaneously the general issue, and one or more special pleas? At common law this must be answered in the negative, whenever such pleas are repugnant; as at common law all the pleas filed in a case are regarded as one. This is the strict practice in England, where the judges in review have solemnly ruled that special pleas can not be pleaded in addition to the plea of not guilty.[1] And in this country, in cases where not guilty has been pleaded simultaneously with autrefois acquit, the same course has been followed, and the plea of not guilty stricken off until the special plea is disposed of.[2] And so has it been ruled when not

2 Com. v. Horton, 26 Mass. (9 Pick.) 206; Com. v. Tilton, 49 Mass. (8 Metc.) 232; United States v. Hartwell, 3 Cliff. 221, Fed. Cas. No. 15318.

See Whart. Ev., § 783.

3 Com. v. Tower, 49 Mass. (8 Metc.) 527.

In Massachusetts, under statute, 1855, ch. 215, § 35, a defendant in a prosecution on that statute can not 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.—Com. v. Adams, 72 Mass. (6 Gray) 359.

1 R. v. Strahan, 7 Cox C. C. 85; R. v. Skeen, 8 Cox C. C. 143, Bell C. C. 97; R. v. Charlesworth, 9 Cox C. C. 40.

Contra: 1 Stark. C. P. 339.

As to issue of insanity, see article by Prof. Ordronaux, 1 Cr. Law Mag. 438.

Defendant entitled to enter as many pleas as he has matter of defense. The difference noticed in the text relates to the order of their presentation and disposition.

2 Infra, § 1415; Hill v. State, 10 Tenn. (2 Yerg.) 248; State v. Copeland, 32 Tenn. (2 Swan) 626.

As to pleas in abatement, see, infra, § 1351.

guilty and the statute of limitations have been pleaded together.[3]

§ 1348. IN PRACTICE SPECIAL PLEA IS TRIED FIRST. In such case after determining the special plea against the defendant, the present practice in the United States is to enter simply a judgment of respondeat ouster, in all cases in which the special plea is not equivalent to the general issue. This, which is technically the correct practice, is not, however, always pursued. A short cut is often taken to the same result, by directing when special pleas and the general issue are filed simultaneously, or are found together on the record before trial, that the special pleas should be tried first, and if they are found against the defendant, then the general issue.[1] But, under any circumstances, it is error to try the special pleas and the general issue simultaneously. The special pleas must be always disposed of before the general issue is tried.[2]

§ 1349. JUDGMENT AGAINST DEFENDANT ON SPECIAL PLEA IS RESPONDEAT OUSTER. If a special plea is determined against the defendant, is the judgment always respondeat

[3] State v. Ward, 49 Conn. 429.

Both pleas must be disposed of before there can be a conviction.—People v. Helding, 59 Cal. 567.

Defects and irregularities not apparent on the indictment must be pleaded in abatement.—See, supra, § 1326; Pointer v. State, 89 Ind. 255.

[1] ALA.—State v. Greenwood, 5 Port. 474. ARK.—Buzzard v. State, 20 Ark. 106. ME.—State v. Inneas, 53 Me. 536. MICH.—People v. Gregory, 30 Mich. 371. N. Y.—Hartung v. People, 26 N. Y. 154; People v. Roe, 5 Park. Cr. Rep. 231.

As sanctioning this view, see 2 Hawk. P. C., ch. 23, §§ 128, 129.

Contra: 1 Chitty Cr. L. 463.

[2] ALA.—Henry v. State, 33 Ala. 389; Nonemaker v. State, 34 Ala. 211; Foster v. State, 39 Ala. 229; Mountain v. State, 40 Ala. 344. FLA.—Savage v. State, 18 Fla. 909. IND.—Clem v. State, 42 Ind. 420, 13 Am. Rep. 369; Pointer v. State, 89 Ind. 255. MASS.—Com. v. Merrill, 90 Mass. (8 Allen) 545. PA.—Solliday v. Com., 28 Pa. St. 13. TENN.—Fulkner v. State, 50 Tenn. (3 Heisk.) 33; Dyer v. State, 79 Tenn. (11 Lea) 509. ENG.—R. v. Roche, 1 Leach 160; R. v. Charlesworth, 9 Cox C. C. 40.

See, infra, §§ 1410, 1414.

ouster? Unless upon a trial by jury on a special plea which embraces the general issue, this question ought now to be answered in the affirmative. The old distinction taken in this respect between felonies and misdemeanors, being no longer founded in reason, should be rejected in practice. And the only consistent as well as just course is to harmonize the present fragmentary rulings in this relation, by adopting the principle that in all cases the question of guilty or not guilty is one which the defendant is entitled of right, no matter how many technical antecedent points may have been determined against him, to have squarely decided by a jury.[1]

III. PLEA TO THE JURISDICTION.

§ 1350. JURISDICTION MAY BE EXCEPTED TO BY PLEA. Where an indictment is taken before a court that has no cognizance of the offense, the defendant may plead to the jurisdiction, without answering at all to the crime alleged;[1] as, if a man be indicted for treason at the quarter sessions, or for rape at the sheriff's tourn, or the

1 Infra, § 1422; 2 Hale P. C. 255. ARK.—Buzzard v. State, 20 Ark. 106; Harding v. State, 22 Ark. 210. MO.—Ross v. State, 9 Mo. 687. PA.—Barge v. Com., 3 Pen. & Watts 262, 23 Am. Dec. 81; Foster v. State, 8 Watts & S. 77. FED.—United States v. Williams, 1 Dill. 485, Fed. Cas. No. 16716.

As to demurrer, see conflicting decisions, supra, § 1332.

As to misdemeanors, when the special plea involves facts of general issue, see, contra, State v. Allen, 1 Ala. 442; Guess v. State, 6 Ark. (1 Eng.) 147; and see dicta of Gibson, C. J., in Barge v. Com., 3 Pen. & W. (Pa.) 262, 23 Am. Dec. 81.

1 2 Hale 286. See Blandford v. State, 10 Tex. App. 627; Kelly v. State, 13 Tex. App. 158.

Defendant should plead to the jurisdiction before he pleads not guilty.—State v. Watson, 20 R. I. 354, 78 Am. St. Rep. 871, 11 Am. Cr. Rep. 24, 39 Atl. 193.

A prisoner, under indictment for murder, can not, by a special plea to the jurisdiction of the court, impeach the constitutionality of an act of assembly which designated the county in which said court was held as a separate judicial district, upon the allegation that said county contained less than the number of inhabitants required under article V, section 5, of the Constitution, to entitle it to be constituted a separate judicial dis-

like;[2] or, if another court have exclusive jurisdiction of the offense.[3] Such pleas are not common, the easier and simpler course being writ of error or arrest of judgment. The want of jurisdiction may also be taken advantage of under the general issue.[4]

IV. PLEA IN ABATEMENT.[1]

§ 1351. ERROR IN DEFENDANT'S NAME MAY BE MET BY PLEA IN ABATEMENT. When the indictment assigns to the defendant a wrong Christian name or surname, he can only take advantage of the error by a plea in abatement, the

trict.—Coyle v. Com., 104 Pa. St. 117, 4 **Am. Cr. Rep.** 379.

2 2 Hale 286.

3 4 Bla. Com. 383. See Whart. Prec. 1145, for forms.

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 offense 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.—Adams v. People, 1 Comst. (N. Y.) 173, 1 Den. 190. See Com. v. Gillespie, 7 Serg. & R. (Pa.) 469, 10 **Am. Dec.** 475; supra, § 161.

4 State v. Mitchell, 83 N. C. 674. **Compare:** State v. Day, 58 Iowa 678, 12 N. W. 733.

1 **Duplicity in a plea in abatement** is reached by general demurrer.—State v. Emery, 59 Vt. 84, 7 **Am. Cr. Rep.** 202, 7 Atl. 129.

Found by the grand jury without any legal evidence, being the objection to the validity of an indictment, must be taken by a motion to quash, and not by a plea in abatement.—Sparrenberger v. State, 53 Ala. 481, 25 **Am. Rep.** 643, 2 **Am. Cr. Rep.** 470.

Indictment charging murder, a preliminary examination was held, and an information filed, based upon such preliminary examination, and charging the same offense as in the indictment. On the first day of the ensuing term of the district court the indictment was, with leave of the court, nolled. Thereafter the defendant was arraigned upon the information, and pleaded in abatement the pendency of the indictment at the time of the preliminary examination and the filing of the information

burden of proving which is on the defendant.[2] Such a plea should be verified by affidavit,[3] and should expose the defendant's proper name as well as deny that he was known by the name stated in the indictment.[4] What particularity is necessary in setting forth the name and addi-

tion. Held, that the plea was properly overruled.—State v. McKinney, 31 Kan. 570, 5 Am. Cr. Rep. 538, 3 Pac. 356.

Non-citizenship of one of the grand jurors as ground of a plea in abatement, and also his consanguinity to respondent, is bad for duplicity.—State v. Emery, 59 Vt. 84, 7 Am. Cr. Rep. 202, 7 Atl. 129.

Not error to sustain demurrer to a plea in abatement which is uncertain and defective because of an incomplete sentence.—Billings v. State, 107 Ind. 54, 57 Am. Rep. 77, 7 Am. Cr. Rep. 188, 6 N. E. 914, 7 N. E. 763.

One of the grand jurors was not "qualified to vote upon any proposition to impose a tax, or for the expenditure of money" (the words of Pub. St. R. I., ch. 200, § 1), is a bad plea, as too general.—State v. Duggan, 15 R. I. 412, 7 Am. Cr. Rep. 220, 6 Atl. 787.

Plea in abatement to information filed by a prosecuting attorney, based upon the return made to the circuit court by a committing magistrate, which alleges that a part of the examination was had on a legal holiday, is bad.—Hamilton v. People, 29 Mich. 173, 1 Am. Cr. Rep. 618.

Plea that the witnesses on whose evidence it was found were not properly sworn, which does not name the witnesses or specify the oath they took, is bad.—Reich v. State, 53 Ga. 73, 21 Am. Rep. 265, 1 Am. Cr. Rep. 543.

Pleas in abatement for mere defects in constitution of the grand jury are generally interposed for delay, and are not favored, and application to amend should be refused.—State v. Duggan, 15 R. I. 412, 7 Am. Cr. Rep. 220, 6 Atl. 787.

Setting up the pendency of another indictment against defendant for the same offense, a plea in abatement to an indictment can not be maintained.—White v. State, 86 Ala. 69, 8 Am. Cr. Rep. 225, 5 So. 674.

Under Criminal Code of Kansas, § 79, no plea in abatement taken to any grand jury duly charged and sworn, for any irregularity in their selection, will be sustained, unless it be one that implies corruption.—State v. Skinner, 34 Kan. 256, 6 Am. Cr. Rep. 307, 8 Pac. 420.

[2] Lynes v. State, 5 Port. (Ala.) 236, 30 Am. Dec. 557; Com. v. Dedham, 16 Mass. 146; Turns v. Com., 47 Mass. (6 Metc.) 225; Com. v. Fredericks, 119 Mass. 199; State v. Drury, 13 R. I. 540; Scott v. Soans, 3 East 111.

See, supra, §§ 138, 147, 161, 1261, and 22 Cent. L. J. 220, 244.

[3] Bohannon v. State, 15 Neb. 209, 18 N. W. 129.

May be signed by the attorney if verified by affidavit.—Ibid.

[4] ALA.—Wren v. State, 70 Ala. 1; Bright v. State, 76 Ala. 96.

tion of the defendant has been considered in another place.[5] Any misnomer, in general, is matter for abatement;[6] thus, where the indictment charged the defendant as George Lyons, it was held he could abate it by showing his true name was George Lynes.[7] But it has been held that a foreigner may be indicted under a name which is the English equivalent of his name in his native tongue, to which he had assented.[8] A blank instead of a name may be taken advantage of by a motion to quash.[9]

§ 1352. —— AND SO OF ERROR IN ADDITION. Want of addition is at common law ground for abatement,[1] though the proper course is motion to quash.[2] But a wrong addition is only to be met by plea in abatement.[3] And 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 abatement.[4]

§ 1353. JUDGMENT FOR DEFENDANT NO BAR TO NEW INDICTMENT IN RIGHT NAME. If a plea of misnomer be put in, the usual course is to re-indict the defendant by the new name, without pushing the old bill further.[1] The prose-

GA.—Cf. Wilson v. State, 69 Ga. 225. S. C.—State v. Farr, 12 Rich. L. 24. VA.—Com. v. Sayres, 35 Va. (8 Leigh) 722. ENG.—R. v. Grainger, 3 Burr. 1617, 97 Eng. Rep. 1010; O'Connell v. R., 11 Cl. & Fin. 155, 8 Eng. Rep. 1061.

See Whart. Prec. 1141, 1142.

For forms, see, supra, §§ 140 et seq.

5 See, supra, §§ 138 et seq.

6 State v. Lorey, 2 Brev. L. (S. C.) 395.

7 Lynes v. State, 5 Port. (Ala.) 236, 30 Am. Dec. 557.

8 Alexander v. Com., 105 Pa. St. 1.

9 Supra, § 1312.

1 State v. Hughes, 2 Har. & McH. (Md.) 479; State v. Newman, 4 N. C. (2 Car. L. Repos.) 74.

See 1 Chitty Cr. L. 204.

2 Supra, § 161.

3 Supra, §§ 148, 161; State v. Daly, 14 R. I. 510.

4 State v. Bishop, 15 Me. (3 Shepley) 122. See Com. v. Clark, 4 Va. (2 Va. Cas.) 401.

The plea must supply the true addition.—R. v. Checkets, 6 M. & S. 88.

1 2 Hale 176, 238; Burn, Indictment 9; Williams, J., Misnomer and Addition, 2; Dick. Quart. Sess. 167.

cutor 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 prosecution,[2] or the prosecutor may demur to the plea, and in cases of felony, the demurrer and joinder may be ore tenus.[3] When the issue is joined upon a plea in abatement or replication thereto,[4] the venire may be returned, and the trial of the point by a jury of the same county proceed instanter.[5] If judgment be found for the defendant on the question of misnomer, this is no bar to an indictment for the same offense in his true name.[6]

It is not a good replication that the defendant is the same person mentioned in the indictment.[7]

Two pleas in abatement, when not repugnant, may be pleaded at the same time.[8]

§ 1354. AFTER NOT GUILTY, PLEA IN ABATEMENT IS TOO LATE. Without leave of court, which is granted only in very strong cases, the plea of not guilty can not be withdrawn to let in a plea in abatement,[1] for on principle a plea of not guilty admits all that a plea in abatement

[2] 2 Leach 476; 2 Hale 237, 238; Cro. C. C. 21. See form, 2 Hale 237; State v. Dresser, 54 Me. 569; Lewis v. State, 38 Tenn. (1 Head) 329.

As to practice and evidence, see Com. v. Gale, 77 Mass. (11 Gray) 320; supra, §§ 161, 1312.

[3] Foster 105; 1 Leach 476; and see, supra, § 1332.

[4] State v. Lashus, 79 Me. 541, 11 Atl. 604.

[5] 2 Leach 478; 2 Hale 238; 22 Hen. 8, ch. 14; 28 Hen. 8, ch. 1; 32 Hen. 8, ch. 3; 3 Inst. 27; Starkie 296.

[6] Com. v. Farrell, 105 Mass. 189; State v. Robinson, 70 Tenn. (2 Lea) 114.

[7] Com. v. Dockham, Thach. C. C. (Mass.) 238.

[8] Com. v. Long, 4 Va. (2 Va. Cas.) 318; United States v. Richardson, 28 Fed. 61.

See, supra, § 1347.

[1] Supra, § 140. MD.—Cooper v. State, 64 Md. 40, 20 Atl. 986. MASS.—Com. v. Butler, 83 Mass. (1 Allen) 4. R. I.—State v. Drury, 13 R. I. 540. S. C.—State v. Farr, 12 Rich. L. 24. TENN.—Dyer v. State, 79 Tenn. (11 Lea) 509. ENG.—R. v. Purchase, 1 Car. & M. 617, 41 Eng. C. L. 335.

Plea in abatement must be prompt.—See State v. Myers, 78 Tenn. (10 Lea) 717.

contests, and after a plea of not guilty, a plea in abatement is too late. A plea in abatement, also, can not, it has been held, be filed after a general continuance.[2]

§ 1355. PLEA TO BE CONSTRUED STRICTLY. A plea in abatement is a dilatory plea, and must be pleaded with strict exactness.[1] It is consequently essential that it should precisely set forth the facts out of which the defense arises, or that there should be a negation of the facts which are presumed from the existence of a record.[2] It may be demurred to for duplicity.[3]

§ 1356. DEFENDANT MAY PLEAD OVER. In England, the rule is that on a plea in abatement on ground of misnomer, the judgment, if for the crown, is final, and that the defendant can not plead over.[1] It seems otherwise, however, where the plea is to matter of law.[2] In this country the practice is to require the defendant to plead over.[3]

2 State v. Swafford, 69 Tenn. (1 Lea) 274. See Dyer v. State, 79 Tenn. (11 Lea) 509.

1 State v. Skinner, 34 Kan. 256, 6 Am. Cr. Rep. 307, 8 Pac. 420; Dolan v. People, 64 N. Y. 485, 2 Cow. Cr. Rep. 287; O'Connell v. R., 11 Cl. & Fin. 155, 8 Eng. Rep. 1061, 9 Jurist 25.

A plea in abatement is a dilatory plea, and must be pleaded with strict exactness; it must be certain to every intent.—State v. Skinner, 34 Kan. 256, 6 Am. Cr. Rep. 307, 8 Pac. 420.

A plea in abatement must be certain to every intent, and stand on its own allegations, unless express reference is made to the indictment.—State v. Emery, 59 Vt. 84, 7 Am. Cr. Rep. 202, 7 Atl. 129.

On trial of fact in plea in abatement of misnomer, the fact, that to an indictment by the same name the defendant had pleaded not guilty, is proper for the consideration of the jury.—State v. Homer, 40 Me. 438.

2 State v. Brooks, 9 Ala. 10.

3 State v. Emery, 59 Vt. 84, 7 Am. Cr. Rep. 202, 7 Atl. 129.

1 R. v. Gibson, 8 East 107.

2 R. v. Johnson, 6 East 583, 8 Rev. Rep. 505, 2 Smith 591; R. v. Duffy, 4 Cox C. C. 190, 1 Bennett & H. Lead. Cas. 340.

See, supra, § 1330; Whart. Prec. 1147, for forms.

3 State v. Robinson, 70 Tenn. (2 Lea) 114; United States v. Williams, 1 Dill. 485, Fed. Cas. No. 16716.

Supra, §§ 1331, 1332; infra, § 1413.

How far errors in the grand jury can be thus noticed has already been considered.[4]

V. OTHER SPECIAL PLEAS.

§ 1357. PLEA OF NON-IDENTITY ONLY ALLOWED IN CASES OF ESCAPE. Special pleas, with the exception of pleas to the jurisdiction, pleas of abatement, and pleas of autrefois acquit, 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, 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.[1]

§ 1358. PLEA OF INSANITY ALLOWED BY STATUTE. By statutes in several jurisdictions the defendant, by whom insanity at the time of the offense is set up as a defense, is required to plead such insanity separately and as a special plea, to be tried and determined before the plea of not guilty.[1] It is further provided in Wisconsin, that if the jury on such issue find the defendant not insane at the time of the commission of the offense, the trial on the plea of not guilty shall at once proceed before the same jury, and the finding on the first trial shall be conclusive on the second on the question of insanity. This statute has been pronounced constitutional by the Su-

[4] Supra, §§ 1271, 1277, 1284; infra, § 1359.

[1] Thomas v. State, 6 Miss. (5 How.) 20.

[1] See 1 Kerr's Whart. Crim. Law, §§ 73-76; Sage v. State, 89 Ind. 141.

The defense of insanity at the time of the perpetration of the alleged crime is included in, and made by the plea of the general issue; and while, in the absence of a special plea setting up insanity at the time of the trial, it may not have been necessary for the court to explain to the jury the nature and purpose of such a plea, that this was done is not cause for a new trial.—Carr v. State, 96 Ga. 284, 10 Am. Cr. Rep. 329, 22 S. E. 570.

preme Court of Wisconsin.[2] Whether the verdict of sanity on the first issue precludes the defendant on the second trial from offering to prove such predisposition to insanity as lowers the grade of the offense was not decided; but it is hard to see how such evidence could be excluded, or how the issue of intent as thus modified could be kept from the jury.[3] Unless by statute, the defense is made under plea of not guilty.[4]

§ 1359. PLEAS TO CONSTITUTION OF GRAND JURY MUST BE SUSTAINED IN FACT. Special pleas as to constitution of grand jury must be good on their face.[1] Thus, where, on 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.[2] How far error in the constitution of the grand jury may be pleaded specially to an indictment has been already considered.[3]

§ 1360. PENDENCY OF OTHER INDICTMENT NO BAR. The pendency of an indictment is no ground for a plea in abatement to another indictment in the same court for the same cause.[1]

§ 1361. PLEA OF LAW IS FOR COURT. A plea in abatement, or a special plea, not involving a statement of fact, is exclusively for court.[1]

2 Bennett v. State, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912.

3 See 1 Kerr's Whart. Crim. Law, § 64.

4 Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480. See Taylor v. Com., 109 Pa. St. 262.

As to practice under plea of insanity, see Darnell v. State, 24 Tex. App. 6, 5 S. W. 522; Messengale v. State, 24 Tex. App. 181, 6 S. W. 35.

1 Supra, §§ 1271, 1277, 1279, 1284.

As to plea of want of prior examination, see State v. Bailey, 32 Kan. 83, 3 Pac. 769.

2 Hord v. Com., 4 Leigh (Va.) 674, 26 Am. Dec. 340.

3 See, supra, §§ 1271, 1277, 1279 et seq.

1 Com. v. Drew, 57 Mass. (3 Cush.) 279; State v. Tisdale, 19 N. C. (2 Dev. & B. L.) 159; Smith v. Com., 104 Pa. St. 339.

See, infra, § 1279.

1 Chase v. State, 46 Miss. 683; Infra, § 1413.

§ 1362. RULING FOR PROSECUTION ON SPECIAL PLEA EQUIVALENT TO JUDGMENT ON DEMURRER. When the prosecution is sustained in an objection to a special plea, on the ground that it is defective, this is equivalent to a judgment for the prosecution on demurrer to the plea.[1]

VI. AUTREFOIS ACQUIT OR CONVICT.[1]

§ 1363. IN GENERAL. It remains to examine what, in this country, form the most important of special pleas, those of autrefois convict, autrefois acquit, and once in jeop-

1 Com. v. Lannan, 95 Mass. (13 Allen) 563. See 1 Kerr's Whart. Crim. Law, §§ 74-76.

1 **As to sufficiency of plea of former jeopardy**, 6 Am. Cr. Rep. 339.

As to the necessity for specially pleading the defense of former jeopardy, 7 Am. Cr. Rep. 199.

Plea of former acquittal to an indictment containing several counts, if it fails to answer any one count, is bad on demurrer.—Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621, 4 Am. Cr. Rep. 338.

A plea of an acquittal of the same offense in a different county is defective, in substance, if it fails to show that the court of such other county had in some legal way acquired jurisdiction of the subject-matter, and how such jurisdiction was acquired, as, by a change of venue, or, in case of larceny, by the defendant having taken the stolen property into such county.—Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621, 4 Am. Cr. Rep. 338.

To make a plea of a former acquittal or conviction a bar to a second indictment, proof of the facts alleged in the second must be sufficient in law to have warranted a conviction upon the first indictment of the same offense charged in the second one, and not of a different offense; and the plea must show that the offense charged in both cases is the same in law and in fact, and the question must be determined by the facts appearing from the record, without the aid of extrinsic circumstances.—Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621, 4 Am. Cr. Rep. 338.

Where a plea of former acquittal is defective in form, the plea may be aided by the record, and should be sustained if the record of the court in the same case contains everything necessary to sustain it. —Johnson v. State, 29 Ark. 31, 21 Am. Rep. 154, 2 Am. Cr. Rep. 430.

Plea of autrefois convict before a court which had no jurisdiction over the offense is bad.—Reich v. State, 53 Ga. 73, 21 Am. Rep. 265, 1 Am. Cr. Rep. 543.

In the absence of statute altering or abolishing the common law rule, the effect of a plea based upon a former conviction is, after its rejection by the court upon

ardy. The first two may be considered together, the law applicable to autrefois convict being generally applicable to autrefois acquit.[2]

1. *As to Nature of Judgment.*

§ 1364. ACQUITTAL WITHOUT JUDGMENT A BAR, BUT NOT SO ALWAYS CONVICTION. An acquittal on a good indictment, even without the judgment of the court thereon, is a bar to a second prosecution for the same offense;[1] but such is not necessarily the case with a conviction on which there is no judgment;[2] as where a prosecuting officer, after conviction, concedes the badness of an indictment and proceeds to trial upon a second;[3] where the case is pending on error;[4] where an indictment was stolen after

demurrer, to put the defendant in the situation of one pleading guilty of the offense charged.—Hughes v. People, 8 Colo. 536, 5 Am. Cr. Rep. 80, 9 Pac. 50.

Evidence must be introduced to prove identity of offenses and parties.—Racco v. State, 37 Miss. 357.

2 **For forms of plea of autrefois acquit, etc.,** Whart. Prec. 1150, etc.

1 Infra, § 1722, and cases there cited. See 2 Russ. on Crimes (4th ed.) 64, note. CAL.—People v. Horn, 70 Cal. 17, 11 Pac. 470. ME.—State v. Elden, 41 Me. 165. MO.—State v. Risley, 72 Mo. 609. N. J.—West v. State, 22 N. J. L. (2 Zab.) 212. ENG.—R. v. Reid, 20 L. J. Rep. (N. S.) M. C. 67, 15 Jur. 181, 1 Eng. L. & Eq. R. 595.

Fact that acquittal was produced by mistake of law or misconception of fact makes no difference. See, infra, § 1722, and O'Brian v. Com., 72 Ky. (9 Bush) 333, 15 Am. Rep. 715; Hines v. State, 24 Ohio St. 134.

See, also, infra, §§ 1441, 1446.

2 ILL. — Brennan v. People, 15 Ill. 511. MASS.—Com. v. Fraher, 126 Mass. 265. MO. — State v. Spear, 6 Mo. 644. N. J.—West v. State, 22 N. J. L. (2 Zab.) 212. N. Y.—Ratzky v. People, 29 N. Y. 124, 28 How. Pr. 112. OHIO — State v. Mount, 14 Ohio 295, 45 Am. Dec. 542. PA.—Pennsylvania v. Huffman, 1 Addis. 140. TENN.—State v. Norvell, 10 Tenn. (2 Yerg.) 24, 24 Am. Dec. 458. TEX.—Lewis v. State, 1 Tex. App. 323. FED.—United States v. Herbert, 5 Cr. 87, Fed. Cas. No. 15354.

Compare: Preston v. State, 25 Miss. 383.

3 Pennsylvania v. Huffman, 1 Addis. (Pa.) 140. Infra, § 1383.

4 Com. v. Fraher, 126 Mass. 265; People v. Casborus, 13 Johns. (N. Y.) 351; Coleman v. United States, 97 U. S. 512, 530, 24 L. Ed. 1121; R. v. Reid, 20 L. J. M. C. 70.

verdict of guilty but before judgment,[5] and where the defendant pleaded a decision against him on a plea to the jurisdiction to a former indictment for the same offense.[6] Where, however, the former proceedings remain uncanceled and unwithdrawn, a verdict of guilty will sustain the plea;[7] though it is otherwise, as we have seen, where judgment has been arrested.[8] A plea of guilty, if outstanding, need not, to be a bar, have a judgment entered on it.[9]

§ 1365. JUDGMENT ARRESTED OR NEW TRIAL GRANTED ON DEFENDANT'S APPLICATION NO BAR. If a new trial be granted, on the defendant's application, this is in itself no bar to a second trial on the same, or on an amended indictment;[1] nor is a judgment arrested on a defective indictment a bar to a subsequent trial on a good indictment for the same offense.[2] It is otherwise, however, when the judgment was erroneously arrested, or the case erroneously dismissed, by a court having jurisdiction, on a good indictment.[3]

5 State v. Mount, 14 Ohio 295, 45 Am. Dec. 542.

6 Gardiner v. People, 6 Park. Cr. Rep. (N. Y.) 155. Supra, § 1349.

7 State v. Parish, 43 Wis. 395.

8 State v. Sherburne, 58 N. H. 535.

9 People v. Goldstein, 32 Cal. 432.

Conviction without judgment is a bar in those states where a defendant is held to be in jeopardy by a conviction. See, infra, §§ 1426 et seq.

1 Infra, §§ 1396, 1397, 1447, 1644. See People v. Hardisson, 61 Cal. 378; State v. Blaisdell, 59 N. H. 329; State v. Stephens, 13 S. C. 285; Dubose v. State, 13 Tex. App. 418.

2 Infra, § 1444; Joy v. State, 14 Ind. 139; R. v. Houston, 2 Cr. & D. 310.

And so of quashing, supra, § 1323.

3 State v. Elden, 41 Me. 165; State v. Norvell, 10 Tenn. (2 Yerg.) 24, 24 Am. Dec. 458; State v. Parish, 43 Wis. 495.

See, infra, §§ 1387, 1388.

In New York, in 1862, in the Court of Appeals, it was determined that when judgment is reversed for an illegal sentence, on a conviction where there was no error, there can be no new trial, but that the plea of autrefois convict is good.—Shepherd v. People, 25 N. Y. 407, 24 How. Pr. 388, reversing 23 How. Pr. 337. See, also, Hartung v. People, 26 N. Y. 154, 167, 28 N. Y. 400, 25 How. Pr.

§ 1366. ARBITRARY DISCHARGE MAY OPERATE AS ACQUITTAL. How far a court has a right to discharge a jury is hereafter considered more fully. In capital cases, as will be seen,[1] the tendency of opinion is that such discharge, unless necessary, works an acquittal.[2] In misdemeanors, and sometimes in felonies, the court, on strong ground shown, may withdraw a juror or discharge the jury.[3] But an arbitrary discharge, or one without adequate cause, operates as an acquittal.[4]

221; Ratzky v. People, 29 N. Y. 124, 28 How. Pr. 112.

1 Infra, §§ 1423 et seq.

2 Infra, §§ 1426-1449.

3 See Com. v. McCormick, 130 Mass. 61, 39 Am. Rep. 423.

4 Infra, §§ 1657, 1754, 1760. See People v. Schoeneth, 44 Mich. 489, 7 N. W. 70.

In United States v. Watson, 3 Ben. 1, Fed. Cas. No. 16651, Judge Blatchford said: "The illness of the district attorney, it not appearing by the minutes that such illness occurred after the jury was sworn, or that it was impossible for the assistant district attorney to conduct the trial, and the motion to put off the case for the term being made by such assistant, can not be regarded as creating a manifest necessity for withdrawing a juror. So, too, as to the absence of witnesses for the prosecution; it does not appear by the minutes that such absence was first made known to the law officer of the government after the jury was sworn, or that it occurred under such circumstances as to create a plain and manifest necessity justifying the withdrawing of a juror. The mere illness of the district attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no ground upon which, in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury, without the consent of the defendant, after the jury has been sworn and the trial has thus commenced. . . . The weight of all the authorities on the subject is, that the position of this case, as it stood when the juror was withdrawn, entitled the defendants, in the absence of their express consent to any other course, to a verdict of acquittal, and therefore entitles them to the action of the court, at this time, on their application to the same effect. An order will, therefore, be entered, declaring that the proceedings on the former trial are held to be equivalent to a verdict of not guilty, and discharging the defendants and their bail from further liability in respect of the indictment."

In England, where, in case of misdemeanor, the jury is improperly, and against the will of a defendant, discharged by the judge from giving a verdict after the trial has begun, this is not equivalent to an acquittal, nor does it entitle the defendant quod eat sine

§ 1367. Record of former judgment to be produced. 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, there being cases in which an acquittal in a foreign jurisdiction is equally effective for this purpose with one at home.[1]

§ 1368. Court must have had jurisdiction. The court, however, must have been competent, having jurisdiction,[1]

die.—R. v. Charlesworth, 1 Best & S. 460, 101 Eng. C. L. 459, 9 Cox C. C. 44; s. c., at nisi prius, 2 F. & F. 326.

Acting on this general principle, where it appeared that in the course of the trial and during the examination of witnesses one of the jurors had, without leave, and without it being noticed by any one, left the jury-box and also the court-house, whereupon the court discharged the jury without giving a verdict, and a fresh jury was empanelled and the prisoner was afterwards tried and convicted before a fresh jury, it was held that the course pursued was right.—R. v. Ward, 17 L. T. N. S. 220; 10 Cox C. C. 573; 16 W. R. 281, C. C. R. See R. v. Winsor, infra, § 1657.

When trial is brought to standstill before verdict, by the close of the term of the court, this in some jurisdictions is a necessary discharge of the jury, and the trial may be recommenced at a subsequent term. Infra, § 1450.

Jury discharged from sickness or surprise: The discussion of this question falls more properly under a subsequent head. Infra, § 1445.

1 Infra, § 1417. See People v. King, 64 Cal. 338, 30 Pac. 1028; R. v. Hutchinson, 3 Keb. 785, 84 Eng. Repr. 1011; Beak v. Thyrwhit, 3 Mod. 194, 87 Eng. Repr. 124, 1 Show. 61, Bull. N. P. 245; R. v. Roche, 1 Leach C. C. 134; 1 Whart. Crim. Ev. (1 Hilton's ed.), § 153.

1 ALA.—State v. Nicholson, 72 Ala. 176. ARK.—Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54; State v. Nichols, 38 Ark. 550. ILL.—Campbell v. People, 109 Ill. 438. IND.—State v. Odell, 4 Blackf. 156; O'Brian v. State, 12 Ind. 369; State v. Morgan, 62 Ind. 35. MASS.—Com. v. Goddard, 13 Mass. 456; Com. v. Peters, 53 Mass. (12 Metc.) 387. MISS.—Montross v. State, 61 Miss. 421. MO.—State v. Payne, 4 Mo. 376. NEB.—Thompson v. State, 6 Neb. 102. N. H.—State v. Hodgkins, 42 N. H. 475. N. Y.—Canter v. People, 1 Abb. Ct. App. Dec. 305, 5 Abb. Pr. N. S. 21, 38 How. Pr. 91, 2 Trans. App. 1. TENN.—Mikels v. State, 50 Tenn. (3 Heisk.) 321; Foust v. State, 85 Tenn. 342, 362, 3 S. W. 657, overruling Foust v. State, 80 Tenn. (12 Lea) 404. TEX.—Norton v. State, 14 Tex. 387. VA.—Com. v. Meyers, 3 Va. (1 Va. Cas.) 188. ENG.—R. v. Bowman, 6 Car. & P. 337, 25 Eng. C. L. 462.

and the proceedings regular.[2] 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 offense.[3] Again, an acquittal by a jury, in a court of the United States, of a defendant who is there indicted for an offense of which that court has no jurisdiction, is no bar to an indictment against him for the same offense in a state court.[4] It is also no bar that the defendant has before been acquitted or convicted of the same offense before a court of the same state, where the offense is one of which the court has no jurisdiction.[5] Thus, a former examination before a magistrate, and a discharge upon a complaint under the New Hampshire Bastardy Act, do not bar further proceedings, as the magistrate has strictly no power to try, but only to examine and discharge or to bind over.[6] But where a justice has jurisdiction, a conviction or acquittal before him is a bar, although the proceedings before the justice were so defective that they might have been reversed for error.[7]

§ 1369. JUDGMENT BY COURT-MARTIAL NO BAR. It has been ruled in Tennessee that an acquittal by a federal court-martial, established by act of Congress for the punishment of offenses against the United States, is no bar to an indictment for murder under the laws of the State

As to judgment in unauthorized term, see, infra, § 1450.

2 Finley v. State, 61 Ala. 201; Com. v. Bosworth, 113 Mass. 200, 18 Am. Rep. 467.

3 State v. Morgan, 62 Ind. 35; Com. v. Alderman, 4 Mass. 477.

See, infra, § 1370.

4 Com. v. Peters, 53 Mass. (12 Metc.) 387. See 1 Kerr's Whart. Crim. Law, §§ 599 et seq.

5 Rector v. State, 6 Ark. 187; State v. Odell, 4 Blackf. (Ind.) 156; Com. v. Goddard, 13 Mass. 455; State v. Payne, 4 Mo. 376.

6 Marston v. Jenness, 11 N. H. 156. See Hartley v. Hindmarsh, L. R. 1 C. P. 553. Infra, § 1370.

7 Com. v. Miller, 35 Ky. (5 Dana) 320; Stevens v. Fassett, 27 Me. 266; Com. v. Loud, 44 Mass. (3 Metc.) 328, 37 Am. Dec. 139; State v. Thornton, 37 Mo. 360.

Compare cases cited supra, § 1364, and infra, § 1370.

of Tennessee.[1] And it has been said by two eminent attorneys-general (Legare and Cushing), that proceedings by state tribunals are no bar to courts-martial instituted by the military authorities of the United States.[2] The tribunals are co-ordinate when there is no legislation giving courts-martial exclusive jurisdiction.[3] At the same time the judgment of a court-martial may constitute res adjudicata, so far as concerns the government by which it is pronounced.[4] And a judgment of conviction by a military court,[5] established by law in an insurgent state, is a bar to a subsequent prosecution by a state court for the same offense.[6]

§ 1370. —— AND SO OF POLICE OR MUNICIPAL CONVICTION OR ACQUITTAL. A police summary conviction for breach of a municipal ordinance is not a bar to a prosecution by the state for a breach of the public peace,[1] or for keeping a

1 State v. Rankin, 44 Tenn. (4 Cold.) 145; Brown v. Wadsworth, 15 Vt. 170, 40 Am. Dec. 674.

See Whart. Confl. of L., §§ 934, 935.

2 3 Opin. Atty.-Gen. 750; 6 ibid. 413.

3 United States v. Cashiel, 1 Hugh. 552, Fed. Cas. No. 14744.

4 Hefferman v. Porter, 46 Tenn. (6 Cold.) 391, 98 Am. Dec. 459; Dynes v. Hoover, 61 U. S. (20 How.) 65, 15 L. Ed. 278; United States v. Reiter, 4 Am. Law Reg. N. S. 534, Fed. Cas. No. 16146; Woolley v. United States, 20 Law Rep. 631.

5 As to distinction between military courts and courts-martial, see 1 Kerr's Whart. Crim. Law, §§ 344, 345.

6 Coleman v. State, 97 U. S. 509, 24 L. Ed. 1118.

In this case it was said by Field, J., that while the plea of former conviction was not a proper plea in the case, as it admitted the jurisdiction of the state court to try the offense if it were not for the former conviction, yet such irregularity would not prevent the courts giving effect to the objection attempted to be raised. The judgment of the Supreme Court of Tennessee, sustaining a conviction of the defendant, was therefore reversed, and defendant ordered to be delivered up to the military authorities of the United States, to be dealt with as required by law on the judgment of the court-martial. See, also, Woolley v. United States, 20 Law Rep. 631; United States v. Reiter, 4 Am. Law Reg. N. S. 534, Fed. Cas. No. 16146. Supra, § 333.

1 ILL.—Severin v. People, 37 Ill. 414. IND.—Levy v. State, 6 Ind. 281. MINN.—State v. Oleson, 26

gaming-house;[2] nor is a conviction in the name of a township, to recover a penalty, a bar to proceedings by indictment in the name of the state.[3] A discharge by such a

Minn. 507, 5 N. W. 959; State v. Lee, 29 Minn. 445, 13 N. W. 913. N. J.—Howe v. Plainfield, 37 N. J. L. (8 Vr.) 150. N. Y.—Rogers v. Jones, 1 Wend. 237, 261, 19 **Am. Dec.** 493; People v. Stevens, 13 Wend. 341. ORE.—State v. Bergman, 6 Ore. 341. TENN.—Greenwood v. State, 65 Tenn. (6 Baxt.) 567, 32 **Am. Rep.** 539.

Compare: Preston v. People, 45 Mich. 486, 8 N. W. 96; State v. Thornton, 37 Mo. 360; State v. Williams, 11 S. C. 292; State v. Hamilton, 3 Tex. App. 643.

Distinction between police and state prosecutions is considered in 1 Kerr's Whart. Crim. Law, § 29.

On the topic in the text, see Cooley Const. Lim. 199; 1 Am. Law J. 49.

2 Robbins v. People, 95 Ill. 175; Com. v. Bright, 78 Ky. 238; Johnson v. State, 59 Miss. 543; Greenwood v. State, 65 Tenn. (6 Baxt.) 507.

3 Wragg v. Penn Township, 94 Ill. 11, 23, 34 **Am. Rep.** 199.

In this case, Dickey, J., said:

"The decisions on this subject by the courts of the several states are apparently in hopeless conflict with each other. Dillon on Municipal Corporations, § 301, says: 'Hence the same act comes to be forbidden by general statute and by the ordinance of a municipal corporation, each providing a separate and different punishment. . . . But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject can not be reconciled. Some hold that the same act may be a double offense, one against the state and one against the corporation. Others regard the same act as constituting a single offense, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction.' In Georgia and Louisiana it is held that a municipal corporation has no power to enact an ordinance touching an offense punishable under the general law of the state. (Mayor v. Hussey, 21 Ga. 80, 68 **Am. Dec.** 452.) In Rice v. State, 3 Kan. 141, the court say: 'It is not necessary in this case to decide whether both the state and the city can punish for the same act; but we have no doubt that the one which shall first obtain jurisdiction of the person of the accused may punish to the extent of its power.' In Missouri the rule is clearly announced that the same act can be punished but once, and that a conviction under a city ordinance may be pleaded in bar to an indictment under the state law. (State v. Cowan, 29 Mo. 330.)"—So, also, State v. Thornton, 37 Mo. 360.

In Alabama the rule is the other way, and it is held that the same act may be punished under a city ordinance and at the same time under the general law.—Mayor v. Allaire, 14 Ala. 400.

In Indiana the rule used to be the same as it is now in Missouri, but in Ambrose v. State, 6 Ind.

police magistrate is a fortiori no bar to proceedings by the state.[4] The reasons given for this conclusion are (1) that in the nature of things an offense against a municipality is of a different type from an offense against the state, and subject to a distinct mode of punishment; and (2) that as two distinct sovereignties,—e. g., state and federal,—may prosecute successively for different aspects of the same offense, so different aspects may be prosecuted successively by state and municipal authority.[5]

351, it was modified, and the court there held that a single act might constitute two offenses—one against the state and one against the municipal government. And in Waldo v. Wallace, 12 Ind. 582, it was held "that each might punish in its own mode, by its own officers, the same act as an offense against each."—S. P. Robbins v. People, 95 Ill. 178; Hankins v. People, 106 Ill. 628; Purdy v. State, 68 Ga. 295; and to same effect McLaughlin v. Stephens, 2 Cr. C. C. 148, 149, Fed. Cas. No. 8874; Polinsky v. People, 11 Hun (N. Y.) 393; see, s. c., 73 N. Y. 65. Infra, § 158.

In Indiana the rule used to be the same as it is now in Missouri, but in Ambrose v. State, 6 Ind. 351, it was modified, and the court there held that a single act might constitute two offenses—one against the state and one against the municipal government. And in Waldo v. Wallace, 12 Ind. 582, it was held "that each might punish in its own mode, by its own officers and the same act as an offense against each."

Same principle in Robbins v. People, 95 Ill. 178; Hankins v. People, 106 Ill. 628; Purdy v. State, 68 Ga. 295. And to same effect, McLaughlin v. Stephens, 2 Cr. 148, Fed. Cas. No. 8874; Polinsky v. People, 11 Hun (N. Y.) 393. See Polinsky v. People, 73 N. Y. 65.

The position in the text is objected to in 4 Crim. Law Mag. 496.

In any view when a police court has no power to enter a final criminal judgment, such action is a nullity.—State v. Morgan, 62 Ind. 35; Bigham v. State, 59 Miss. 529. See State v. Curtis, 29 Kan. 384.

The magistrate's judgment is not conclusive to the effect that the crime is one of which he has jurisdiction.—Com. v. Goddard, 13 Mass. 456; Com. v. Curtis, 28 Mass. (11 Pick.) 134.

Under the Virginia practice, a discharge by an examining court of a prisoner committed on a charge of felony is not a bar to another prosecution for the same offense, except when the record shows that the discharge was upon an examination of the facts charged.—McCann's Case, 55 Va. (14 Gratt.) 570.

4 Com. v. Hamilton, 129 Mass. 479; Garst, In re, 10 Neb. 78, 4 N. W. 511; White v. State, 9 Tex. App. 390; Wolverton v. Com., 75 Va. 909.

5 See infra, § 441; 1 Kerr's

§ 1371. OF COURTS WITH CONCURRENT JURISDICTION, THE COURT FIRST ACTING HAS CONTROL. Where a concurrent jurisdiction exists in different tribunals, the one first exercising jurisdiction rightfully acquires the control to the exclusion of the other.[1] Hence where, after indictment and before trial in a court having jurisdiction, the case was brought before a justice of the peace having jurisdiction of the same offense, and before him the offender was tried and sentenced, the court held that the conviction and sentence were no bar to the indictment.[2] The same position applies to prosecutions for piracy, in which the sovereign who first tries the offender absorbs the jurisdiction.[3]

Whart. Crim. Law, § 318. Also Lewis v. State, 21 Ark. 209; Hughes v. People, 8 Colo. 536, 9 Pac. 50; State v. Sly, 4 Ore. 277.

1 Whart. Confl. of Law, § 933. GA.—Mize v. State, 49 Ga. 375. IND.—Trittipo v. State, 10 Ind. 343; Trittipo v. State, 13 Ind. 360. MASS.—Com. v. Cunningham, 13 Mass. 245. MO.—State v. Simonds, 3 Mo. 414.

Compare: State v. Tisdale, 19 N. C. (2 Dev. & B. L.) 159.

As to conflicting pardons, see, infra, § 1474.

2 Com. v. Miller, 35 Ky. (5 Dana) 320; Burdett v. State, 9 Tex. 43.

As to conflicting jurisdiction of federal and state courts, see 1 Kerr's Whart. Crim. Law, §§ 306, 307, 336.

3 See United States v. The Pirates, 18 U. S. (5 Wheat.) 184, 5 L. Ed. 64.

"When two courts have concurrent criminal jurisdiction," so it is elsewhere stated, "the court that first assumes this jurisdiction over a particular person acquires exclusive control, so that its judgments, if regularly rendered, are a bar to subsequent action of all other tribunals."—Whart. Confl. of Law., § 933. See: IND.—Trittipo v. State, 10 Ind. 343; Trittipo v. State, 13 Ind. 360. MASS.—Com. v. Goddard, 13 Mass. 455. MO.—State v. Simonds, 3 Mo. 414. NEB. —Marshall v. State, 6 Neb. 121, 29 Am. Rep. 363. N. J.—State v. Davis, 4 N. J. L. (1 South.) 311; State v. Plunkett, 18 N. J. L. (3 Harr.) 5. FED.—Putney v. The Celestine, 1 Biss. 1, 4 Am. L. J. 164, Fed. Cas. No. 2541; Robinson, Ex parte, 6 McL. 355, Fed. Cas. No. 11935.

"Ne bis in idem," is the Roman maxim in this relation, having the same meaning as the English doctrine that no man shall be placed twice in jeopardy for the same offense; and though this maxim is based on the Roman theory of the union of all nations under one imperial head, yet it must be allowed now to prevail in all cases where concurrent courts deal with the same subject matter under the same common law. It is here that

§ 1372. OFFENSE HAVING DISTINCT ASPECTS SEPARATE GOVERNMENTS MAY PROSECUTE. An offense, however, may have two aspects, so that one sovereign may punish it in the

the difficulties spring up, when the question arises as to the effect of the conviction or acquittal of a defendant in a foreign court, under a distinct jurisprudence.

Had the foreign court jurisdiction over the offense in question? If it had not, the law undoubtedly is that its action is a nullity. Even an acquittal in a court of the United States has been pronounced by the Supreme Court of Massachusetts to be a nullity in a case where, in the opinion of the latter court, the former had no jurisdiction.—Com. v. Peters, 53 Mass. (12 Met.) 387.

But who is to judge of the question of jurisdiction? Suppose a German court, in exercise of the cosmopolitan surveillance which is established in some parts of Germany (Whart. Confl. of L., § 885), should try an American in Germany for an assault committed on another American in New York. Would the judgment of the German court in this respect be final? Certainly, by the tests of the English common law, it would not. Neither in England nor in the United States would the assumption of German courts to exercise extra-territorial jurisdiction of this kind be tolerated. And yet this is a different question from that which would arise if an American citizen should be bona fide arrested and punished by a German court, exercising a jurisdiction for which it has at least a respectable show of international authority. Could such an offender be a second time punished for this offense? It would seem not, as a legitimate result of the maxim, Ne bis in idem. So far as concerns penal international law, this maxim, as to offenses of which the prosecuting state has international jurisdiction, may be viewed as at least establishing the position that if a person is tried by a government to which he is corporeally subject, he can not, after punishment by that government for a particular offense, be punished for this offense elsewhere. This, indeed, seems to be a necessary corollary of the doctrine accepted even by the English common law, that every person is subject to the penal laws of the state in which he is resident, even though he owes allegiance to another country. But it is necessary, to make such a punishment a satisfaction, and a bar to a future trial, that it should be complete, and should have been executed to its full extent. Punishment only partially submitted to is only a defense pro tanto. It is certain, also, that in offenses against the state's own sovereignty, the judgment of a foreign court would be no bar to a prosecution. — Ibid. See Halleck's Int. Law, 175 Woolsey, § 77; Helie, Traite de l'Instruction Criminelle, p. 621.

With acquittals, however, another course of reasoning obtains. It is true that an acquittal in the forum delicti commissi is viewed, when the proceedings are regular and the issue of fact made, as con-

first aspect, and another in the second.[1] Thus, uttering of forged coin may be punished by a state as a cheat,[2] and by the federal government as forgery.[3] In such cases, it is argued by a late able federal judge (Grier, J.), that

clusive on the question of the local criminality of the offense charged (Bar, § 143, p. 560, argues such an acquittal is to be regarded as a lex generalis that the case was not penal); though it would not prevent a foreign sovereign from prosecuting for offenses against himself. But an acquittal in the forum domicilii would only be regarded as conclusive when it should appear to have been rendered by a court having local jurisdiction after a fair trial. Certainly, while a judgment of a court delicti commissi would be final, to the effect that the act in question was not penal in that country, no extra-territorial force can be assigned to a decision of the Judex Domicilii, unless he has international jurisdiction. The judgment, in such a case, could not be regarded as barring a prosecution in the forum delicti commissi.—See Whart. Confl. of L., §§ 905, 914, 934, 935, 938.

By New York Penal Code of 1882, § 679, a foreign conviction or acquittal is a bar to a trial in New York for the same act or omission.

A person living under two governments or jurisdictions, as does every inhabitant of the states of this Union, may commit two crimes by doing a single act—one against the state and the other against the United States. And in such case the conviction or acquittal of the one crime, in a forum of the state, is no bar to a prosecution for the other in a forum of the United States.—Deady, J., in United States v. Barnhart, 10 Sawy. 497, 22 Fed. 285.

The question of conflict of jurisdiction in such cases is discussed in 1 Kerr's Whart. Crim. Law, §§ 305-329.

Mr. Wharton tells us that a sentence of acquittal or conviction "pronounced under the municipal law of the state where the supposed crime was committed, or to which the supposed offender owed allegiance," is a bar to a prosecution in another state. This, however, leaves the matter unsettled when the conflict is between the court of domicil and the court of the state where the offense was committed.

1 1 Kerr's Whart. Crim. Law, §§ 307, 343; United States v. Cashiel, 1 Hughes 552, Fed. Cas. No. 14744; United States v. Wells, 15 Int. Rev. Rec. 56, Fed. Cas. No. 16665.

See criticism on this position in 4 Cent. L. J. 498.

2 Fox v. Ohio, 46 U. S. (5 How.) 410, 12 L. Ed. 213. See 1 Kerr's Whart. Crim. Law, 9th ed., §§ 305-329.

Fraudulent act by a bankrupt made indictable under the Federal Bankrupt Act does not preclude its prosecution under a state statute as a cheat by false pretenses. —See Abbott v. People, 75 N. Y. 602.

3 United States v. Marigold, 50 U. S. (9 How.) 560, 13 L. Ed. 257.

one judgment can not be pleaded in bar to the other.[4] But this is to be taken subject to the qualifications hereinbefore expressed. If the charges be identical, then the court first seizing jurisdiction absorbs the offense.[5] If, however, the offense is one capable of being broken into sections, or is in one sense aimed at one sovereign,[6] in another sense against another sovereign, then each sovereign may independently prosecute for the ingredient or phase by which such sovereign is distinctively offended.[7] In such case, however, the second prosecuting sovereign should only impose such a punishment as, with that already inflicted, would be an adequate penalty for the aggregate offense.[8] If the punishment imposed by the sovereign first prosecuting be adequate, then the second should interpose a nolle prosequi or pardon. But mere jeopardy in such other state, without conviction and punishment will not avail as ground for a plea of former jeopardy in a foreign state.[9] Supplementary jurisdiction is in such cases to be maintained,[10] but cumulative punishment avoided by interposition of executive clemency. This is the course advised by the German jurists

4 Moore v. Illinois, 55 U. S. (14 How.) 13, 14 L. Ed. 306. See, infra, §§ 1398, 1399.

5 See People v. West Chester, 1 Park. Cr. Rep. (N. Y.) 659.

In United States v. Barnhart, 10 Sawy. 491, 22 Fed. 285, 6 Crim. Law Mag. 201, it was held that a former acquittal in a state court of killing an Indian on an Indian reservation, was not a bar to a prosecution in a federal court. This, however, can only be sustained on the ground that the state court had no jurisdiction.

6 **Acquittal in one state** for crime against the sovereignty of another state can not constitute a second putting in jeopardy where prosecuted in the latter state.—Strobhar v. State, 55 Fla. 167, 47 So. 4.

7 1 Kerr's Whart. Crim. Law, § 343.

8 Marshall v. State, 6 Neb. 120, 29 Am. Rep. 363. See Hendrich v. Com., 33 Va. (6 Leigh) 707.

9 See State v. Adams, 14 Ala. 486; Phillips v. People, 55 Ill. 430; Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621; Marshall v. State, 6 Neb. 121, 29 Am. Rep. 363.

10 Marshall v. State, 6 Neb. 120, 29 Am. Rep. 363.

just quoted, and is substantially approved by the late Chief Justice Taney.[11]

§ 1373. —— ABSORPTIVE CHARACTER OF FEDERAL STATUTES —CONSPIRACY. At the same time, what is here said must be taken in connection with the conflict of opinion heretofore noticed as to the absorptive character of federal statutes.[1]

It should be added, that where a conspiracy is spread over several sovereignties each sovereign may prosecute for the overt act which is an infraction of its own laws.[2]

§ 1374. PROCEEDINGS FOR CONTEMPT NO BAR. A person may be indicted for an assault committed in view of the court, though previously fined for the contempt.[1] The plea of "autrefois convict" shall not avail him, because the same act constitutes two offenses: one violates the law which protects courts of justice, and stamps an efficient character on their proceedings; the other is leveled against the general law, which maintains public order and tranquillity.[2] Thus, 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 growing out of the same transaction.[3]

§ 1375. —— NOR HABEAS CORPUS. Proceedings on habeas corpus are not ordinarily a bar. It is true that a person discharged under the Habeas Corpus Act of South Caro-

11 United States v. Amy, 14 Md. 152 n, 4 Quart. L. J. 163, Fed. Cas. No. 14445; 1 Kerr's Whart. Crim. Law, §§ 305-329 et seq., 343.

1 1 Kerr's Whart. Crim. Law, §§ 305 et seq.

2 Bloomer v. State, 48 Md. 321.

1 See People v. Mead, 92 N. Y. 415; R. v. Lord Osulston, 2 Str. 1107, 93 Eng. Repr. 1063.

See, infra, §§ 1894, 1919.

2 Infra, § 1919; State v. Yancey, 4 N. C. (1 Car. L. Repos.) 519; State v. Woodfin, 27 N. C. (5 Ired.) 199, 42 Am. Dec. 161; State v. Williams, 2 Spear. L. (S. C.) 26.

3 See Opinion of Mr. Butler, attorney-general of the United States, 2 Opinions of the Attorneys-General 958. The details are given in Houston's Life, by Crane (1884), p. 43.

lina, from prison, having been committed on a charge of murder, has been held to be protected thereby from a subsequent prosecution on the same charge.[1] The same is true where the release is on the ground of delay in bringing to trial.[2] This, however, is not the general rule.[3] A fortiori a discharge at a preliminary examination is no bar.[4]

§ 1376. IGNORAMUS AND QUASHING NO BAR. If a man be committed for a crime, and a bill preferred against him is ignored by the grand jury, he is still liable to be indicted for the same offense on new evidence,[1] or even on the same evidence,[2] though the sending up a second bill after an ignoramus, is an extreme act of prerogative, subject to the revision of the court.[3] The same is the case with quashing,[4] even after motion for a new trial, when the indictment is defective.[5]

1 State v. Fley, 2 Brev. L. (S. C.) 338, 4 Am. Dec. 583.

2 In re Begerow, 136 Cal. 293, 56 L. R. A. 528, 68 Pac. 773. See, infra, § 1379.

Dismissal of information charging homicide for failure to bring to trial in sixty days, is no bar to another information for the same offense.—People v. Palassou, 14 Cal. App. 125, 111 Pac. 109.

See, infra, § 1377.

3 Yates v. Lansing, 5 Johns. (N. Y.) 282; affirmed, 9 Johns. (N. Y.) 395; State v. Weatherspoon, 88 N. C. 18; McCann's Case, 55 Va. (14 Gratt.) 570; Milburn, Ex parte, 34 U. S. (9 Pet.) 704, 9 L. Ed. 280.

4 State v. Jones, 16 Kan. 608.

1 State v. Harris, 91 N. C. 656.

2 2 Hale 243-246; 2 Hawk., ch. 35, § 6. See, supra, § 1301. Also: CAL.—Clarke, Ex parte, 54 Cal. 412. GA.—Christmas v. State, 53 Ga. 81. NEV.—Job, Ex parte, 17 Nev. 184, 30 Pac. 699. N. C.—State v. Harris, 91 N. C. 656. PA.—Com. v. Miller, 2 Ash. 61. ENG.—R. v. Newton, 2 Moo. & R. 503.

3 Supra, § 1301.

Second bill on the same evidence will be quashed.—Richards v. State, 22 Neb. 145, 34 N. W. 346.

4 Supra, §§ 1312 et seq., 1320; Weston v. State, 63 Ala. 155; People v. Varnum, 53 Cal. 630; State v. Taylor, 34 La. Ann. 978; Com. v. Bressant, 126 Mass. 246; United States v. Nagle, 17 Blatchf. 258, Fed. Cas. No. 15852.

5 State v. Clark, 32 Ark. 231; infra, § 1388.

In a California case, after the defendant had been bound to answer by a justice of the peace for a felony, and the grand jury recommended that it be referred to the next grand jury, and the

§ 1377. —— NOR IS NOLLE PROSEQUI OR DISMISSAL. The entry of a nolle prosequi by the competent authority does not in itself operate as an acquittal of the charge contained in the indictment on which the nolle prosequi is entered.[1] The nolle prosequi, indeed, unless vacated in the same term by leave of court, destroys the efficiency of the indictment on which it is entered.[2] It does not bar,

county court then ordered that the defendant be discharged from custody, this order was held not a bar to another prosecution of the defendant for the same offense.—Ex parte Cahill, 52 Cal. 463.

1 ALA.—State v. Blackwell, 9 Ala. 75; Aaron v. State, 39 Ala. 75; Winston, Ex parte, 52 Ala. 419; Walker v. State, 61 Ala. 30. ARK.—Brown v. State, 10 Ark. 607. CONN.—State v. Main, 31 Conn. 572; State v. Garvey, 42 Conn. 232. GA.—Williams v. State, 57 Ga. 478. IND.—Patterson v. State, 70 Ind. 341. KAN.—State v. Ingram, 16 Kan. 14; State v. McKinney, 31 Kan. 570, 3 Pac. 356; State v. Hart, 33 Kan. 218, 6 Pac. 288. KY.—Com. v. Thompson, 13 Ky. (3 Litt.) 284. LA.—State v. Hornsby, 8 Rob. 583, 41 Am. Dec. 314; State v. Byrd, 31 La. Ann. 419. MASS.—Com. v. Wheeler, 2 Mass. 172; Com. v. Tuck, 37 Mass. (20 Pick.) 356; Bacon v. Towne, 58 Mass. (4 Cush.) 234. MISS.—Clarke v. State, 23 Miss. 261. MO.—Donaldson, Ex parte, 44 Mo. 149; State v. Patterson, 73 Mo. 695. N. Y.—Gardiner v. People, 6 Park. Cr. Rep. (N. Y.) 155. N. C.—State v. McNeil, 10 N. C. (3 Hawks) 183; State v. Thornton, 35 N. C. (13 Ired.) 256. S. C.—State v. McKee, 1 Bail. L. 651, 21 Am. Dec. 499; State v. Haskett, 3 Hill L. 95; Thomas v. State, 75 S. C. 477, 55 S. E. 893. TENN.—Walton v. People, 35 Tenn. (3 Sneed.) 687. TEX.—Branch v. State, 20 Tex. App. 594. VT.—State v. Chapman, 52 Vt. 313, 36 Am. Rep. 754. VA.—Com. v. Lindsay, 4 Va. (2 Va. Cas.) 345; Wortham v. Com., 26 Va. (5 Rand.) 669. FED.—United States v. Stowell, 2 Curt. 153, 170, Fed. Cas. No. 16409; United States v. Shoemaker, 2 McL. 114, Fed. Cas. No. 16279. ENG.—R. v. Roper, 1 Craw. & Dix. 185; R. v. Mitchell, 3 Cox C. C. 93.

Information based on same charge grand jury investigated and failed to indict does not put accused twice in jeopardy.—State v. Whipple, 57 Vt. 637.

Setting aside indictment for irregularity after discharge of grand jury, new grand jury may be impaneled.—State v. Disbrow, 130 Iowa 19, 8 Ann. Cas. 190, 106 N. W. 263.

A nolle prosequi applies to the particular indictment only, and not to the offense.—Sewell, J., Com. v. Wheeler, 2 Mass. 172.

2 MASS.—Com. v. Wheeler, 2 Mass. 72; Com. v. Dowdican, 115 Mass. 133. MO.—State v. Primm, 60 Mo. 106. TEX.—Bowden v. State, 1 Tex. App. 137. WIS.—Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728. ENG.—R. v. Allen, 1 Best & S. 850, 101 Eng. C. L. 849;

however, new proceedings, except when it is entered when the jury has been actually empaneled, in which case, if the defendant refuse to consent or if (in some jurisdictions) he be put in jeopardy of his life by the jury being charged, or if the entry be made after the evidence closes, the entry operates as an acquittal;[3] though it may be otherwise where defendant was not in jeopardy, and where local law authorizes a nolle prosequi during trial,[4]

R. v. Roper, 1 Cr. & D. 85; R. v. Mitchell, 3 Cox C. C. 36.

See, supra, § 1310.

[3] ALA.—State v. Kreps, 8 Ala. 951; Cobia v. State, 16 Ala. 781; Grogan v. State, 44 Ala. 9; Battle v. State, 54 Ala. 93. GA.—Reynolds v. State, 3 Ga. 53; Durham v. State, 9 Ga. 306; Jones v. State, 55 Ga. 625. IND.—Weinzorpflin v. State, 7 Blackf. 186; Harker v. State, 8 Blackf. 545; Wright v. State, 5 Ind. 290, 61 Am. Dec. 90. MASS.—Com. v. Tuck, 37 Mass. (20 Pick.) 356; Com. v. Kimball, 73 Mass. (7 Gray) 328; Com. v. Goodenough, Thacker's C. C. 132. N. H.—State v. Smith, 49 N. H. 155, 6 Am. Rep. 480. N. Y.—People v. Vanhorne, 8 Barb. 158; People v. Barrett, 2 Cain. 304, 2 Am. Dec. 239. N. C.—Spier's Case, 12 N. C. (1 Dev. L.) 491. OHIO—Mount v. State, 14 Ohio 295, 45 Am. Dec. 542; Baker v. State, 12 Ohio St. 214. PA.—McFadden v. State, 23 Pa. St. 12, 62 Am. Dec. 308. S. C.—State v. McKee, 1 Bail. L. 651, 21 Am. Dec. 499. TENN.—Ward v. State, 20 Tenn. (1 Humph.) 253; State v. Connor, 45 Tenn. (5 Coldw.) 311. VT.—State v. Roe, 12 Vt. 93. W. VA.—Gruber v. State, 3 W. Va. 700. FED.—United States v. Farring, 4 Cr. 465, Fed. Cas. No. 15075; United States v. Shoemaker, 2 McL. 114, Fed. Cas. No. 16279.

As to nolle prosequi generally, see, supra, § 1310.

As to jeopardy, see infra, § 1506.

As to dismissal after a plea of guilty, see Boswell v. State, 11 Ind. 47.

After jury charged with case absolute right to enter nolle prosequi is suspended.—State v. Costello, 11 La. Ann. 283.

After trial commenced, prosecutor may enter nolle prosequi, subject to defendant's right to insist upon trial.—Farrar v. Steele, 31 La. Ann. 640; State ex rel. Butler v. Moise, 48 La. Ann. 109, 35 L. R. A. 701, 18 So. 943.

Nolle prosequi after jury sworn, without the consent of the accused, amounts to an acquittal.—Reynolds v. State, 3 Ga. 53; Joy v. State, 14 Ind. 139.

[4] Infra, §§ 1426 et seq.; also: CONN.—State v. Garvey, 42 Conn. 232. IND.—Kistler v. State, 64 Ind. 371. MASS.—Com. v. Kimball, 73 Mass. (7 Gray) 328, cited supra, § 1310. PA.—Com. v. Seymour, 2 Brewst. 567. TEX. — Taylor v. State, 35 Tex. 98. VT.—State v. Roe, 12 Vt. 93. FED.—United States v. Morris, 1 Curt. 23, Fed. Cas. No. 15815.

and where the defendant, though entitled to do so, did not demand an acquittal.[5]

In some jurisdictions the consent of the court is requisite to a nolle prosequi;[6] though the fact that such consent is given does not strengthen the effect of the nolle prosequi unless the case be before the jury, and the defendant be put in jeopardy according to the local construction of the law.[7]

Discharge from a former indictment upon payment of costs, in consequence of the refusal of the prosecutor to prosecute further, is no bar.—State v. Blackwell, 9 Ala. 79.

In Massachusetts, under the provision in ch. 171, § 28, that in cases of assault, on acknowledgment of satisfaction by party injured, the court may discharge the defendant, the discontinuance of the prosecution is at the discretion of the court.—Com. v. Dowdican, 115 Mass. 133.

In such cases the dismissal is not technically a bar. "The effect of dismissing a complaint without a trial is like that of quashing or entering a nolle prosequi to an indictment. By neither of these is the defendant acquitted of the offense charged against him. (Com. v. Gould, 78 Mass. (12 Gray) 171.)" —Com. v. Bressant, 126 Mass. 246.

There may be cases in which a bar will be interposed where a joint defendant is discharged in order to use him as a witness against his co-defendant.—People v. Bruzzo, 24 Cal. 41.

In such cases it has been held that a stipulation by the prosecuting attorney not to try precludes the prosecuting authorities from proceeding to trial.—People v. Bruzzo, 24 Cal. 41; Hardin v. State, 12 Tex. App. 186.

See, however, 1 Whart. Crim. Ev. (Hilton's ed.), § 443, where the question is discussed in detail, and cases there cited. See, also, Venters v. State, 18 Tex. App. 211.

In United States v. Ford, 99 U. S. 594, 25 L. Ed. 399, it was held that the United States district attorney can not, as to the informer, bind the government by a contract not to prosecute.

As to jeopardy, when accomplice is called, and the case against him withdrawn, see United States v. Morris, 1 Curtis 23, Fed. Cas. No. 15815; infra, §§ 1426 et seq.

5 Com. v. Kimball, 73 Mass. (7 Gray) 328.

6 See, supra, § 1310; State v. Garvey, 42 Conn. 232; People v. McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328.

7 **In Maryland,** in 1868, pending a motion to quash an indictment for a felony, there was received and filed in the case a nolle prosequi, granted by the governor, ordering "that all further proceedings against the accused on the indictment should cease and determine upon payment of the costs accrued upon said indictment, and that no further prosecution be had

When a count is divisible a surplus averment may be got rid of either by a formal nolle prosequi or by a withdrawal equivalent thereto.[8]

§ 1378. AFTER VERDICT NOLLE PROSEQUI A BAR. After verdict the entry of a nolle prosequi, either with or without consent of court, as the local statutes may prescribe, is a usual method either of recording executive clemency, or of disencumbering the case from embarrassing surplus charges. In either case such nolle prosequi may be viewed as a pardon.[1] But after a new trial a nolle prosequi is no bar.[2]

§ 1379. DISCHARGE FOR WANT OF PROSECUTION NOT A BAR. When a defendant is discharged from an indictment for want of prosecution, by virtue of the first section of the

or carried on against him for or on account of the said offense." On motion of the counsel for the traverser, the Circuit Court ordered a "stet" to be entered in the prosecution, and further proceedings therein to be stayed. On a writ of error from the judgment of the Circuit Court, it was held:

1st. That the discharge of the accused was an end and determination of the suit, and such a final judgment as might be reviewed on writ of error.

2d. That the traverser was not entitled to claim the benefit of the nolle prosequi, until he had paid the costs of the prosecution; until that condition was performed the writ was inoperative.

3d. That as the record did not show affirmatively that the costs had not been paid, and in the absence of any objection to the discharge of the accused on that account having been made in the circuit court, it will be presumed by the appellate court that the condition precedent, upon which the nolle prosequi was made to depend, was performed by the accused.—State v. Morgan, 33 Md. 44.

8 Supra, §§ 200, 292, et seq.

1 ME.—State v. Whittier, 21 Me. 341, 38 Am. Dec. 272; State v. Burke, 38 Me. 574. MASS.—Com. v. Briggs, 24 Mass. (7 Pick.) 177; Com. v. Tuck, 37 Mass. (20 Pick.) 356; Com. v. Jenks, 67 Mass. (1 Gray) 490. N. Y.—People v. Van Horne, 8 Barb. 158. TENN.—State v. Fleming, 26 Tenn. (7 Humph.) 152, 46 Am. Dec. 73. VT.—Roe v. State, 12 Vt. 93.

See, infra, §§ 1670-1672, 1846-1850.

Nolle prosequi after verdict and before judgment as to one or all of counts in indictment.—See State v. Bruce, 24 Me. 71; State v. Burke, 38 Me. 574; Rounds v. State, 78 Me. 42, 2 Atl. 673.

2 State v. Rust, 31 Kan. 509, 3 Pac. 428.

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.[1] It was intimated, however, by the Supreme Court, that if a defendant be "discharged" for want of prosecution upon an indictment, he can not be afterwards arraigned or tried under that indictment.[2] But such discharge, it was said, is no bar to a subsequent indictment for the same offense, or to the trial upon it; and a plea of such former indictment and discharge is bad upon demurrer.[3]

Under the Virginia statute a discharge based on arbitrary delays by the state operates as a bar;[4] and so under the Ohio statute.[5]

§ 1380. FOREIGN STATUTE OF LIMITATIONS MAY BAR. The general subject of the construction of limitation statutes has been already noticed.[1] An interesting question may arise as to the effect of a foreign statute of limitations in barring a crime in the forum deprehensionis. It may be enough here to say, that in cases of conflict, a liberal interpretation of the law, such as that heretofore vindicated, would require the interposition of the statute most favorable to the defendant. If by the lex delicti commissi the statute falls, he should not elsewhere be held responsible. But a foreign statute of limitations will not be regarded by our courts as affecting offenses distinctively within our jurisdiction.[2]

1 In re Begerow, 136 Cal. 293, 35 L. R. A. 528, 68 Pac. 773; State v. Garthwaite, 23 N. J. L. (3 Zab.) 143.

2 State v. Garthwaite, 23 N. J. L. (3 Zab.) 143.

3 Ibid. See, supra, § 379; Scrafford, In re, 21 Kan. 735.

Where 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.—Hurt v. State, 25 Miss. 378, 59 Am. Dec. 225.

4 Supra, § 379.

5 Ex parte McGehan, 22 Ohio St. 442; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; Johnson v. State, 42 Ohio St. 207.

1 Supra, §§ 367 et seq.

2 Supra, § 380.

§ 1381. FRAUDULENT PRIOR JUDGMENT NO BAR. We shall have hereafter occasion to see that a conviction fraudulently obtained by the prosecution will be set aside by the courts.[1] It has also been held that a former conviction or acquittal procured by the fraud of the defendant is no bar to a subsequent prosecution.[2] The fraud in such prior procedure must be plainly shown, as otherwise it will be a bar.[3] A mere resort to a fraudulent defense can not shake a verdict of acquittal thereby procured; nor can

1 Infra, § 1789.

2 ARK.—Bradley v. State, 32 Ark. 722. CONN.—State v. Brown, 16 Conn. 54; State v. Reed, 26 Conn. 202. GA.—State v. Johns, 7 Ga. 422. ILL.—Bulson v. People, 31 Ill. 409. IND.—State v. Davis, 4 Blackf. 345; Watkins v. State, 68 Ind. 427, 34 **Am. Rep.** 273; Halloran v. State, 80 Ind. 586. IOWA—State v. Green, 16 Iowa 239. MASS.—Com. v. Alderman, 4 Mass. 477; Com. v. Dascom, 111 Mass. 404. MINN.—State v. Simpson, 28 Minn. 66, 41 **Am. Rep.** 269, 9 N. W. 78. MO.—State v. Cole, 48 Mo. 70. N. H.—State v. Little, 1 N. H. 257. TENN.—State v. Atkinson, 28 Tenn. (9 Humph.) 677; State v. Colvin, 30 Tenn. (11 Humph.) 599, 54 **Am. Dec.** 58; State v. Lowry, 31 Tenn. (1 Swan.) 34; State v. Clenny, 38 Tenn. (1 Head) 270. WIS.—McFarland v. State, 68 Wis. 400, 60 **Am. Rep.** 867, 32 N. W. 226. ENG.—R. v. Furser, Say. 90, 96 Eng. Repr. 813; R. v. Duchess of Kingston, 2 How. St. Tr. 544, Strange Tr. 707.

In Massachusetts a plea of guilty to an assault, followed by a fine, when the prosecution was fraudulently got up by the defendant, has been held no bar.—Com. v. Dascom, 111 Mass. 404.

In Mississippi. See Bigham v. State, 59 Miss. 529.

In North Carolina it is said that an acquittal obtained by fraud may be contested only in cases of misdemeanor.—State v. Swepson, 79 N. C. 632.

In Texas, same rule as in Massachusetts. — Watson v. State, 5 Tex. App. 271.

In 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 offense, but in the meantime fraudulently procured himself to be indicted for the same offense 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.—Com. v. Jackson, 4 Va. (2 Va. Cas.) 501; and see State v. Colvin, 30 Tenn. (11 Humph.) 599, 54 **Am. Dec.** 58, 4 Am. Law Reg. 1.

3 State v. Casey, 44 N. C. (1 Busb. L.) 209. See Burdett v. State, 9 Tex. 43.

a conviction under which a full penalty has been imposed be treated as a nullity.[4] And even where the proceedings were fraudulently induced by the defendant himself, yet if he suffers on conviction the full penalty of the law, this is a bar.[5]

§ 1382. —— NOR PRIOR PENDING INDICTMENT. It has been ruled that though the defendant has pleaded to a former indictment for the same offense, the fact of the former indictment being still pending is no bar to a trial on the second.[1] The more accurate practice, however, is to quash or enter a nolle prosequi on the first indictment,[2] which action may be had at any time, and constitutes no bar to further proceedings on the subsequent bill.[3] As will hereafter be seen, a defective verdict does not bar further proceedings on the same indictment,[4] nor does

4 State v. Casey, 44 N. C. (1 Busb. L.) 209.

5 Com. v. Alderman, 4 Mass. 477; State v. Little, 1 N. H. 257; State v. Atkinson, 28 Tenn. (9 Humph.) 677.

See, infra, § 1388.

1 D. C.—United States v. Neverson, 1 Mack. 452. IND.—Dutton v. State, 5 Ind. 532; Hardin v. State, 22 Ind. 347. MASS.—Com. v. Drew, 57 Mass. (3 Cush.) 279; Com. v. Murphy, 65 Mass. (11 Cush.) 472; Com. v. Berry, 71 Mass. (5 Gray) 93; Com. v. Golding, 80 Mass. (14 Gray) 49; Com. v. Fraher, 126 Mass. 265. MISS.—Miazza v. State, 36 Miss. 614. MO.—State v. Webb, 74 Mo. 333; State v. Eaton, 75 Mo. 586, overruling State v. Smith, 71 Mo. 45; State v. Vincent, 91 Mo. 662, 4 S. W. 430. NEV.—State v. Lambert, 9 Nev. 321. N. Y.—People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501. N. C.—State v. Tisdale, 19 N. C. (2 Dev. & B. L.) 159; State v. Nixon, 78 N. C. 558; State v. Hastings, 86 N. C. 596. OHIO—O'Meara v. State, 17 Ohio St. 515. PA.—Smith v. Com., 14 W. N. C. 40. TEX.—Bailey v. State, 11 Tex. App. 140. VA.—Stewart v. Com., 69 Va. (28 Gratt.) 950. FED.—United States v. Herbert, 5 Cr. 87, Fed. Cas. No. 15354.

2 ALA.—Perkins v. State, 66 Ala. 457. KAN.—State v. McKinney, 31 Kan. 570, 3 Pac. 356. MO.—State v. Andrew, 76 Mo. 101. N. Y.—People v. Van Horne, 8 Barb. 160. TENN.—Clinton v. State, 65 Tenn. (6 Baxt.) 507.

See, supra, §§ 1301-1306, 1317.

As to practice under Alabama Code, see Coleman v. State, 71 Ala. 312.

3 Com. v. Gould, 78 Mass. (12 Gray) 171; R. v. Houston, 2 Cr. & D. 310.

4 Infra, § 1689.

the discharge of a jury from legal necessity.[5] It should be remembered that where two courts have concurrent jurisdiction, the court which first obtains possession of a case absorbs the jurisdiction,[6] and that no second jury can be empaneled in a case until the first is discharged.[7]

§ 1383. —— NOR DO PRIOR CIVIL PROCEEDINGS. According to a prevalent view in England, a person who, when injured by a felony committed by another, fails to prosecute such other person, can not proceed in a civil suit to recover damages for his injury. "The policy of the law requires that, before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offense."[1] To this the following qualifications were stated by Baggallay, L. J., in 1879:[2] "It appears to me that the following propositions are affirmed by the authorities, many of which, however, are dicta, or enunciations of principle, rather than decisions: (1) That a felonious act may give rise to a maintainable action; (2) That the cause of action arises upon the commission of the offense; (3) That, notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing the felon to justice; (4) That this rule has no application to cases in which the offender has been brought to justice at the instance of some other person injured by a similar offense, as in Fauntleroy's Case,[3] or in which prosecution

5 Infra, §§ 1445-1448.

6 Supra, § 1371.

7 People v. Dolan, 51 Mich. 610, 17 N. W. 78.

1 Ellenborough, C. J., Crosby v. Lang, 12 East 409, 413, 11 Rev. Rep. 437.

2 Ball, Ex parte, 40 L. T. N. S. 141, L. R. 10 Ch. D. 667, note 19 Am. Law. Reg. 48.

In Wells v. Abrahams, L. R. 7 Q. B. 554, it was held that the question could only arise when part of the plaintiff's case.

3 Stone v. Marsh, 6 Barn. & C. 551, 13 Eng. C. L. 252.

is impossible by reason of the death of the offender, or of his escape from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence; (5) That the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect the seeking of civil redress by action."[4]

To misdemeanors the objection has been held not to apply,[5] and in this country it has been doubted whether the rule holds good even as to felonies.[6] Even where the

4 Wellock v. Constantine, 2 H. & C. 146; and Elliott, Ex parte, 3 Mont. & A. 110, are cited by Bramwell, L. J., in the same case, as the only two cases "in which it (the rule) has operated to prevent the debt being enforced," and as to the latter of these cases he expresses doubts. See discussion of these cases in London Law Times for April 12, 1879.

5 Ibid.; Fissington v. Hutchinson, 15 L. T. R. N. S. 390.

6 Authorities are thus grouped by Walton, J., in Nowlan v. Griffin, 68 Me. 235, 28 Am. Rep. 45. Judge Walton says: "In Boody v. Keating, 4 Me. 164, and again in Cowell v. Merrick, 19 Me. 392, the court say that the rule, that a civil action in behalf of the party injured is suspended until a criminal prosecution has been commenced and disposed of, 'is limited to larcenies and robberies.' The same opinion had before been expressed in Boardman v. Gore, 15 Mass. 331, 336. In Boston & Worcester R. Co. v. Dana, 67 Mass. (1 Gray) 83, where the defendant had made himself comparatively rich by stealing from the railroad company, the question was fully examined, and the court held that, while it is undoubtedly the law in England that the civil remedy of the party injured by a felony is suspended till after the termination of a criminal prosecution against the offender, such had never been the law here. And such is the prevailing opinion in this country." Citing: CONN.—Cross v. Guthery, 2 Root 90, 1 Am. Dec. 61. IND.—Lofton v. Vogles, 17 Ind. 105. KY.—Ballew v. Alexander, 45 Ky. (6 B. Mon.) 38. MD.—Hepburn's Case, 3 Bland 114. MASS.—Boardman v. Gore, 15 Mass. 331, 338; Boston & W. R. Co. v. Dana, 67 Mass. (1 Gray) 83. N. H.—Pettingill v. Rideout, 6 N. H. 454, 25 Am. Dec. 473. N. J.—Patton v. Freeman, 1 N. J. L. (Coxe) 143. N. C.—White v. Fort, 10 N. C. (3 Hawks) 251. OHIO—Story v. Hammond, 4 Ohio 376; Hawk v. Minnick, 19 Ohio St. 462, 2 Am. Rep. 413. PA.—Piscat Bank v. Turnley, 1 Miles 312; Foster v. Com., 8 Watts & S. 77. VA.—Allison v. Farmers' Bank, 27 Va. (6 Rand.) 223.

To the same effect, Short v. Baker, 23 Ind. 555, 85 Am. Dec. 477; Quimby v. Blackey, 63 N. H. 77, affirming Hollis v. Davis, 56 N. H. 74, 85, and overruling Bank v. Flanders, 4 N. H. 239; Cannon v.

rule is maintained, it is held that it does not prevent the bringing suit; the principle being satisfied if the suit be brought, and be continued until the criminal prosecution terminates;[7] and the reason of the rule limits it in any way to cases in which the failure to bring the civil suit is imputable to the plaintiff's negligence or to his desire to compound the offense.

Supposing, therefore, a civil or quasi civil suit to be pending, whose object is to obtain compensation for an injury, it is no bar, either in felonies or misdemeanors, to a subsequent criminal prosecution for such injury as a public offense.[8]

It has also been held, that when the statute provides a penalty as well as fine and imprisonment for an offense, a judgment for the amount of the penalty does not bar a criminal prosecution to enforce the fine and imprison-

Barris, 1 Hill L. (S. C.) 372; Mitchell v. Mimms, 1 Tex. 8.

English distinction has been sustained at common law in Alabama: Martin v. Martin, 25 Ala. 201; Bell v. Troy, 35 Ala. 104. Also in Georgia: Neal v. Farmer, 9 Ga. 555. And in Maine: Crowell v. Merrick, 19 Me. 392; Belknap v. Milliken, 23 Me. 381. Aliter by statute, Nowlan v. Griffin, 68 Me. 235, 28 Am. Rep. 45.

In Connecticut the limitation is as to capital felonies: Cross v. Guthery, 2 Root (Conn.) 90, 1 Am. Dec. 61.

But the reason for the English rule, that the duty of prosecuting in felonies falls on the party injured, fails in this country where the responsibility is thrown on the prosecuting officer of the state.—See Drake v. Lowell, 54 Mass. (13 Met.) 292; Wheatley v. Thorn, 23 Miss. 62; Newell v. Cowan, 30 Miss. 492.

— **So in New York** by statute; Van Duzer v. Howe, 21 N. Y. 531; and in Arkansas: Brunson v. Martin, 17 Ark. 273.

Under U. S. Rev. St., § 3318, 3 Fed. Stats. Ann., 1st ed., p. 685, 4 Fed. Stats. Ann., 2nd ed. p. 71, a suit and judgment for the United States for the penalty of $100 does not bar a criminal prosecution. — See Lesynski, In re, 16 Blatch. 9, Fed. Cas. No. 8279.

7 Pettingill v. Rideout, 6 N. H. 454, 25 Am. Dec. 473.

8 CONN.—State v. Rowley, 12 Conn. 101. KY.—Chiles v. Drake, 59 Ky. (2 Metc.) 147, 74 Am. Dec. 406. MASS.—Com. v. Elliott, 2 Mass. 372. MISS.—State v. Blennerhasset, 1 Miss. (Walk.) 7. N. Y.—People v. Stevens, 13 Wend. 341; Beatchly v. Moser, 15 Wend. 215; Robinson v. Culp, 1 N. Y. 231. S. C.—Buckner v. Beek, 1 Dud. 168. ENG. — See Jones v. Clay, 1 Bos. & P. 191;

ment.[9] Nor is the case varied by the fact that there has been a settlement in the civil suit in favor of the prosecutor.[10] But in each line of procedure the courts will so mould trial and sentence as to prevent injustice from being done by undue cumulation of process.[11] And it has been held that a suit instituted by the government for a penalty for a particular act is barred by either an acquittal or a conviction on an indictment for the same offense.[12]

§ 1384. Civil suit a ground for nolle prosequi. How far a prior civil suit is cause for a nolle prosequi is elsewhere considered.[1]

Whether a case will be continued in consequence of the pendency of civil proceedings, is noticed hereafter.[2]

§ 1385. After conviction of minor, indictment is barred as to major. As we shall soon have occasion to see more fully,[1] when there has been a conviction of a minor offense, on an indictment for a major inclosing a minor, the defendant can not afterwards be put on trial for the major.

R. v. Rhodes, 2 Str. 703, 728, 93 Eng. Repr. 795, 811.

Compare: State v. Frost, 1 Brev. (S. C.) 385; State v. Blyth, 1 Bay (S. C.) 166.

9 Lesynski, In re, 16 Blatchf. 9, Fed. Cas. No. 8279; citing United States v. Claflin, 25 Int. Rev. Rec. 465.

Compare: Com. v. Howard, 13 Mass. 222; Com. v. Murphy, 68 Mass. (2 Gray) 514.

See 2 Hawk. P. C., ch. 26, § 63.

10 Fagnan v. Knox, 66 N. Y. 526, 1 Abb. N. C. 246.

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. Supra, § 1377.

11 1 Kerr's Whart. Crim. Law, § 45.

12 Coffey v. United States, 116 U. S. 436, 29 L. Ed. 684, 6 Sup. Ct. 437; United States v. McKee, 4 Dill. 128, Fed. Cas. No. 15688.

1 Supra, § 1377.

2 Infra, § 1534.

1 Infra, §§ 1396, 1845, and cases there cited.

§ 1386. SPECIFIC PENALTY INFLICTED BY SOVEREIGN MAY BE EXCLUSIVE. A sovereign may impose a specific penalty on a particular offense, and when this is done, such penalty may be exclusive. Thus, in Jefferson Davis' case, Chief Justice Chase held that on persons subjected to the penalties imposed in the fourteenth section of the federal constitution no further punishment could be inflicted, and that on this ground the indictment should be quashed.[1] On the other hand, unless the statutory penalty imposed on a common-law offense is on its face exclusive, and is in the nature of a police imposition, then, even after submission to such penalty, the defendant can be indicted for the offense at common law.[2]

2. *As to Former Indictment.*

§ 1387. IF FORMER INDICTMENT COULD HAVE SUSTAINED A VERDICT THE JUDGMENT IS A BAR. If the defendant could have been legally convicted on the first indictment upon proof of the facts claimed to constitute the offense, his acquittal (or conviction) on that indictment may be successfully pleaded to a second indictment for the same offense;[1] and it is immaterial whether the proper evidence were adduced at the trial of the first indictment or not.[2] In other words, where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, and where the offenses are substantially the same, the plea is

[1] United States v. Davis, Chase Dec. 1, 24, 3 Am. L. Rev. 368, Fed. Cas. No. 3621a.

[2] 1 Kerr's Whart. Crim. Law, § 24.

[1] See Goode v. State, 70 Ga. 752; State v. Stewart, 11 Ore. 52, 4 Pac. 128; Hirshfield v. State, 11 Tex. App. 207.

[2] Com. v. Clair, 89 Mass. (7 Allen) 525; Mitchell v. State, 42 Ohio St. 383; Heikes v. Com., 26 Pa. St. 513; Com. v. Trimmer, 84 Pa. St. 65; R. v. Clark, 1 Brod. & B. 473, 5 Eng. C. L. 748; R. v. Sheen, 2 Carr. & P. 634, 12 Eng. C. L. 776; R. v. Emden, 9 East 437; R. v. Vandercomb, 2 Leach C. C. 708; and cases cited infra, §§ 1396, 1407.

generally good,[3] but not otherwise.[4] 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 have supported a conviction on the first. Where the doctrine of merger obtains, the evidence of the consummated felony would have secured an acquittal on the first indictment, and such acquittal would be 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.[5] On the other hand, where the doctrine of merger is not held, the prior judgment bars; since, as the defendant in such case could have been convicted of the assault on evidence of the felony, the felony can not be prosecuted after acquittal of the assault.[6] When, however, as will hereafter be more fully

3 Infra, § 1407, and cases there cited; Jervis' Archbold, 82; Keller 58; 1 Leach 448. See, also: GA.—Holt v. State, 38 Ga. 187. ILL.—Gerard v. People, 4 Ill. (3 Scam.) 363; Guedel v. People, 43 Ill. 226. IOWA—State v. Gleason, 56 Iowa 203, 9 N. W. 126. KAN.—State v. Kuhuke, 30 Kan. 462, 2 Pac. 689. MD.—State v. Reed, 12 Md. 263. MASS.—Com. v. Cunningham, 13 Mass. 245; Com. v. Wade, 34 Mass. (17 Pick.) 395; Com. v. Tenney, 97 Mass. 50; Com. v. Hoffman, 121 Mass. 369. N. C.—State v. Birmingham, 44 N. C. (Busb.) 120. OHIO—Price v. State, 19 Ohio 423. PA.—Com. v. Trimmer, 84 Pa. St. 65. S. C.—State v. Ray, 1 Rice L. 1, 33 Am. Dec. 90; State v. Risher, 1 Rich. L. 219; State v. Shiver, 20 S. C. 293. TENN.—State v. Ellison, 72 Tenn. (4 Lea) 229. TEX.—McElmurray v. State, 21 Tex. App. 691, 2 S. W. 892. WIS. — State v. Moon, 41 Wis. 684. ENG.—R. v. Emden, 9 East 437; R. v. O'Brien, 46 L. J. 177.

4 CAL.—People v. Clark, 67 Cal. 99, 7 Pac. 178. IND.—Brewer v. State, 59 Ind. 101. LA.—State v. Helveston, 38 La. Ann. 314. TENN. —State v. Ross, 72 Tenn. (4 Lea) 442. TEX.—Whitford v. State, 24 Tex. App. 489, 5 Am. St. Rep. 896, 6 S. W. 537. VA.—Justice v. Com., 81 Va. 209.

5 CAL.—People v. Schmidt, 64 Cal. 260, 30 Pac. 814. ME.—State v. Murray, 15 Me. 100. MASS.—Com. v. Kingsbury, 5 Mass. 106. N. Y.—People v. Mather, 4 Wend. 265. PA.—Com. v. Parr, 5 Watts & S. 345.

See, infra, §§ 1395, 1396-1398.

6 See, infra, §§ 1396, 1397.

seen, a new fact supervenes after the first prosecution, which fact materially changes the character of the offense, then the defendant may be prosecuted for the offense thus evolved.[7]

§ 1388. JUDGMENT ON DEFECTIVE INDICTMENT NO BAR. A conviction under a defective indictment is no bar, unless the conviction has been followed by judgment and execution of the sentence.[1] Hence, after judgment has been arrested or reversed on a defective indictment, or after an indictment has been quashed, or a judgment for the defendant has been entered on demurrer,[2] a new indictment may be found, correcting the defects in the prior indictment, and to the second indictment the proceedings under the first are no bar.[3] But an erroneous acquittal

7 Nicholas' Case, Fost. Cr. L. 64, and cases cited, infra, § 1412.

1 Infra, § 1444. IND.—Fritz v. State, 40 Ind. 18. ME.—State v. Hays, 78 Me. 603. MASS.—Com. v. Loud, 44 Mass. (3 Metc.) 328, 37 Am. Dec. 139; Com. v. Keith, 49 Mass. (8 Metc.) 531. MO.—State v. Owen, 78 Mo. 367. N. Y.—Croft v. People, 15 Hun 484. FED.—United States v. Jones, 31 Fed. 725.

2 Supra, § 1332.

As to California practice on judgment on demurrer, see People v. Jordan, 63 Cal. 217; People v. Giesea, 63 Cal. 315.

3 Infra, § 1444. ALA.—State v. Phil., 1 Stew. 31; Cobia v. State, 16 Ala. 781; Turner v. State, 40 Ala. 21; Jeffries v. State, 40 Ala. 381; Robinson v. State, 52 Ala. 587. ARK.—State v. Gill, 33 Ark. 129. GA.—Oneil v. State, 48 Ga. 66. ILL.—Guedel v. People, 43 Ill. 226. IND.—State v. Elder, 65 Ind. 282, 32 Am. Rep. 69. IOWA—State v. Knouse, 33 Iowa 365. LA.—State v. Owens, 28 La. Ann. 5. MD.—Cochrane v. State, 6 Md. 400. MASS.—Com. v. Fischblatt, 45 Mass. (4 Metc.) 354; Com. v. Gould, 73 Mass. (12 Gray) 171; Com. v. Chesley, 107 Mass. 223. NEB.—State v. Priehnow, 16 Neb. 131, 19 N. W. 628. N. Y.—People v. Casborus, 13 Johns. 351; People v. McKay, 18 Johns. 212. OHIO—Sutcliff v. State, 18 Ohio 469, 51 Am. Dec. 459. PA.—Com. v. Zepp, 5 Pa. L. J. 256. S. C.—State v. Ray, 1 Rice 1, 33 Am. Dec. 90. TEX.—Simco v. State, 9 Tex. App. 338; Grisham v. State, 19 Tex. App. 504. VA.—Allen v. Com., 29 Va. (2 Leigh) 727; Page v. Com., 36 Va. (9 Leigh) 683; Com. v. Hatton, 44 Va. (3 Gratt.) 623. ENG.—Campbell v. R., 11 Ad. S. E. N. S. (11 Q. B.) 799, 63 Eng. C. L. 799; Wrihtpole's Case, Cro. Car. 147; R. v. Houston, 2 Craw. & D. 310; R. v. Wildey, 1 Maule & S. 183; R. v. Drury, 3 Cox C. C. 544.

A prior indictment, quashed after conviction and motion for

(if not fraudulent) is conclusive so that the defendant can not be retried for any offense of which he could have been convicted under the indictment on which there was an acquittal.[4]

It is otherwise when the acquittal is on an indictment which is so inadequate or defective that under it the offense charged in the second indictment could not have been legally proved.[5] The same rule is held to apply to a new trial on defendant's application.[6]

As we have seen, a defective arrest of judgment on a good indictment is a bar in all cases where the state could have obtained a reversal of the arrest; since there is still pending against the defendant a good indictment, on which he has been put in jeopardy.[7]

new trial on it, is no bar to a subsequent indictment for the same offense.—State v. Clark, 32 Ark. 231. Supra, § 1376.

As to demurrers, see supra, § 1332.

4 2 Inst. 318; 2 Hale 274. CONN. —State v. Brown, 16 Conn. 54. GA. —Black v. State, 36 Ga. 447, 91 Am. Dec. 772. IND.—State v. Dark, 8 Blackf. 526. N. Y.—People v. Maher, 4 Wend. 229, 21 Am. Dec. 122. N. C.—State v. Taylor, 8 N. C. (1 Hawks) 462. TENN.—State v. Norvell, 10 Tenn. (2 Yerg.) 24, 24 Am. Dec. 458; Slaughter v. State, 25 Tenn. (6 Humph.) 410. VT.—State v. Kittle, 2 Tyl. 471. ENG.—R. v. Praed, 4 Burr. 2257, 98 Eng. Repr. 177; R. v. Sutton, 5 Barn. & Ad. 52, 27 Eng. C. L. 32; R. v. Mann, 4 Moo. & S. 337.

See, supra, § 1383.

5 ALA.—Waller v. State, 40 Ala. 325 (see, however, Berry v. State, 65 Ala. 117). CAL.—People v. Clark, 67 Cal. 99, 7 Pac. 178. GA. —Whitley v. State, 38 Ga. 50; Black v. State, 36 Ga. 447, 91 Am. Dec. 772. KY.—Mount v. Com., 63 Ky. (2 Duv.) 93. MASS.—Com. v. Clair, 89 Mass. (7 Allen) 525. MISS.—State v. McGraw, 1 Miss. (Walker) 208; Munford v. State, 39 Miss. 558. N. Y.—People v. Barrett, 1 Johns. 66. S. C.—State v. Ray, 1 Rice 1, 33 Am. Dec. 90. VA.—Com. v. Somerville, 3 Va. (1 Va. Cas.) 164, 5 Am. Dec. 514. ENG.—Vaux's Case, 4 Coke 44a, 76 Eng. Repr. 992.

Former conviction of petit larceny may be no bar to indictment for grand larceny.—See Good v. State, 61 Ind. 69.

6 Lawrence v. People, 2 Ill. (1 Scam.) 414; State v. Redman, 17 Iowa 329; State v. Walters, 16 La. Ann. 400.

See, infra, § 1455.

7 Supra, §§ 1331, 1365; State v. Norvell, 10 Tenn. (2 Yerg.) 24, 24 Am. Dec. 458.

§ 1389. —— Same test applies to acquittal as principal or accessary. Whether an acquittal as principal bars an indictment as accessary depends upon the question whether an accessary can be convicted on an indictment charging him as principal. That he can not, was the common-law doctrine;[1] and where this is the law, an acquittal as principal is no bar to an indictment as accessary.[2] And on the same reasoning an acquittal as accessary is no bar, in felonies, to an indictment as principal.[3] It is otherwise under recent codes in which accessaries may be indicted as principals.

§ 1390. Acquittal on one count does not affect other counts; but otherwise as a conviction. Where the counts are for distinct offenses, a defendant who has been acquitted upon one of several counts 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. It is otherwise when the variation between the counts is merely formal.[1] When there is a conviction on one count, and no verdict as to the others, a nolle prosequi may be entered as to the others, or the court may regard the action as an acquittal on such counts.[2]

§ 1391. Acquittal from misnomer of misdescription no bar. An acquittal from misnomer or misdescription is no bar.[1] Thus, an acquittal upon an indictment in a wrong county can not be pleaded to a subsequent indictment for

[1] Kerr's Whart. Crim. Law, §§ 278-285.

[2] Supra, §§ 288-294; 1 Kerr's Whart. Crim. Law, §§ 278-285; 2 Hale 244; Fost. 361; 2 Hawk. c. 35, s. 11. See, also, State v. Larkin, 49 N. H. 36, 6 Am. Rep. 456; State v. Buzzell, 58 N. H. 257, 42 Am. Rep. 586; State v. Buzzell, 59 N. H. 65; Morrow v. State, 82 Tenn. (14 Lea) 475; R. v. Plant, 7 Car. & P. 575, 32 Eng. C. L. 766.

[3] Ibid.; Reynolds v. People, 83 Ill. 479, 25 Am. Rep. 410.

[1] See, infra, § 1836.

[2] Logg v. People, 8 Ill. App. 99; Bonnell v. State, 64 Ind. 498.

See, infra, § 1836.

[1] See State v. Sherrill, 82 N. C. 694.

the offense in another county.[2] And, as a general rule, an acquittal on a former indictment on account of a variance between pleading and proof, is no bar.[3] So an acquittal for an attempt to pass a counterfeit note to A. at one time does not bar an indictment for an attempt to pass

[2] Vaux's Case, 4 Co. 45a, 46b, 76 Eng. Repr. 992; Com. Dig. Indictment, 1; Methard v. State, 19 Ohio St. 363.

[3] ALA.—Martha v. State, 26 Ala. 72. ARK.—McCoy v. State, 46 Ark. 141. IND.—State v. Elder, 65 Ind. 282, 32 Am. Rep. 69. KY.—But see Williams v. Com., 78 Ky. 93; Com. v. Bright, 78 Ky. 238. LA.—State v. Vines, 34 La. Ann. 1079. MASS.—Com. v. Sutherland, 109 Mass. 342. N. H.—State v. Sias, 17 N. H. 558. N. C.—State v. Williams, 94 N. C. 891. PA.—Com. v. Trimmer, 84 Pa. St. 65. VA.—Burres v. Com., 68 Va. (27 Gratt.) 934; Robinson v. Com., 73 Va. (32 Gratt.) 866. ENG.—R. v. Green, Dears. & B. 113; R. v. O'Brien, 46 L. T. 177.

Acquittal of assault with a deadly weapon with intent to rob, no bar to a prosecution charging robbery in taking money from the party by force and against his will.—State v. Caddy, 15 S. D. 167, 91 Am. St. Rep. 666, 87 N. W. 927.

Acquittal on charge of assault and battery no bar to a prosecution for disturbing the peace.—Wilcox v. United States, 7 Ind. Ter. 86, 13 S. W. 774.

Acquittal on charge of malicious destruction of property in destroying a casket in which a corpse was buried, no bar to prosecution for illegal disinterment of the body enclosed in such casket.—State v. Magone, 33 Ore. 570, 56 Pac. 684.

Acquittal on charge of murder of a named person no bar to a prosecution charging robbery of such person at the same time.—Warren v. State, 79 Neb. 526, 113 N. W. 142.

Acquittal on charge of permitting person to enter saloon at prohibited hours, a bar to prosecution for allowing another person to enter saloon at a prohibited hour, when second person is claimed to have accompanied the first, and entered at the same time with him.—State v. Rosenbaum, 23 Ind. App. 236, 77 Am. St. Rep. 432, 55 N. E. 170.

Acquittal on charge of selling liquor to a minor no bar to a prosecution charging selling liquor without a license.—State v. Gapen, 17 Ind. App. 524, 47 N. E. 25.

Conviction on charge of carrying a deadly weapon, no bar to a prosecution for violating the statute against drawing or threatening to use such weapon.—Davidson v. State, 99 Ind. 366.

Conviction on charge of keeping gambling room in violation of an ordinance, no bar to a prosecution under statute charging the same offense.—De Haven v. State, 2 Ind. App. 376, 28 N. E. 562.

Killing two persons by same act accused can not plead a conviction of the killing of one as a bar to a prosecution for killing the other.—People v. Majors, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597.

it to B. at another time.[4] But a conviction, followed by an endurance of punishment, will bar a future prosecution for the same offense.[5]

[4] Burks v. State, 24 Tex. App. 326, 6 S. W. 300.

[5] Fritz v. State, 40 Ind. 18; see Com. v. Loud, 44 Mass. (3 Metc.) 328, 37 Am. Dec. 140; Com. v. Keith, 49 Mass. (8 Metc.) 531.

See, supra, § 1373.

In case where 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 can not plead autrefois acquit.—Com. v. Mortimer, 4 Va. (2 Va. Cas.) 325; 2 Hale 247. Supra, § 1387.

Where defendant was formerly indicted for forging a will, which was set out in the indictment thus: "I, John Styles," etc., and was acquitted for variance, the will given in evidence commencing "John Styles," without the "I," it was ruled that he could not plead this acquittal in bar of another indictment, reciting the will correctly, "John Styles," etc.—R. v. Cogan, 1 Leach C. C. 448.

It is otherwise when the defendant could have been convicted on the first indictment.—Durham v. People, 5 Ill. (4 Scam.) 172, 39 Am. Dec. 407; Fritz v. State, 40 Ind. 18; Com. v. Loud, 44 Mass. (3 Metc.) 328, 37 Am. Dec. 140; Com. v. Keith, 49 Mass. (8 Metc.) 531.

Additional illustrations may be here given:

The defendant was charged with having stolen 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.—Hite v. State, 17 Tenn. (9 Yerg.) 357.

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. — State v. Risher, 1 Rich. L. (S. C.) 219. See, also, United States v. Book, 2 Cr. L. 294, Fed. Cas. No. 14624.

In an English case bearing on the same point, the evidence was that the prisoner stole the goods of J. B. from his stall, which at the time was in charge of R. B., his son, a child of fourteen, who lived with his father, and worked for him. The first indictment against him for stealing the goods described them as the property of R. B. The sessions thinking this a wrong description directed an acquittal, and caused a new bill to

§ 1392. —— NOR IS ACQUITTAL FROM VARIANCE AS TO INTENT. When a particular intention is essential to the proof of the case, an acquittal from a variance as to such

be sent up laying the property in J. B. To this indictment he pleaded autrefois acquit. It was held that the plea could not be sustained, for the prisoner could not, on the evidence, have been convicted on the first indictment, charging the property as that of R. B., and that the court could only look at the first indictment, as it stood, without considering whether the allegation as to the ownership of the goods might not have been amended so as to have warranted a conviction. — R. v. Green, Dears. & B. C. C. 113; 2 Jur. N. S. 1146; 26 L. J. M. C. 17; 7 Cox C. C. 186.

An acquittal of arson 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.—Com. v. Wade, 34 Mass. (17 Pick.) 395.

An acquittal on a charge of embezzling cloth and other materials of which overcoats are made is no defense to an indictment for embezzling overcoats, although the same facts which were proved on the trial of the first indictment are relied upon in support of the second.—Com. v. Clair, 89 Mass. (7 Allen) 525.

The court: "The obvious and decisive answer to the defendant's plea in bar of autrefois acquit is, that the first indictment charges a different offense from that set out in the indictment on which the defendant is now held to answer. The principle of law is well settled, that, in order to support a plea of autrefois acquit, the offense charged in the two indictments must be identical. The test of this identity is, to ascertain whether the defendant might have been convicted on the first indictment by proof of the facts alleged in the second."

An acquittal upon one indictment for receiving stolen goods is no bar to the prosecution of the same defendant upon another, without further proof of the identity of the offenses than that the goods described in the second indictment are such that the averments of the first indictment might describe them.—Com. v. Sutherland, 109 Mass. 342.

A trial and acquittal on an indictment for stealing a particular article misnamed is no bar to a subsequent prosecution for stealing such article correctly described.—Com. v. Clair, 89 Mass. (7 Allen) 525; State v. McGraw, 1 Miss. (Walker) 208.

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.—R. v. Champneys, 2 Man. & R. 26.

What misnomers are variance is considered more fully in another work.—1 Whart. Crim. Ev. (Hilton's ed.), §§ 94 et seq.

In Virginia, by statute, "a per-

intention is no bar to a second indictment stating the intention accurately.[1]

§ 1393. —— OTHERWISE AS TO VARIANCE AS TO TIME. The variance as to time, between the two indictments, must be in matter of substance to defeat the plea. If the difference be in a point immaterial to be proved, the acquittal on the first is a bar to the second. 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 an act which could not be twice committed.[1] 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.[2]

§ 1394. ACQUITTAL ON JOINT INDICTMENT A BAR IF DEFENDANT COULD HAVE BEEN LEGALLY CONVICTED. When several are jointly indicted for an offense which may be joint or several, and all are acquitted, no one can again be indicted separately for the same offense, since on the

son acquitted of an offense, on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the force or substance thereof, may be arraigned again on a new indictment, or other proper accusation, and tried and convicted for the same offense, notwithstanding such former acquittal." — Code, 1860, ch. 199, § 16, p. 814; Robinson v. Com., 73 Va. (32 Gratt.) 866.

1 State v. Hattabaugh, 66 Ind. 223; State v. Jesse, 20 N. C. (3 Dev. & B. L.) 98; State v. Birmingham, 44 N. C. (1 Busb.) 120.

See 1 Whart. Crim. Ev. (Hilton's ed.), § 125.

1 2 Hale 179, 244; 2 Hawk. 35.

2 Ibid.

On an indictment for keeping a gaming-house, tempore G. 4, the defendant pleaded that at the sessions, 4 G. 4, he was indicted for keeping a gaming-house on the 8th of January, 47 Geo. 3, and on divers other days and times between that day and the taking of the inquisition against the peace

former trial any one might have been convicted, and the others acquitted.[1] Where, however, the former joint indictment is erroneous, for joining persons for an offense which could not be committed jointly, as for perjury, an acquittal thereon will be no bar to a subsequent prosecution against each.[2] An acquittal of one defendant in an offense which is necessarily joint,—e. g., adultery,—acquits the other.[3]

§ 1395. Acquittal from merger at common law no bar. It has been often held in this country, that where, on an indictment for an assault, attempt, or conspiracy, with intent to commit a felony, it appears that the felony was actually consummated, it is the duty of the court to charge the jury that the misdemeanor merges, and that the defendant must be acquitted. It used to be supposed that at common law, whenever a lesser offense 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. The reason for this is the old common law rule that a defendant charged with misdemeanor is entitled to greater privileges as to counsel and to a copy of the indictment than would a defendant charged with felony.[1] Even where this distinction has ceased, the

of our lord the said king, with an averment that the offense in both indictments was the same; it was holden no bar, because the contra pacem tied the prosecutor to proof of an offense in the reign of Geo. 3, the only king named in that indictment.—R. v. Taylor, 3 Barn. & C. 502, 10 Eng. C. L. 502, 612.

1 R. v. Parry, 7 Carr. & P. 836, 32 Eng. C. L. 898; R. v. Dann, 1 Moo. C. C. 424.

See, infra, § 1419.

2 See Com. v. McChord, 32 Ky. (2 Dana) 244. Supra, § 364.

3 Supra, §§ 351, 366; State v. Bain, 112 Ind. 335, 14 N. E. 232.

1 See 1 Kerr's Whart. Crim. Law, §§ 39, 521, 748; 2 id. 1608; Hawk., b. 2, ch. 47, § 6; 1 Chitty Cr. L. 251, 639; R. v. Walker, 6 Carr. & P. 657, 25 Eng. C. L. 624; R. v. Eaton, 8 Carr. & P. 417, 34 Eng. C. L. 812; R. v. Cross, 1 Ld. Ray. 711, 91 Eng. Repr. 1374, 3 Salk. 193, 91 Eng. Repr. 772; R. v. Woodhall, 12 Cox C. C. 240.

courts of several states[2] have held that at common law where a felony is proved, the defendant is to be acquitted of the constituent misdemeanor, and though the notion has been sturdily resisted elsewhere,[3] 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; an acquittal being ordered in the first case because there was doubt as to the misdemeanor, and in the second because there was doubt as to the felony. 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, is no longer in force; that the statutory misdemeanor of violating a young child does not merge in rape;[4] nor a common law conspiracy to commit a larceny, in the consummated felony.[5] It has also been provided by statute

Compare: R. v. Carradice, Rus. & R. 205.

2 IND.—Wright v. State, 5 Ind. 527. IOWA—State v. Lewis, 48 Iowa 578, 30 **Am. Rep.** 407. KY.—Com. v. Blackburn, 62 Ky. (1 Duv.) 4. ME.—State v. Murray, 15 Me. 100. MD.—Black v. State, 2 Md. 376. MASS.—Com. v. Kingsbury, 5 Mass. 106; Com. v. Newell, 7 Mass. 245; Com. v. Roby, 29 Mass. (12 Pick.) 496. MICH.—People v. Richards, 1 Mich. 216. N. J.—Johnson v. State, 26 N. J. L. (2 Dutch) 313. N. Y. — People v. Mather, 4 Wend. 265, 21 **Am. Dec.** 122. N. C.—State v. Durham, 72 N. C. 447. PA.—Com. v. Parr, 5 Watts & S. 345; Com. v. McGowan, 2 Pars. 341.

Compare comments in § 1387.

3 ARK. — Cameron v. State, 13 Ark. 712. CONN.—State v. Shepard, 7 Conn. 54. MD. — State v. Sutton, 4 Gill 494. MICH.—Hanna v. People, 19 Mich. 316. MISS.—Laura v. State, 26 Miss. 174. N. Y.—Lohman v. People, 1 N. Y. 379; People v. White, 22 Wend. 175. OHIO—Hess v. State, 5 Ohio 5, 22 **Am. Dec.** 767; Stewart v. State, 5 Ohio 241. S. C.—State v. Taylor, 2 Bail. L. 49; People v. Jackson, 3 Hill L. 92. VT.—State v. Scott, 24 Vt. 127. VA.—Canada v. Com., 63 Va. (22 Gratt.) 899.

4 R. v. Neale, 1 Den. C. C. 36 See Siebert v. State, 95 Ind. 471; State v. Ellis, 74 Mo. 207; State v. Woolaver, 77 Mo. 103.

5 Com. v. Andrews, 132 Mass. 263; R. v. Button, 11 Ad. & El. N. S. (11 Q. B.) 929, 63 Eng. C. L. 927; R. v. Evans, 5 Carr. & P. 553, 24 Eng. C. L. 704; R. v. Anderson, 2 Man. & R. 469.

Bearing of the cases on question of autrefois acquit is thus stated by Lord Denman, C. J., in R. v. Button, 11 Ad. & E. N. S. (11 Q. B.)

that on an indictment for felony the defendant can be convicted of any constituent misdemeanor duly pleaded.[6] Similar statutes have been enacted in most jurisdictions in this country, and in others the rule is adopted as at common law.[7] These statutes, however, do not apply to cases where the offenses are distinct, but only to those where one offense is an ingredient of another;[8] nor can it

929, at p. 946, 63 Eng. C. L. 927, 945: "The same act may be part of several offenses; 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."

6 Infra, § 1675.

7 Com. v. Dean, 108 Mass. 347, 349, 11 Am. Rep. 357, citing Com. v. Bakeman, 105 Mass. 53; Morey v. Com., 108 Mass. 433; People v. Arnold, 46 Mich. 268, 9 N. W. 406.

In New York, by the penal code of 1882, § 685, an attempt does not merge in a consummated crime.

8 R. v. Shott, 3 Carr. & K. 206; R. v. Simpson, 3 Carr. & K. 207.

In other words, the prosecution can say, "We relieve the defendant from the aggravations of the charge, and try him only on one minor offense contained in the indictment"; but it can not say, "We will charge him with one offense and try him for another essentially different."

As to whether incest merges in rape, see 3 Kerr's Whart. Crim. Law, § 2097. See, generally, infra, § 1398; 1 Kerr's Whart. Crim. Law, §§ 33-38, 748. See, more fully, 1 Kerr's Whart. Crim. Law, § 748; 2 id. 1608.

In Pennsylvania, by the Revised Act of 1860, persons tried for misdemeanor are not to be acquitted if the offense turn out to be felony.

Similar statute exists in other states: Prindeville v. People, 42 Ill. 217; Com. v. Squires, 42 Mass. (1 Metc.) 258.

The Michigan statute, providing that no person shall be acquitted of a misdemeanor because the proofs show a felony, can not apply to a statutory offense where the misdemeanor could not be included in any felony, and where the offense proved would be inconsistent with that charged, instead of being an aggravation of it.—People v. Chappell, 27 Mich. 486.

Otherwise when the misdemeanor is part of the felony.—People v. Arnold, 46 Mich. 268, 9 N. W. 406.

Two were indicted in England for having on the 10th November, 1849, assaulted P. They pleaded autrefois acquit, and in their plea set out an indictment for murder, the third count of which alleged that they had murdered the deceased, by beatings on the 5th November and 1st December, 1849,

be maintained under the statutes that a defendant is to be convicted on proof showing him to be guilty of an offense materially different from that charged.

It is conceded on both sides that a felony of low grade does not merge in a felony of higher;[9] nor does a misdemeanor merge in a misdemeanor.[10] 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.[11]

§ 1396. Where an indictment contains a minor offense inclosed in a major, a conviction or acquittal of minor bars major. Most indictable offenses comprise two

and 1st January, 1850, and on divers other days between the 5th November and 1st January; and the plea averred that the assaults charged in the second indictment were identically the same as those of which they had been acquitted on the trial of the first. The replication was that the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the indictment. On the first trial the counsel for the crown had stated the assaults as conducing to the death, and had given them in evidence to sustain the charge of murder. It was proved, however, that the cause of death was a blow inflicted shortly before the death of the deceased, which occurred on the 4th January, but there was no evidence to show by whom the blow was struck, and the prisoners were acquitted. The judge, on the second trial, told the jury that if they were satisfied that there were several distinct and independent assaults, some or any one of which did not in any way conduce to the death of the deceased, it would be their duty to find the prisoners guilty. The jury found the prisoners guilty. It was held that the conviction was right, as the prisoners could not, on the trial for murder, have been convicted, under 7 Will. 4 & 1 Vict., ch. 83, § 11, of the assaults for which they were indicted on the second trial. —R. v. Bird, T. & M. 437; 2 Den. C. C. 94; 5 Cox C. C. 11; 2 Eng. L. & Eq. 448.

9 Barnett v. People, 54 Ill. 325; Bonsall v. State, 35 Ind. 460; Com. v. McPike, 57 Mass. (3 Cush.) 181, 50 Am. Dec. 727; People v. Bristol, 23 Mich. 118; People v. Smith, 57 Barb. (N. Y.) 46.

10 See State v. Damon, 2 Tyl. (Vt.) 387.

11 People v. Carmichael, 5 Mich. 10, 71 Am. Dec. 769; People v. Adwards, 5 Mich. 22.

See 1 Kerr's Whart. Crim. Law, §§ 155, 156.

or more grades, of any one of which, either at common law or by statute, a jury may convict.[1] Under an indictment for murder, for instance, a defendant may be convicted of murder in the second degree, of manslaughter, and, in some jurisdictions, of assault and battery. Under an indictment for burglary containing an averment of larceny he may be convicted of larceny.[2] Under an indictment for assault with intent, he may be convicted of a simple assault.[3] Under an indictment for the consummated offense, he may, in several states, be convicted of the attempt. It becomes, therefore, a question of interest to determine how far a conviction or an acquittal on an indictment for an offense comprising several stages affects a subsequent charge for one of these stages. The answer is, that if there could have been a conviction on the first indictment of the offense prosecuted under the second, then the conviction or acquittal under the first indictment bars the second. Where on the first trial the conviction or acquittal is of the minor offense, this rule has been frequently recognized.[4] Thus, where under an

1 1 Kerr's Whart. Crim. Law, §§ 33-38.

2 Infra, §§ 1675, 1726; Com. v. Prewitt, 82 Ky. 240. See Munson v. State, 21 Tex. App. 329, 17 S. W. 251.

3 Supra, § 323.

4 Infra, §§ 1675, 1726, 1873; supra, § 293. ALA.—Bell v. State, 48 Ala. 184. ARK.—Cameron v. State, 13 Ark. 712. KY.—Conner v. Com., 76 Ky. (13 Bush) 714. LA.—State v. Delaney, 28 La. Ann. 434; State v. Byrd, 31 La. Ann. 419; State v. Dennison, 31 La. Ann. 847. ME.—State v. Waters, 39 Me. 54; State v. Dearborn, 54 Me. 442. MASS.—Com. v. Griffin, 38 Mass. (21 Pick.) 523. MISS.—Swinney v. State, 16 Miss. (8 Smed. & M.) 576. MO.—State v. Ross, 29 Mo. 32; State v. Smith, 53 Mo. 139; State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643; State v. Pitts, 57 Mo. 85. OHIO—Stewart v. State, 5 Ohio 242. ORE.—State v. Taylor, 3 Ore. 10. TENN.—State v. Chaffin, 32 Tenn. (2 Swan) 493. TEX.—Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; Grisham v. State, 19 Tex. 504. VA.—Livingston v. Com., 55 Va. (14 Gratt.) 592; Com. v. Stuart, 69 Va. (28 Gratt.) 950. ENG.—R. v. Bird, Temp. & M. 437; 3 Den. C. C. 94, 5 Cox C. C. 11; R. v. Oliver, 8 Cox C. C. 384; R. v. Yeadon, 9 Cox C. C. 91.

Acquittal of higher degree bars trial for lower degree (dis. op.).—Cornelius v. State, 54 Tex. Cr. 173, 112 S. W. 1050.

indictment for murder the defendant could have been convicted of murder or of manslaughter, then his conviction of manslaughter bars after a new trial a subsequent prosecution for the murder.[5] On the same reasoning a

Conviction on one count of indictment, verdict being silent as to the other counts, is an acquittal on all other counts. — State v. Leavitt, 87 Me. 721, 32 Atl. 787.

Guilty on one of two counts found by jury, on reversal accused can not be tried on the other count. — Logg v. People, 8 Ill. App. 99.

By New York Penal Code of 1882, § 36, the position in the text is affirmed.

5 Infra, §§ 1726, 1873; 2 Hale 246; Fost. 329. See, also: ALA.—Bell v. State, 48 Ala. 685; De Armand v. State, 71 Ala. 351; Sylvester v. State, 72 Ala. 201. CAL.—People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620; People v. Smith, 134 Cal. 453, 66 Pac. 669. GA.—Jordan v. State, 22 Ga. 545; Miller v. State, 58 Ga. 200. ILL.—Brennon v. People, 15 Ill. 511; Barnett v. People, 54 Ill. 325. IOWA—Gordon v. State, 3 Iowa 410; State v. Tweedy, 11 Iowa 350. KAN.—State v. McCord, 8 Kan. 232, 12 Am. Rep. 469. LA.—State v. Delaney, 28 La. Ann. 434; State v. Byrd, 31 La. Ann. 419; State v. Dennison, 31 La. Ann. 847. ME.—State v. Payson, 37 Me. 362. MD.—State v. Flannigan, 6 Md. 167; Davis v. State, 39 Md. 365. MASS.—Com. v. Herty, 109 Mass. 348. MICH.—People v. Knapp, 26 Mich. 112. MINN.—State v. Lessing, 16 Minn. 80. MISS.—Morris v. State, 16 Miss. (8 Smed. & M.) 762; Hurt v. State, 25 Miss. 378, 59 Am. Dec. 225; Rolls v. State, 52 Miss. 391. MO. — Watson v. State, 5 Mo. 497; State v. Ross, 29 Mo. 32; State v. Sloan, 47 Mo. 604; State v. Smith, 53 Mo. 139, but now contra in Missouri under constitution of 1875; State v. Sims, 71 Mo. 538; State v. Bruffey, 75 Mo. 389; State v. Martin, 76 Mo. 337; State v. Anderson, 89 Mo. 312, 1 S. W. 135. OHIO—Wroe v. State, 20 Ohio St. 460; Morehead v. State, 34 Ohio St. 212. ORE.—State v. Stevens, 29 Ore. 85, 43 Pac. 947. S. C.—State v. Commis, 3 Hill L. 241. TENN.—Slaughter v. State, 25 Tenn. (6 Humph.) 410. TEX.—Wornock v. State, 6 Tex. App. 450; Parker v. State, 22 Tex. App. 105, 3 S. W. 100. VA.—Lithgow v. Com., 4 Va. (2 Va. Cas.) 297; Kirk v. Com., 36 Va. (9 Leigh) 627; Stuart v. Com., 69 Va. (28 Gratt.) 950. WIS.—State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Belden, 33 Wis. 120.

As dissenting from the text, see United States v. Keen, 1 McL. 429, Fed. Cas. No. 15510; Bailey v. State, 26 Ga. 579; Veatch v. State, 60 Ind. 291.

The argument in the text is strengthened, of course, when there has been a direct acquittal of the major.

In such cases the conviction of murder in the second degree must be specially pleaded.—Jordan v. State, 81 Ala. 20. Infra, § 1413.

In R. v. Tancock, 13 Cox C. C. 217, the prisoner having been pre-

conviction of murder in the second degree is an acquittal

viously convicted for the manslaughter of A., was shortly after his trial indicted for wilful murder upon the same facts. The prisoner pleaded autrefois convict. The facts of identity of the prisoner and deceased having been given in evidence, and the judge (Denman, J.) having read the depositions, which, as he thought, disclosed a case of manslaughter, he held the plea to be proved, at the same time stating that, if he thought the case would ultimately have resolved itself into one of murder, he should have tried the prisoner, and, if necessary, reserved the point for the consideration of the court for crown cases reserved. But this last point was merely intimated and can not be accepted as of authority.

In this case, however, the first indictment was for manslaughter, and the view of Denman, J., is in accordance with the distinction taken infra.

In State v. Chumley, 67 Mo. 41, it was held that a conviction on an indictment for an assault with intent to kill, bars an indictment on the same facts for an assault with intent to maim.

Conviction of manslaughter under invalid indictment held to be autrefois acquit in Mixon v. State, 33 Tex. Cr. Rep. 458, 34 S. W. 290.

—Reversed on application of accused, on an indictment charging murder, he may be tried for murder on his second trial.—State v. Gillis, 73 S. C. 318, 6 Ann. Cas. 993, 5 L. R. A. (N. S.) 571, 53 S. E. 487.

Conviction of second degree murder can not be retried for first degree murder.—Johnson v. State, 27 Fla. 245, 9 So. 208.

New trial opens up whole case and a conviction may be had for the greater offense, under constitutional and statutory provisions (mostly), in some jurisdictions, especially where the new trial is granted on the application of the accused. See: CAL.—People v. Keefe, 65 Cal. 232, 3 Pac. 818 (but the doctrine is limited to charges of murder). GA.—Bailey v. State, 26 Ga. 579; Small v. State, 63 Ga. 386; Waller v. State, 104 Ga. 505, 30 S. E. 835. IND. — State v. Morris, 1 Blackf. 37; Ex parte Bradley, 48 Ind. 548; Veatch v. State, 60 Ind. 29. KAN.—State v. McCord, 8 Kan. 232, 12 Am. Rep. 469; State v. Terreso, 56 Kan. 126, 42 Pac. 354. KY.—Com. v. Arnold, 83 Ky. 1, 4 Am. St. Rep. 114, 8 Ky. L. Rep. 181, 6 Crim. L. Mag. 61. MO.—State v. Simms, 71 Mo. 538 (constitution of 1875 overthrows rule to contrary laid down in State v. Ross, 29 Mo. 32, and cases following that one). NEB. — Bohanan v. State, 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390. N. Y.—People v. Palmer, 109 N. Y. 413, 4 Am. St. Rep. 477, 17 N. E. 213; People v. Cignarale, 110 N. Y. 23, 16 Am. St. Rep. 155, 6 N. Y. Cr. Rep. 82, 17 N. E. 135. OHIO—State v. Beheimer, 20 Ohio St. 579. S. C.—State v. Gillis, 73 S. C. 318, 6 Ann. Cas. 993, 5 L. R. A. (N. S.) 571, 53 S. E. 487. VT.—State v. Bradley, 67 Vt. 465, 32 Atl. 238. VA.—Livingston's Case,

of murder in the first degree;[6] a conviction of larceny, on an indictment for burglary and larceny, is an acquittal of

55 Va. (14 Gratt.) 134. FED.—United States v. Harding, 1 Wall. Jr. 127, 147, Fed. Cas. No. 15301.

—**Weight of decision** is to the contrary, holding that a conviction of a lesser degree, or a lesser crime, is an acquittal of the higher degree, or of the higher crime, and on new trial there can not be a trial or conviction of the higher degree or greater crime. See: ALA.—Lewis v. State, 51 Ala. 1; Fields v. State, 52 Ala. 348; Berry v. State, 65 Ala. 117; Smith v. State, 68 Ala. 424; De Armon v. State, 71 Ala. 351; Sylvester v. State, 72 Ala. 201. ARK.—Johnson v. State, 29 Ark. 31, 21 Am. Rep. 154. CAL.—People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620; People v. McFarlane, 138 Cal. 481, 61 L. R. A. 245, 71 Pac. 568, 72 Pac. 48 (applies in all cases except a charge of murder in first degree; see preceding paragraph). FLA.—Johnson v. State, 27 Fla. 245, 9 So. 208; Golding v. State, 31 Fla. 262, 12 So. 525. ILL.—Brennan v. People, 15 Ill. 511; Barnett v. People, 54 Ill. 325. IOWA — State v. Tweedy, 11 Iowa 350; State v. Helm, 92 Iowa 540, 61 N. W. 246. LA.—State v. Hornsby, 8 Rob. 583, 41 Am. Dec. 314; State v. Desmond, 5 La. Ann. 398; State v. Chandler, 5 La. Ann. 489, 52 Am. Dec. 599; State v. Byrd, 31 La. Ann. 419; State v. Dennison, 31 La. Ann. 847; State v. Victor, 36 La. Ann. 978; State v. Joseph, 40 La. Ann. 5, 3 So. 405. MICH.—People v. Knapp, 26 Mich. 112; People v. Comstock, 55 Mich. 405, 21 N. W. 384. MINN.—State v. Lessing, 16 Minn. 75. MISS.—Hurt v. State, 25 Miss. 378, 59 Am. Dec. 225; Rolls v. State, 52 Miss. 391; Powers v. State, 83 Miss. 691, 36 So. 6. ORE.—State v. Steeves, 29 Ore. 85, 43 Pac. 947. PA.—Com. v. Winters, 1 Pa. Co. Ct. Rep. 537. TENN.—Slaughter v. State, 25 Tenn. (6 Humph.) 410. TEX.—Jones v. State, 13 Tex. 168; Tribble v. State, 2 Tex. App. 424; Robinson v. State, 21 Tex. App. 160, 17 S. W. 632; Parker v. State, 22 Tex. App. 105, 3 S. W. 100; Smith v. State, 22 Tex. App. 316, 3 S. W. 684; Mixon v. State, 35 Tex. Cr. Rep. 458, 34 S. W. 290; Coleman v. State, 43 Tex. Cr. Rep. 280, 65 S. W. 90. WASH.—State v. Murphy, 13 Wash. 229, 43 Pac. 44. W. VA. — State v. Cross, 44 W. Va. 315, 29 S. E. 527. WIS.—State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; State v. Belden, 33 Wis. 120. FED.—In re Bennett, 84 Fed. 324.

6 ALA.—Lewis v. State, 51 Ala. 1; Field v. State, 52 Ala. 348; Berry v. State, 65 Ala. 117. ARK.—Johnson v. State, 29 Ark. 31, 21 Am. Rep. 154. FLA.—Johnson v. State, 27 Fla. 245, 9 So. 208. MO.—State v. Smith, 53 Mo. 139. IND.—Clem v. State, 42 Ind. 420, 13 Am. Rep. 369. TENN.—Slaughter v. Com., 25 Tenn. (6 Humph.) 410. WIS.—State v. Belden, 33 Wis. 120.

Compare: People v. Lilly, 38 Mich. 270.

Conviction of burglary on charge of burglary and grand larceny, is an acquittal of the latter

burglary;[7] a conviction of robbery in the second degree bars a subsequent prosecution for robbery in the first degree.[8] A defendant, also, who is convicted of assault with intent to ravish, under an indictment for rape, can not subsequently be tried for the rape;[9] and a defendant who is convicted of an assault under an indictment for an assault with intent to kill, or for assault and battery, can not be subsequently tried for the assault with felonious intent, or for the assault and battery.[10] On the same hand, where, under the first indictment there could have been no conviction of the major offense, then a conviction or acquittal of the minor on the first indictment does not bar a second indictment for the major offense.[11] Thus,

charge.—Bell v. State, 48 Ala. 684, 17 Am. Rep. 40.

7 Supra, § 293; infra, §§ 1726, 1837. Also: ALA.—Smith v. State, 68 Ala. 424. MISS.—Morris v. State, 16 Miss. (8 Smed. & M.) 762. MO.—State v. Bruffey, 75 Mo. 389; State v. Martin, 76 Mo. 337; State v. Bruffey, 11 Mo. App. 79. TENN.—Esmon v. State, 31 Tenn. (1 Swan) 14. VT.—State v. Kittle, 2 Tyl. 471.

Compare: State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643, as stated fully, infra, § 1397, and as to Missouri cases, see analysis in prior note.

As to cases where the burglary and the larceny are separately indicted, see Smith v. State, 22 Tex. App. 350, 3 S. W. 238.

8 People v. Jones, 53 Cal. 58; State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643.

9 State v. Shepard, 7 Conn. 54.

10 ALA.—State v. Stedman, 7 Port. 495; Carpenter v. State, 23 Ala. 84. ARK.—McBride v. State, 7 Ark. 374. CAL.—People v. Apgar, 35 Cal. 389. GA.—Clark v. State, 12 Ga. 350. IOWA—State v. Shepard, 10 Iowa 126. ME.—State v. Dearborn, 54 Me. 442. MASS.—Com. v. Fischblatt, 45 Mass. (4 Metc.) 350. NEV.—State v. Robey, 8 Nev. 312. N. H.—State v. Handy, 47 N. H. 538. N. J.—State v. Townsend, 17 N. J. L. (2 Harr.) 543; Francisco v. State, 24 N. J. L. (4 Zab.) 30; State v. Johnson, 30 N. J. L. (1 Vr.) 185. OHIO—Stewart v. State, 5 Ohio St. 242; White v. State, 13 Ohio St. 569. TEX.—Gardenheir v. State, 6 Tex. 348; Reynolds v. State, 11 Tex. 120; Grisham v. State, 19 Tex. 504; Robinson v. State, 21 Tex. App. 160, 17 S. W. 632. VT.—State v. Coy, 2 Aik. (Vt.) 181; State v. Reed, 40 Vt. 603. ENG.—R. v. Dawson, 3 Stark. 623, Eng. C. L. 595.

The reason is, the conviction of the minor is the acquittal of the major.—Infra, § 1675.

11 CONN.—Wilson v. State, 24 Conn. 57. GA.—Roberts v. State, 14 Ga. 8. ILL.—Freeland v. People, 16 Ill. 380; Severin v. People, 37 Ill. 414. IND.—State v. Warner,

a conviction or acquittal on an indictment for an assault with intent to kill or ravish (the acquittal being on the ground of merger) will be no bar to an indictment for the consummated offense.[12] And when after a trial for assault the assaulted person dies, a prosecution for the murder is not barred by the prior prosecution of the assault.[13] A conviction of larceny, also, on an indictment for burglary with intent to steal, does not bar a prosecution for the

14 Ind. 572. IOWA — Scott v. United States, 1 Morr. 142; State v. Mikesell, 70 Iowa 176, 30 N. W. 474. KY.—Duncan v. Com., 36 Ky. (6 Dana) 295. MASS.—Josslyn v. Com., 47 Mass. (6 Metc.) 236; Com. v. Evans, 101 Mass. 25; Com. v. Herty, 109 Mass. 348. MICH.—People v. Knapp, 26 Mich. 112. N. Y.—People v. Saunders, 4 Park. Cr. Rep. 197; People v. Smith, 57 Barb. 46. S. C.—State v. Nathan, 5 Rich. L. 213, 55 Am. Dec. 714. WIS. — State v. Martin, 30 Wis. 216, 11 Am. Rep. 567. ENG.—R. v. Button, 11 Ad. & El. N. S. (11 Q. B.) 929, 63 Eng. C. L. 927; R. v. Morris, L. R. 1 C C. 90; R. v. Salvi, 10 Cox C. C. 481 n.; R. v. Thompson, 9 W. R. 203.

Compare: R. v. Elrington, 1 Best & S. 689, 101 Eng. C. L. 687, 9 Cox C. C. 86, 10 W. R. 13, cited, infra, § 1700.

Rule in the text was held to apply to a case where the court trying the minor case had no jurisdiction of the major.—Com. v. Curtis, 28 Mass. (11 Pick.) 134.

12 ME.—State v. Murray, 15 Me. 100. MASS.—Com. v. Kingsbury, 5 Mass. 106. N. Y.—People v. Mather, 4 Wend. 265; People v. Saunders, 4 Park. Cr. Rep. 197. PA.—Com. v. Parr, 5 Watts & S. 345. ENG.—R. v. Morris, L. R. 1 C. C. R. 90.

See, supra, § 1387.

In State v. Hattabough, 66 Ind. 223, it was held that a conviction or acquittal of a simple assault and battery, before a court of competent jurisdiction to try the same, does not bar a subsequent prosecution for the same assault and battery with intent to commit a felony, citing Severin v. People, 37 Ill. 414; People v. Saunders, 4 Park. Cr. Rep. (N. Y.) 197.

On the other hand, in R. v. Walker, 2 Man. & R. 457, where it was held that an acquittal of an assault barred a subsequent prosecution for felonious stabbing based on the same transaction, it was said by Coltman, J.: "Suppose a party had been acquitted of an assault, and he was afterwards indicted for the felony which involved that assault; it is clear, if he did not make the assault, he could not be guilty of that which includes and depends upon the assault."

13 Wright v. State, 5 Ind. 527; Com. v. Evans, 101 Mass. 25; Burns v. People, 1 Park. Cr. Rep. (N. Y.) 182; R. v. Morris, L. R. 1 C. C. R. 90; R. v. Salvi, 10 Cox C. C. 481 n., and other cases cited, infra, § 1398.

burglary.[14] We must at the same time remember that the prosecution, as will presently be seen more fully,[15] by selecting a minor stage, and prosecuting it with the evidence of the major stage, declining to present an averment of the latter, may preclude itself from afterwards prosecuting for the major offense in a distinct indictment. Otherwise the prosecution might arbitrarily subject a defendant to trials for a series of progressive offenses on the same proof tentatively applied until at last a conviction should be reached.

§ 1397. Conviction or acquittal of major offense bars minor when on first trial defendant could have been convicted of minor. Of the rule just expressed the converse is in a large measure true. Thus, whenever, under an indictment containing successive stages of an offense, the defendant could have been convicted on the minor offenses at the trial, his conviction of the major offense protects him from a further prosecution of the minor. And the same rule applies to acquittals, whenever the defendant could have been convicted of the minor offense and the acquittal goes to the aggregate charge.[1] It is

14 Wilson v. State, 24 Conn. 57; but see Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528; Smith v. State, 23 Tex. App. 357, 59 Am. Rep. 773, 5 S. W. 219.

See, infra, §§ 1397, 1407.

15 See, infra, § 1398.

1 2 Hale 246; Fost. 339. ALA.—Bell v. State, 48 Ala. 684, 17 Am. Rep. 40. GA.—Johnson v. State, 14 Ga. 55. IND.—Fritz v. State, 40 Ind. 18. LA.—State v. Keogh, 13 La. Ann. 243. MD.—State v. Reed, 12 Md. 263. MO.—State v. Smith, 15 Mo. 550; State v. Pitts, 57 Mo. 85. N. J.— State v. Cooper, 13 N. J. L. (1 Gr.) 361, 25 Am. Dec. 490. N. Y.—Lohman v. People, 1 N. Y. 379; People v. McGowan, 17 Wend. 386; People v. Loop, 3 Park. Cr. Rep. 561; People v. Smith, 57 Barb. 56. N. C.—State v. Lewis, 9 N. C. (2 Hawks) 98, 11 Am. Dec. 741; State v. Cowell, 26 N. C. (4 Ired. L.) 231. PA.—Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542. TENN.—Wilcox v. State, 74 Tenn. (6 Lea) 571, 40 Am. Rep. 53. TEX.—Wilcox v. State, 31 Tex. 586; Thomas v. State, 40 Tex. 36. VT.—State v. Smith, 43 Vt. 324. VA.—Murphy v. Com., 64 Va. (23 Gratt.) 460. FED.—Respublica v. Roberts, 2 U. S. (2 Dall.) 124, 1 L. Ed. 316. ENG.—Vaux's Case, 4 Co. 44a, 45a, 76 Eng. Repr. 992; R. v. Gould, 9 Carr. & P. 364,

otherwise when there could have been no conviction of the minor offense under the first indictment.[2] Thus, an acquittal of burglary with intent to steal does not bar a prosecution for larceny;[3] and an acquittal of murder, on the ground that the assaults averred did not contribute to the murder, does not bar a subsequent indictment for the assaults.[4]

§ 1398. PROSECUTOR MAY BAR HIMSELF BY SELECTING A SPECIAL GRADE. Upon the doctrines above stated an inter-

38 Eng. C. L. 217; R. v. Barratt, 9 Carr. & P. 387, 38 Eng. C. L. 231.

2 2 Hawk., ch. 25, § 5. ALA.—State v. Standifer, 5 Port. 523. CONN.—State v. Nichols, 8 Conn. 496. FLA.—Boswell v. State, 20 Fla. 869. GA.—Wood v. State, 48 Ga. 192, 15 Am. Rep. 664. ILL.—Reynolds v. People, 83 Ill. 479, 25 Am. Rep. 410. MASS.—Com. v. Hudson, 80 Mass. (14 Gray) 11. MO.—State v. Wightman, 26 Mo. 515. OHIO—Heller v. State, 23 Ohio St. 582. N. C.—State v. Jesse, 19 N. C. (2 Dev. & B. L.) 297; State v. Morgan, 95 N. C. 641. PA.—Hilands v. Com., 114 Pa. St. 372, 6 Atl. 267. ENG.—R. v. Henderson, 1 Carr. & M. 328, 41 Eng. C. L. 183; R. v. Compton, 3 Carr. & P. 418, 14 Eng. C. L. 640; R. v. Webster, 1 Leach C. C. 12.

Compare: R. v. Gould, 9 Carr. & P. 364, 38 Eng. C. L. 217; R. v. Taylor, L. R. 1 C. C. 194, 11 Cox C. C. 261; R. v. Reid, 15 Jur. 181.

See, infra, § 1398.

3 ALA.—Fisher v. State, 46 Ala. 717. CAL.—People v. Garnett, 20 Cal. 622; People v. Helbing, 61 Cal. 620. GA.—Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528. IND.—State v. Warner, 14 Ind. 572. MISS.—Roberts v. State, 55 Miss. 421. TENN.—State v. De Graffenried, 68 Tenn. (9 Baxt.) 287. TEX.—Howard v. State, 8 Tex. App. 447.

Contra: State v. Lewis, 9 N. C. (2 Hawks) 98, 11 Am. Dec. 741.

In Wilson v. State, 24 Conn. 57, a conviction for larceny, as we have seen, was held no bar to statutory house-breaking; and see, infra, § 1407.

But a conviction for larceny has been held a bar to an indictment for subsequently receiving the same goods. — United States v. Harmison, 3 Sawy. 556, Fed. Cas. No. 15308.

In State v. Brannon, 55 Mo. 63, 17 Am. Rep. 643, the defendant was indicted "for robbery in the first degree," which was held to be a sufficient indictment for larceny. The conviction was for robbery "in the second degree." The verdict was set aside, as there were no degrees in robbery. When, subsequently, the defendant was again tried upon the same indictment, and convicted of larceny, this was held error; it being held that as the defendant could, upon the first trial, have been convicted of either robbery or larceny, but was lawfully convicted of neither, the verdict was an acquittal.

4 R. v. Bird, T. & M. 437; 2 Den.

esting qualification has been proposed. Suppose the prosecution could, if it chose, have presented the two offenses in a single count,—e. g., assault, with assault with intent to wound,—but did not do so, thereby, as has just been said, virtually, with the whole case before it, entering a nolle prosequi on the higher grade. Can a second indictment be maintained for such higher grade? The answer must be in the negative;[1] since the prosecution can not take advantage of its own negligence in the imperfect pleading of its case, and since such voluntary withdrawal of the aggravated grade, sanctioned by a verdict, operates as an acquittal of the higher grade. Another reason is the annoyance which a contrary rule would capriciously inflict. "The state can not split up a crime and prosecute it in parts. A prosecution for any part of a single crime" (supposing that at the time the entire crime could be prosecuted) "bars any further prosecution based upon the whole or a part of the same crime."[2]

Should the defendant be acquitted on the first trial, the whole case of the second prosecution being before the

C. C. 94; 5 Cox C. C. 11, cited, supra, § 1395. See Moore v. State, 59 Miss. 529.

1 ALA.—Moore v. State, 71 Ala. 299, 302, 46 Am. Rep. 318, 4 Crim. L. Mag. 429. IOWA—State v. Foster, 33 Iowa 525. KY.—Com. v. Miller, 35 Ky. (5 Dana) 320. N. Y.—People v. Warren, 1 Park. Cr. Rep. 338. N. C. — State v. Stanly, 49 N. C. (4 Jones) 290. TENN.—State v. Chaffin, 32 Tenn. (2 Swan) 493. TEX. — Price v. State, 41 Tex. 300. VT.—State v. Smith, 43 Vt. 324. VA.—Smith v. Com., 48 Va. (7 Gratt.) 593. FED.—United States v. Harmison, 3 Sawy. 556, Fed. Cas. No. 15308. ENG.—R. v. Elrington, 1 Best & S. 688, 101 Eng. C. L. 687, 9 Cox C. C. 86, 10 W. R. 13, citing R. v. Stanton, 5 Cox C. C. 324; Thompson, In re, 9 W. R. 203.

See Grisham v. State, 19 Tex. App. 504; R. v. Elrington, and other cases in the same line, may be sustained on the ground that the withdrawal of the higher charge by the prosecution operates, when sanctioned by the verdict, as an acquittal of such charge. See, supra, § 1395, and cases cited infra.

The English rulings above cited, however, took place under a statute providing that after a trial by justices there should be no further proceedings, civil or criminal, "for the same cause."

2 Drake v. State, 60 Ala. 42; Jackson v. State, 14 Ind. 327, 328.

jury, then, as he has been acquitted of the essential ingredients of the second case, the second case can not proceed.[3]

3. *As to Nature of Offense.*

§ 1399. WHEN ONE UNLAWFUL ACT OPERATES ON SEPARATE OBJECTS, CONVICTION AS TO ONE OBJECT DOES NOT EXTINGUISH PROSECUTION AS TO OTHER; E. G., WHEN TWO PERSONS ARE SIMULTANEOUSLY KILLED. Concurrent injuries to distinct persons may be classified as follows:

§ 1400. —— (1.) CONCURRENT NEGLIGENT INJURIES. Suppose a railroad corporation, by negligence in the construction of a bridge, causes the concurrent deaths of a number of passengers, is the responsibility of the corporation, or of its officers to whom the negligence is imputable, limited to a single case of death? It is alleged, by those maintaining the affirmative, that as the injury is but one act, there can be but one indictment and but one punishment. But is there, in such cases, only one act? In civil suits it has been decided in multitudes of cases that there are as many distinct acts, separately cognizable, as there are persons injured; and one of the chief checks we have upon railroad companies is that when a great disaster occurs from their negligence, they have to pay damages for every person hurt; and hence they multiply their precautions against the negligences which should produce such great disasters. If a foot-bridge crossing a brook breaks down under a single traveler, the negligent constructor of the bridge is liable to but a single suit, and this may be a sufficient penalty. If a railway bridge crossing an estuary breaks down, through the negligence of the company constructing it, and a hundred persons are swept into the sea, the company may be liable to a hundred suits; atrocious negligence hereby receiving signal

[3] To this effect see cases in preceding section, on the question whether a conviction of burglary with intent to steal bars larceny.

and conspicuous condemnation. In no other way can care in proportion to peril be legally exacted. Why, then, should it be otherwise in criminal issues? In criminal as well as civil issues, the principle is that the guilt of neglect is in proportion to the greatness of the duty neglected. It may be said, that in cases of injuries arising from the neglect of railroad officers, a gross punishment can be inflicted in the first case tried and that the others can be dropped. But to this it may be answered as follows: (1.) It is no more just when a man is tried for negligent misconduct towards A., to punish him for negligent misconduct to B., than it would be just when he is tried for negligent misconduct towards A., to punish him for malicious acts done subsequently to B. If the acts are separate they are to be punished separately, and that they are separate the courts, in civil suits, have repeatedly ruled. (2.) Our statutes do not ordinarily permit a series of offenses to be thus lumped in their punishment. Punishments are assigned to specific objective acts of negligence. To impose the statutory punishment in such cases, if we stop with the first prosecution, is often a very inadequate penalty for the crime. To this view it may be objected that an offender may be crushed under a load of successive punishments. But this is an objection that goes, not to the responsibility of the party for each offense, but simply to the degree in which he is to be punished for his misconduct. The same objection would apply to successive trials in cases where A., at intervals of a day or a month, assaults murderously B., C., and D. The proper course is not to deny his responsibility for the wrongful acts, but, in cases where his punishment in the first case is adequate, to apply executive clemency. He may, for instance, in the first case, be sentenced to imprisonment for five years, and this may be regarded by the executive as a sufficient penalty to impose on a particular individual. But if he is sentenced in the first case

to an imprisonment for one or two years, this may be properly followed by a second prosecution with a similar punishment. If this objection, it may be added, applies to successive criminal prosecutions, it applies still more strongly to successive civil suits, the penalties of which can not be reduced by the executive.

§ 1401. —— (2.) CONCURRENT MALICE AND NEGLIGENCE. The characteristics of this concurrence are elsewhere fully discussed.[1] A. aims a pistol at B., but the ball glances and wounds C. Here, as we have seen, there is an attempt to kill B., for which the defendant is indictable, and a negligent wounding of C., for which the defendant is also indictable. The offenses are distinct in purpose, in object, in effect, and ordinarily in mode of punishment. They are consequently to be tried separately. And in this way alone can a proper penalty be inflicted. A trial for neither offense would bring with it such a penalty. An attempt has usually a lenient punishment imposed on it; and such is the case with a negligent wounding. But here we have acts which, if we could join them, would present the features of a malicious wounding, and would deserve the punishment imposed on that high offense. But we can not so join them; and if we prosecute only for the neglect or the attempt singly, the punishment would be inadequate.

§ 1402. —— (3.) CONCURRENT MALICIOUS ACTS. A., for instance, designing to inflict severe physical injury on B. and C., waits till he finds them together. We may suppose the case of poison administered in such a way as not to kill but to seriously hurt, such being the intention. If he administers the dose to them at intervals of half an hour, there can be no question that the offenses are distinct. Do they cease to be distinct, because in this view, he manages to get them to his table together, and then to

1 1 Kerr's Whart. Crim. Law, § 157.

poison them by soup, for instance, distributed from the same tureen? In the Roman law we have cases in which the idea of unification of such offenses is sternly rejected, and in which each poisoning is held to be distinct. The English common law tends to the same effect. There can be no question that each party injured, in such cases, supposing death not to ensue, can maintain a civil suit for the damage he has suffered individually. There can be no question, also, that by the English common law, he is obliged, before bringing the civil suit, to bring a criminal prosecution.[1] Wherever, in such cases, a civil suit lies, there, as a condition precedent, lies a criminal prosecution. It may be said that this also heaps an intolerable burden on the offender. This objection, however, if good, would limit to a single suit all civil retribution sought by the party injured. And the question here also, as in the preceding cases, is one for the executive, if it appear that immoderate penalties are about to be inflicted. The objection does not go to the severance of the offenses. This severance is required, (1) because the purpose in each case is distinct; and (2) because the object in each case is distinct.

§ 1403. —— Application of the rules. The question before us, as it presents itself to us in the concrete, may be treated in a series of cases, of which the following is the first to be discussed:

If A. in shooting at B. kills both B. and C., is his conviction under an indictment for killing B. a bar to a prosecution against him for killing C.? In answering this question let us remember that to join the killing of B. and C. in the same count would be a duplicity that would not be tolerated; and that if joined in the same indictment, in separate counts, the court would compel an election between the offenses. It would be necessary, therefore,

1 See, supra, § 1383.

to prosecute the cases separately; and if so, it is hard to see how a conviction or acquittal of the one could bar a prosecution of the other. To the indictment for killing B., for instance, A. might set up self-defense, and be acquitted, but this might be plausibly argued to be an issue different from that which would be presented on his trial for killing B., should it appear that the killing of B. was an unprovoked or a negligent act. The killing of B. also may be malicious, as where A. designs to shoot B., while the concurrent killing of C. may be negligent; as where the ball, after striking B., glances and strikes C., whom A. has no possible reason to expect to be at the spot, and whose death may be to him peculiarly abhorrent.[1] An acquittal or conviction, therefore, for killing C. ought not, on principle, to bar a subsequent indictment for killing B., though the killings were by the same act.[2]

[1] 1 Kerr's Whart. Crim. Law, § 157.

[2] ALA. — State v. Standifer, 5 Port. 523. CAL.—People v. Alibez, 49 Cal. 452; People v. Majors, 65 Cal. 138, 3 Pac. 597. CONN.—State v. Benham, 7 Conn. 414. KAN.—State v. Horneman, 16 Kan. 452. MISS.—Teat v. State, 53 Miss. 439, 24 Am. Rep. 708. N. Y.—People v. Warren, 1 Park. Cr. Rep. 338. N. C. — State v. Fayetteville, 6 N. C. (2 Murph.) 371. S. C.—State v. Fife, 1 Bail. L. 1. TENN.—Kannon v. State, 78 Tenn. (10 Lea) 386. VA.—Vaughan v. Com., 4 Va. (2 Va. Cas.) 273; Smith v. Com., 48 Va. (7 Gratt.) 593. ENG.—R. v. Champneys, 2 Man. & R. 26; R. v. Jennings, R. & R. 368.

In 2 Whart. Crim. Ev. (Hilton's ed.), § 587, other points are noticed; and, as disputing the conclusion of the text, see Ben v. State, 22 Ala. 9, 58 Am. Dec. 234; Clem v. State, 42 Ind. 420, 13 Am. Rep. 369; State v. Damon, 2 Tyl. (Vt.) 370.

In Wharton on Homicide (Bowlby's ed.), §§ 28-48, will be found a discussion of whether the grade in all cases of killing is identical. See Forrest v. State, 81 Tenn. (13 Lea) 103.

The following supposed cases may strengthen the argument in the text:

A. when shooting at B. with intent to kill, by the same shot negligently, as it is alleged, injures C. An acquittal on an indictment for the negligent injury to C. is no bar to an indictment for the malicious shooting of B.

A., an officer, with a warrant to arrest B., shoots B., the shooting being the only means of preventing B.'s escape. By the same shot, however, he (either negligently or maliciously) injures C. An acquittal in the former case is no bar to a prosecution in the latter.

§ 1404. —— OTHERWISE AS TO TWO BATTERIES AT ONE TIME. Where the rule is that there can be batteries of two or more persons, introduced in the same count,[1] it follows on technical grounds, that a conviction or acquittal on an indictment charging a battery of A. and B. is a bar to a subsequent prosecution for a battery of B., though on the first trial the verdict went simply to the battery of A. But where the first indictment charges only the battery of A., this, for the reasons stated in the last section, does not bar a subsequent indictment for a battery of B.[2] And

A public executioner, when discharging his office, withdraws the platform in such a way as not only to cause the death of the convict, which he is appointed to effect, but to inflict a serious wound on a by-stander, such wound being maliciously intended by the executioner. An acquittal on an indictment for the killing is no bar to an indictment for the malicious wounding.

An artilleryman aims his gun in such a way as to kill not only soldiers of the hostile force, but persons attending a hospital, whom he knows to be non-combatants. An acquittal on an indictment for killing the former is no bar to an indictment for killing the latter.

A. attacked by B., and driven to the wall, seizes the opportunity when he can kill B. in self-defense to wound C. An acquittal in the first case is no bar to an indictment in the second.

1 ALA.—Shaw v. State, 18 Ala. 547. IOWA—State v. McClintock, 8 Iowa 203. MASS.—Com. v. McLoughlin, 66 Mass. (12 Cush.) 615; Com. v. O'Brien, 107 Mass. 208. R. I.—Kinney v. State, 5 R. I. 385. TENN.—Fowler v. State, 50 Tenn. (3 Heisk.) 154. ENG.—R. v. Benfield, 2 Burr. 980, 984, 97 Eng. Repr. 664, 666; R. v. Giddings, 1 Car. & M. 634, 41 Eng. C. L. 344.

Compare: R. v. Scott, 4 Best & S. 368, 116 Eng. C. L. 366, where it was held that one conviction for several curses on the same day with a cumulative penalty at the rate of so much per curse, was good.—1 Smith Lead. Cas. (8th Eng. ed.) 712.

In Hartley, In re, 31 L. J. M. C. 232, it was held that there could be several convictions for selling pieces of bad meat at the same stall on one day. See Beal, Ex parte, L. R. 3 Q. B. 382; State v. Hopkins, 56 Vt. 250.

In Ben v. State, 22 Ala. 9, 58 **Am. Dec.** 234, it was held that it was not duplicity to include in one count the administering poison to three persons.

Contra: People v. Warren, 1 Park. Cr. Rep. (N. Y.) 338.

2 ALA. — State v. Standifer, 5 Port. 523. IND. — Greenwood v. State, 64 Ind. 250. KAN.—Olathe v. Thomas, 26 Kan. 233. N. Y.—People v. Warren, 1 Park. Cr. Rep. 338. N. C.—State v. Nash, 86 N. C. 650, 41 **Am. Rep.** 472; Vaughan v Com., 4 Va. (2 Va. Cas.) 273;

where the defendant fired a revolver twice in rapid succession at a crowd, the first shot wounding A. and the second wounding B., it was held that a conviction for assault on A. was no bar to an indictment for an assault on B.[3]

§ 1405. ——— So OF ARSON. The exception above given is extended in a New York case where it is held that an indictment charging as a single act the burning of a number of designated dwelling-houses is not bad for duplicity. The criminal act, it was said, is kindling the fire with felonious intent to burn the houses specified, and is consummated when the burning is effected; and the fact that the houses did not burn at the same time, and that but one was set on fire, the fire communicating therefrom to the others, does not make the burning of each a separate offense. It was further argued that if the indictment charges as a distinct offense the burning of each house, it is subject to the objection of duplicity, and the defect is not cured by a withdrawal, upon the trial, of all claim to convict the prisoner for burning any house but one.[1]

§ 1406. —— So WHEN SEVERAL ARTICLES ARE SIMULTANEOUSLY STOLEN. Where several articles belonging to the same owner are stolen by the same person simultaneously,

Smith v. Com., 48 Va. (7 Gratt.) 593.

3 State v. Nash, 86 N. C. 650, 41 Am. Rep. 472.

As to Mississippi statute in this relation, see Pope v. State, 63 Miss. 53.

1 Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464, affirming 3 Hun 310, 5 Thomp. & C. 539; Squires v. Com., 42 Mass. (1 Metc.) 258 (the houses in this case, it should be observed, were burned in a block).

In State v. Colgate, 31 Kan. 511, 47 Am. Rep. 507, 3 Pac. 346, it was held that an acquittal for burning a building was a bar to a prosecution for burning some account-books in the building, the act of ignition being in both cases the same, citing Com. v. Wade, 34 Mass. (17 Pick.) 395; Hennessy v. People, 21 How. Pr. (N. Y.) 239, citing R. v. Cooper, 5 Car. & P. 535, 24 Eng. C. L. 694.

they may be grouped in the same count, and a conviction or acquittal on such count, or on any divisible allegation thereof, bars a future indictment for the stealing of any of the articles enumerated in the count.[1] But in states in which it is held that there can be no joinder of larcenies of articles belonging to distinct owners,[2] it follows that a

1 ARK.—State v. Clark, 32 Ark. 231. IND. — Jackson v. State, 14 Ind. 327. IOWA—State v. Egglesht, 41 Iowa 574, 20 **Am. Rep.** 612. KY.—Fisher v. Com., 64 Ky. (1 Bush) 211, 89 **Am. Dec.** 620; Nichols v. Com., 78 Ky. 180. LA.—State v. Augustine, 29 La. Ann. 119; State v. Faulkner, 32 La. Ann. 725. MASS.—Com. v. Williams, 56 Mass. (12 Cush.) 583; Com. v. O'Connell, 94 Mass. (12 Allen) 451; Com. v. Eastman, 68 Mass. (2 Gray) 76. MO.—Lorton v. State, 7 Mo. 55, 37 **Am. Dec.** 179. N. H.—State v. Snyder, 50 N. H. 150. N. Y.—Woodward v. People, 62 N. Y. 117, 20 **Am. Rep.** 464; People v. Wiley, 3 Hill 194. ORE.—State v. McCormack, 8 Ore. 236. S. C.—State v. Thurston, 2 McMul. L. 382. TENN.—State v. Williams, 29 Tenn. (10 Humph.) 101. TEX.—Quitzow v. State, 1 Tex. App. 47, 28 **Am. Rep.** 396; Hatch v. State, 6 Tex. App. 384. VT.—State v. Cameron, 40 Vt. 555. ENG.—R. v. Carson, R. & R. 303; Furneaux's Case, R. & R. 335.

Compare: 1 Hale 241; People v. McGowan, 17 Wend. (N. Y.) 386; Woodward v. People, 62 N. Y. 117, 20 **Am. Rep.** 464, supra.

In Fontaine v. State, 65 Tenn. (6 Bax.) 514, it was held that selling several lottery tickets in one sheet was a single offense.

The same view was taken in United States v. Miner, 11 Blatchf. 511, Fed. Cas. No. 15780, as to possessing in one block two connected plates for counterfeiting.

2 Com. v. Andrews, 2 Mass. 409; State v. Thurston, 2 McMull. L. (S. C.) 382; Morton v. State, 69 Tenn. (1 Lea) 498; Phillips v. State, 85 Tenn. 551, 3 S. W. 434.

As ruling that stealing simultaneously several articles belonging to different owners may be treated as one offense, see ALA.—Ben v. State, 22 Ala. 9, 58 **Am. Dec.** 234. D. C.—Hoiles v. United States, 3 McArth. 370, 36 **Am. Rep.** 106. IOWA—State v. Egglesht, 41 Iowa 574, 20 **Am. Rep.** 612. KY.—Fisher v. Com., 64 Ky. (1 Bush) 212, 89 **Am. Dec.** 620; Nichols v. Com., 78 Ky. 180. ME.—State v. Nelson, 29 Me. 329. MASS.—Com. v. Williams, Thach. Cr. Cas. 84. MO.—Lorton v. State, 7 Mo. 55, 37 **Am. Dec.** 179; State v. Daniels, 32 Mo. 558; State v. Morphin, 37 Mo. 373. N. H.—State v. Merrill, 44 N. H. 624. PA.—See Kilrow v. Com., 89 Pa. St. 480; Fulmer v. Com., 97 Pa. St. 503; Com. v. Dobbin, 2 Pars. 380. TEX.—Wilson v. State, 45 Tex. 76, 23 **Am. Rep.** 602; Dodd v. State, 10 Tex. App. 370. VT.—State v. Newton, 42 Vt. 537. ENG.—R. v. Bleasdale, 2 Car. & K. 765, 61 Eng. C. L. 764.

Same rule in embezzlement. See Com. v. Pratt, 137 Mass. 245.

In Nichols v. Com., 78 Ky. 180, it was said that there was a sev-

conviction or acquittal for stealing or feloniously receiving the goods of B. does not bar a prosecution for stealing or receiving the goods of C., though the acts were simultaneous. Indeed, though the offenses were nominally the same, they may be substantially different, since one article may be taken under a claim of right and the other with felonious intent, the only point in common being concurrence in time.[3]

Another reason for the conclusion just given is, that if, in those jurisdictions which hold the joinder of articles belonging to different owners to be duplicity, we should bar a subsequent indictment for goods stolen from an owner different from the owner named in the first indictment, we would deprive the owner in the second case of his right to a restoration of the goods by sentence of court, when it might be that he had no notice of the first prosecution. But whatever may be the force of this reasoning, the weight of authority now is that the prosecution, wherever it is at liberty to join in one indictment all articles simultaneously stolen, may be treated, when it selects only one of them, for trial, as barring itself from indicting for the others.[4]

erance when the larceny was of two parcels of poultry 200 yards apart, though on the same night.

3 KY.—Fisher v. Com., 64 Ky. (1 Bush) 211, 89 Am. Dec. 620. MASS.—Com. v. Andrews, 2 Mass. 409; Com. v. Sullivan, 104 Mass. 552. NEV.—See State v. Lambert, 9 Nev. 321. N. Y.—People v. Warren, 1 Park. Cr. Rep. 338. S. C.—State v. Thurston, 2 McMull. L. 382. ENG.—R. v. Brettel, 1 Carr. & M. 609, 41 Eng. C. L. 331; R. v. Knight, L. & C. 378, 9 Cox C. C. 439.

As to divisibility in this respect, see 1 Kerr's Whart. Crim. Law, §§ 33-38, 1169. See, also, Phillips v. State, 85 Tenn. 551, 3 S. W. 434; Alexander v. State, 21 Tex. App. 406, 17 S. W. 139; and infra, § 1409.

4 ALA.—Ben v. State, 22 Ala. 9, 58 Am. Dec. 234. GA.—Lowe v. State, 57 Ga. 171. IND.—Bell v. State, 42 Ind. 335. IOWA—State v. Egglesht, 41 Iowa 574, 20 Am. Rep. 612. ME.—State v. Nelson, 29 Me. 329. MO.—State v. Morphin, 37 Mo. 373. NEV.—State v. Lambert, 9 Nev. 321. N. H.—State v. Merrill, 44 N. H. 624. OHIO—State v. Hennessy, 23 Ohio St. 339, 13 Am. Rep. 253. PA.—Fulmer v. Com., 97 Pa. St. 503. TEX.—Wilson v. State, 45 Tex.

What has just been said applies to the sale of lottery tickets. When tickets are sold singly, no matter how short may be the interval of time between the sales, such sales may be prosecuted singly. When, however, a bunch of them is sold in a block, this constitutes but one offense.[5]

§ 1407. WHEN ONE ACT HAS TWO OR MORE INDICTABLE ASPECTS, IF THE DEFENDANT COULD HAVE BEEN CONVICTED OF EITHER UNDER THE FIRST INDICTMENT HE CAN NOT BE CONVICTED OF THE TWO SUCCESSIVELY. We have heretofore noticed cases in which a minor offense, being a stage in the consummation of a major offense, is united in the same count with the major. We have now to approach another class of cases,—those in which one particular act has two or more indictable aspects. Although the question has been the subject of much difference of opinion, we may venture to hold that when one act has two or more aspects, if the defendant could have been convicted of either under the first indictment he can not be convicted of the two on the two indictments tried successively. In other words, where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first, the second is barred by a conviction or acquittal on the first.[1] If, for instance, the

170; Hudson v. State, 9 Tex. App. 151, 35 Am. Rep. 732; Shubert v. State, 21 Tex. App. 551, 2 S. W. 883; Willis v. State, 24 Tex. App. 586, 6 S. W. 857. FED.—United States v. Beerman, 5 Cr. 412, Fed. Cas. No. 14560.

See, supra, § 301.

A prosecutor may be estopped by selecting a particular phase of an offense.—See, infra, § 1407; and see 2 Kerr's Whart. Crim. Law, §§ 1169-1187.

In State v. Clark, 32 Ark. 231, it was held that stealing several articles simultaneously from the same owner forms but one offense, and after one conviction for stealing a part no further prosecution can be pursued for the rest.

[5] Fontaine v. State, 65 Tenn. (6 Baxt.) 514; see, United States v. Patty, 9 Biss. C. C. 429, 2 Fed. 664.

See, 2 Kerr's Whart. Crim. Law, § 1710.

[1] Archbold's C. P. by Jervis 82; 1 Leach 448; 2 N. Y. Rev. Stats. 1856. GA.—Holt v. State, 38 Ga. 187. ILL.—Gerard v. People, 4 Ill. (3 Scam.) 363; Dunham v. People, 5 Ill. (4 Scam.) 172, 39 Am. Dec. 407; Guedel v. People, 43 Ill. 226.

defendant is indicted for holding and uttering forged paper, a conviction for holding, the acts being simultaneous, bars a subsequent prosecution for uttering the same paper, or the converse.[2] If he is indicted for a riot, of which the overt act is an assault, and if on the trial of the riot the assault is put in evidence, and he is convicted and sentenced on the basis of the assault, the assault can not afterwards be made the basis of an independent prosecution;[3] nor when a riot consists in breaking up a religious meeting can the defendant be prosecuted for the two

IND.—Clem v. State, 42 Ind. 420, 13 Am. Rep. 369. IOWA—State v. Egglesht, 41 Iowa 574, 20 Am. Rep. 612; State v. Murray, 55 Iowa 530, 8 N. W. 350; State v. Gleason, 56 Iowa 203, 9 N. W. 126. KY.—Hinkle v. Com., 34 Ky. (4 Dana) 518. LA.—State v. Keogh, 13 La. Ann. 243; State v. Vines, 34 La. Ann. 1073. ME.—State v. Inness, 53 Me. 536. MD.—State v. Reed, 12 Md. 263. MASS.—Com. v. Cunningham, 13 Mass. 245; Com. v. Wade, 34 Mass. (17 Pick.) 395; Com. v. Trickey, 95 Mass. (13 Allen) 559; Com. v. Tenney, 97 Mass. 50; Morey v. Com. 108 Mass. 433. N. Y.—People v. Barrett, 1 John. 66; Canter v. People, 38 How. Pr. 91; Buell v. People, 18 Hun 487. N. C.—State v. Revels, 44 N. C. (Busb. L.) 200. OHIO—Price v. State, 19 Ohio 423. S. C.—State v. Ray, 1 Rice L. 1, 33 Am. Dec. 90; State v. Risher, 1 Rich. L. 219. TENN.—Hite v. State, 17 Tenn. (9 Yerg.) 357; Wilcox v. State, 74 Tenn. (6 Lea) 571, 40 Am. Rep. 53. ENG.—R. v. Emden, 9 East 437.

In Texas it has been held that a conviction of swindling by forgery bars a subsequent prosecution for the forgery.—State v. Hirshfield, 11 Tex. App. 207.

2 State v. Benham, 7 Conn. 414; People v. Van Keuren, 5 Park. C. R. (N. Y.) 66.

In State v. Egglesht, 41 Iowa 574, 20 Am. Rep. 612, the defendant was held guilty of but one offense in passing four checks at the same time to the same person.

But an acquittal for forging does not bar a prosecution for uttering. —Harrison v. State, 36 Ala. 248; Foster v. State, 39 Ala. 229.

An acquittal for forging a certificate of deposit on one bank does not bar a prosecution for obtaining money from another bank, by forwarding the certificate in a forged letter.—See People v. Ward, 15 Wend. (N. Y.) 231.

3 ALA.—State v. Standifer, 5 Port. 523. ILL.—Price v. People, 9 Ill. App. 36. IOWA—Scott v. United States, 1 Morr. 142. KY.—Duncan v. Com., 36 Ky. (6 Dana) 295. N. C.—State v. Stanly, 49 N. C. (4 Jones L.) 290. S. C.—State v. Fife, 1 Bail. L. 1. VT.—State v. Locklin, 59 Vt. 654, 10 Atl. 464. VA.—Com. v. Kinney 4 Va. (2 Va. Cas.) 139; Smith v. Com.,

offenses successively.[4] Nor can there be a prosecution for an assault when the defendant has been already convicted of a breach of the peace which constituted the assault.[5] But where he is convicted of an assault, this does not, for the reasons already given, bar a subsequent prosecution for a riot of which the assault was one of the overt acts, as he could not, under the indictment for the assault, have been convicted of the riot.[6] Nor does an acquittal for obstructing a steam-engine, by putting a rail across the track, bar a prosecution for putting the rail across the track with intent to obstruct, if the defendant could not have been convicted of the latter offense on the indictment for the former;[7] nor does an acquittal for arson bar a prosecution for burning an untenanted house, the indictment for the former not including the latter offense;[8] nor does a conviction for disturbing a religious meeting by firing a pistol bar a prosecution for homicide by the same shot;[9] nor does an acquittal of bigamy bar a prosecution for adultery;[10] nor does a prosecution for threatening to kill bar an indictment for assault with intent to murder, being part of the same transaction;[11] nor does a conviction for larceny, on an indictment for larceny, bar a prosecution for the burglary to which the larceny was an incident.[12] It may be, however, that where the prosecution elects to prosecute to conviction a particular phase of a crime,—e. g., larceny in a case of robbery,[13] or arson in a

48 Va. (7 Gratt.) 593. ENG.—R. v. Champneys, 2 Moo. & R. 26.

4 State v. Townsend, 2 Har. (Del.) 543.

5 Com. v. Miller, 35 Ky. (5 Dana) 320; Com. v. Hawkins, 74 Ky. (11 Bush) 603.

6 McRea v. Americanus, 59 Ga. 168, 27 Am. Rep. 390; Freeland v. People, 16 Ill. 380.

7 Com. v. Bakeman, 105 Mass. 53.

8 State v. Jenkins, 20 S. C. 351.

9 State v. Ross, 72 Tenn. (4 Lea) 442.

10 Swancoat v. State, 45 Tex. App. 105.

11 Lewis v. State, 1 Tex. App. 323.

12 See Wilson v. State, 24 Conn. 57; Price v. People, 9 Ill. App. 36; State v. Warner, 14 Ind. 572; supra, § 1396.

13 See Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528; Copenhaven v. State, 15 Ga. 264.

case where killing was an incident to the arson,[14]—it may be regarded as entering a nolle prosequi as to the other phases. But so far as the strict rule of law is concerned, the proceedings on the first trial can not bar a prosecution for an offense on which there could be no conviction on the first trial.[15] An acquittal for larceny, for instance, does not bar an indictment for obtaining the same goods by false pretenses, or by conspiracy to cheat,[16] nor, at common law, for being an accessary before or after the fact to the stealing.[17] Whether a conviction for burglary with intent to steal bars an indictment for larceny has been already considered.[18]

§ 1408. —— So IN LIQUOR CASES. In liquor cases we have the rules before us abundantly illustrated. Where, under an indictment for a nuisance, the defendant could

In State v. Lewis, 9 N. C. (2 Hawks) 98, 11 **Am. Dec.** 741, it was held that a conviction for larceny on an indictment for burglary and larceny barred a subsequent prosecution for robbery on the same facts.

Compare: Supra, § 1397.

14 State v. Cooper, 13 N. J. L. (1 Gr.) 361, 25 **Am. Dec.** 490; People v. Smith, 3 Weekly Digest (N. Y.) 162.

Compare: R. v. Greenwood, 23 Up. Can. Q. B. 250; and see, as justly criticising, State v. Cooper, note to R. v. Tancock, 13 Eng. R. 659; R. v. Tancock, 13 Cox C. C. 217.

15 Supra, § 1387; State v. Ross, 72 Tenn. (4 Lea) 442.

Compare: State v. Cooper, 13 N. J. L. (1 Gr.) 361, 25 **Am. Dec.** 490; State v. Lewis, 9 N. C. (2 Hawks) 98; State v. Fayetteville, 6 N. C. (2 Murph.) 371.

In Fiddler v. State, 26 Tenn. (7 Humph.) 508, the courts departed from the strict rule of law, and took ground more properly belonging to the executive, namely, that when a defendant has been adequately punished for one of a series of offenses, further prosecutions may be stopped.

16 Dominick v. State, 40 Ala. 680, 91 **Am. Dec.** 496; State v. Sias, 17 N. H. 558; R. v. Henderson, 1 Carr. & M. 328, 41 Eng. C. L. 183.

17 Foster v. State, 39 Ala. 229; State v. Larkin, 49 N. H. 36, 6 **Am. Rep.** 456; supra, § 1389.

18 Supra, § 1397.

An acquittal of fornication with A. has been held no bar to a prosecution for refusal to support bastard child begotten with A.—Davis v. State, 58 Ga. 173.

An acquittal on a charge of killing an unborn child, when attempting to produce a miscarriage of the mother, is no bar to an indictment for attempting the miscarriage.—State v. Elder, 65 Ind. 282, 32 **Am. Rep.** 69.

not be convicted of keeping or selling intoxicating liquors, a conviction or acquittal of the former offense will not bar a prosecution for the latter.[1] Under the same circumstances, an indictment for a specific sale under one statute is not barred by a conviction under another statute of being a common seller, or of keeping a tippling-house.[2] But where the conviction is of being a "common seller of liquor," and on the trial, to prove this, several sales are put in evidence, and the defendant is sentenced on the aggregate case, he can not be subsequently convicted on an indictment charging a sale within the period covered by the first trial.[3] But for distinct successive sales there may be distinct indictments, if the evidence in the subsequent cases is not part of the proof of the first.[4] This is

1 ALA.—Martin v. State, 59 Ala. 34. CONN.—State v. Moriarty, 50 Conn. 415. KAN.—State v. Kuhuke, 30 Kan. 462, 2 Pac. 689. ME.—State v. Inness, 53 Me. 536. MASS.—Com. v. Hardiman, 91 Mass. (9 Allen) 487; Com. v. Cutler, 91 Mass. (9 Allen) 486; Com. v. McCauley, 105 Mass. 69. N. J.—State v. Williams, 30 N. J. L. (1 Vr.) 102.

See, 2 Kerr's Whart. Crim. Law, § 1803.

2 CONN.—State v. Moriarty, 50 Conn. 415. GA.—Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528. ME.—State v. Combs, 32 Me. 527; State v. Maher, 35 Me. 225; State v. Inness, 53 Me. 536. MASS.—Com. v. Cutler, 91 Mass. (9 Allen) 486. MISS.—Morman v. State, 24 Miss. 54. PA.—Heikes v. Com., 26 Pa. St. 513. R. I.—State v. Johnson, 3 R. I. 94.

Contra: Under varying statutes. —Miller v. State, 3 Ohio St. 475; State v. Nutt, 28 Vt. 598.

In Com. v. Jenks, 67 Mass. (1 Gray) 490, it was held that after a conviction of being a common seller the defendant could not be charged with particular sales at the same time; but in Com. v. Hudson, 80 Mass. (14 Gray) 11, it was held that an acquittal as a common seller did not bar a prosecution for single sales.—See Com. v. Kennedy, 97 Mass. 224.

3 Com. v. Welch, 97 Mass. 593; Com. v. Connors, 116 Mass. 35; State v. Andrews, 27 Mo. 267; State v. Nutt, 28 Vt. 598.

A conviction for keeping a tenement for sale of intoxicating liquors from August 1 to October 4 bars a complaint for keeping the same tenement for the same purpose from May 1 to November 17 of the same year.—Com. v. Dunster, 145 Mass. 101, 13 N. E. 350.

4 See Com. v. Mead, 92 Mass. (10 Allen) 396; State v. Cassety, 1 Rich. L. (S. C.) 90; State v. Brown, 49 Vt. 437.

eminently the case when the sales are to distinct persons.[5] It is otherwise, however, when the first indictment is for a continuous offense of which the second indictment presents an ingredient.[6]

§ 1409. SEVERANCE OF IDENTITY BY PLACE. When the performance of a continuous act runs through successive jurisdictions, then it is broken into separate offenses cog-

5 Ibid.; Com. v. Mead, 92 Mass. (10 Allen) 396; State v. Ainsworth, 11 Vt. 91.

6 Com. v. Robinson, 126 Mass. 259, 30 Am. Rep. 674.

Lord, J., said in above case: "In Morey v. Com., 108 Mass. 433, Gray, C. J., says 'a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.' In Com. v. Armstrong, 73 Mass. (7 Gray) 49, as well as in several other cases, it is decided that an indictment for being a common seller of intoxicating liquors, from a day named to the day of the finding of the indictment, is supported by proof of three sales made on any one day between the days named in the indictment. That case further decides that, although where the offense consists of but a single act, the day on which the act is alleged to have been committed is immaterial if it appears to have been a day on which the offense charged might have been committed; but when, on the other hand, the offense charged is continuous in its nature and requires a series of acts for its commission, the time within which the offense is alleged to have been committed is material, and must be proved as alleged. So when a person is charged with an offense continuous in its nature and requiring for its commission a series of acts, and such offense is alleged to have been committed upon a single day, evidence of any facts tending to establish the offense at any other time than upon the day named is inadmissible. Applying these principles to the case at bar, the same evidence which would have warranted a conviction upon the first complaint would have warranted a conviction upon the present complaint, for upon the second complaint the jury would have been required to convict the defendant if it should appear that he committed the acts complained of at any time between the first day of January and the first day of June, 1878."

In Com. v. McShane, 110 Mass. 502, it was held that a conviction may be had on an indictment upon the Gen. Stats., ch. 87, §§ 6, 7, for maintaining a tenement for the illegal keeping and sale of intoxicating liquors, although the only evidence is as to liquors for keeping which with intent to sell the defendant has been already indicted, and punished.

nizable in each jurisdiction.[1] And where horses belonging to different owners were stolen by the defendant at places a mile apart, it was held that a conviction in one case did not bar the other.[2] This distinction has been applied to goods of different owners stolen in different parts of the same room.[3]

§ 1410. SEVERANCE OF IDENTITY BY TIME. The mere passage of time does not by itself break up into parts an offense otherwise continuous.[1] If the transaction is set on foot by a single impulse, and operated by an unintermittent force, it forms a continuous act, no matter how long a time it may occupy.[2] So has it been held in reference to gas abstracted continuously for a long period from the prosecutor's pipes,[3] and to ore fradulently quarried for several years through innocent agents by means of one orifice in the defendant's quarry, such orifice being made at one specific time.[4] And when inculpatory facts rapidly succeeding each other are put in evidence in one case by the prosecution, it can not bring a second indictment for a part of these facts, relying on evidence which was introduced at the first trial.[5] But a series of illegal

1 Whart. Confl. of L. § 931; 1 Kerr's Whart. Crim. Law, §§ 33-38, 333; supra, § 1372; infra, § 1411, note. See, also, Campbell v. People, 109 Ill. 565, 50 Am. Rep. 621; State v. Rankin, 44 Tenn. (4 Cold.) 145; Moore v. Illinois, 55 U. S. (14 How.) 13, 14 L. Ed. 306.

2 Alexander v. State, 21 Tex. App. 406, 57 Am. Rep. 617, 17 S. W. 139; supra, § 1406.

3 Phillips v. State, 85 Tenn. 551, 3 S. W. 434.

1 "All offenses involving continuous action, and which may be continued from day to day, may be so alleged."—Carpenter, J., State v. Bosworth, 54 Conn. 1, 4 Atl. 248.

2 Smith v. State, 79 Ala. 257.

As to separate stealings, see State v. Martin, 82 N. C. 672; Ricord v. R. R., 15 Nev. 167.

3 See R. v. Jones, 4 Car. & P. 217, 19 Eng. C. L. 483.

4 R. v. Bleasdale, 2 Car. & K. 765, 61 Eng. C. L. 764; R. v. Firth, L. R. 1 C. C. 172; 11 Cox C. C. 234.

5 Com. v. Robinson, 126 Mass. 259, 30 Am. Rep. 674; cited supra, § 1408. Com. v. Robinson is adopted as law by Blatchford, J., in Snow, In re, 120 U. S. 274, 30 L. Ed. 658, 7 Sup. Ct. 556; citing Huffman v. State, 23 Tex. App. 491, 5 S. W. 134; and also, 1 Kerr's Whart. Crim. Law, §§ 33-38, 1169.

Compare: Brewer v. State, 5 Ind. 501.

acts following each other with time for specific thought between debauch are separately indictable.[6] It is said to be otherwise as to acts of gambling at one sitting.[7] But this can not be sustained unless the acts were part of one transaction.

§ 1411. ——BUT CONTINUOUS MAINTENANCE OF NUISANCES CAN BE SUCCESSIVELY INDICTED, ALITER AS TO BIGAMY. Where, therefore, there is each day new action on the part of the inculpated parties, adding to the offense, then for each day's increment there can be a new indictment.[1] Thus, an acquittal for a prior stage of the same nuisance is no bar to an indictment for a nuisance at the present time, though the offenses on the record are identically the same, each day's continuation of the nuisance being a repetition of the offense.[2] And a conviction of selling illegally at one time is no bar to a conviction for selling illegally at another time.[3] But the periods of time in which the offense is charged must not in any point coincide, or the second prosecution fails.[4] And a conviction under the act

6 See, infra, § 1411; supra, § 1408.

7 Wingard v. State, 13 Ga. 396.

1 See Campbell v. State, 22 Tex. App. 262, 2 S. W. 825.

2 Gormley v. State, 37 Ohio St. 120; People v. Townsend, 3 Hill (N. Y.) 479; State v. Cassety, 1 Rich. L. (S. C.) 90; State v. Ainsworth, 11 Vt. 91; R. v. Fairie, 8 El. & Bl. 486, 92 Eng. C. L. 485; 8 Cox C. C. 66.

See Kerr's Whart. Crim. Law, §§ 54, 517, 1685.

Compare: United States v. McCormick, 5 Cr. 104, Fed. Cas. No. 4012.

3 State v. Derichs, 42 Iowa 196; supra, §§ 1393, 1408.

4 Com. v. Robinson, 126 Mass. 259, 30 Am. Rep. 674, cited supra, §§ 1408-1410.

The several theories on this topic are thus given by Berner, Lehrbuch, § 140:

Formal concurrence, which exists when a particular act has several criminal aspects. A particular sexual transaction, for instance, may be both rape and incest. A stealing may be both larceny and an attempt.

Material concurrence, where several successive acts form part of the same apparently continuous transaction.

In cases of formal concurrence, the rule, as has been seen, is, that there should be a conviction only of the crime to which the higher penalty is attached, though the minor crime may be taken into consideration in adjusting punishment.

of Congress, of cohabiting with more than one woman, precludes another conviction for the same offense at a different time.[5]

§ 1412. CONVICTION OF ASSAULT NO BAR, AFTER DEATH OF ASSAULTED PARTY, TO INDICTMENT FOR MURDER. Where, after a conviction of assault, the assaulted person dies, the conviction of assault is no bar to a conviction for murder or manslaughter.[1] The reason is that as at the time of the conviction of assault there could have been no conviction of the homicide, the prosecution for the homicide is not barred by the conviction of the assault.

In cases of material concurrence the following theories have been propounded: 1. Absorption or Merger.—In this case the lesser offense is lost sight of in the greater. Pœna major absorbet minorem. Only the most heinous of the concurrent crimes is to be punished, and the others are only to be considered as affording grounds for the adjustment of the sentence. Against this view it is argued that it violates the public sense of justice that any crime, proved in a court of justice, should go unpunished, and that the commission of a greater crime should not be a free pass to the commission of a lesser crime. 2. Cumulation.—Each distinct offense, though several follow each other in rapid succession as part of the same transaction, is to be punished separately, and for this is invoked the maxim, Quot delicta, tot pœnæ. To this the objection is made that public justice is sufficiently satisfied if the criminal has applied to him in his sentence such an increase of punishment as the aggravation of the transaction requires, and that this is one of the objects of giving to the judges discretion in the dispensing of punishment. 3. Intermediate View.—By this view the cumulation of the entire penalties of the several concurrent crimes is rejected, while the theory of the merger of the lesser in the greater is repudiated. The criminal is sentenced on the heaviest of the imputed crimes (pœna major), while in the sentence due consideration is taken of the lesser crimes, provided they appear in evidence as part of the aggravating circumstances of the case.

5 People v. Otto, 70 Cal. 523, 11 Pac. 675; Snow, In re, 120 U. S. 274, 30 L. Ed. 658, 7 Sup. Ct. 556.

1 IND.—Wright v. People, 5 Ind. 527. ME.—State v. Hattabough, 66 Ind. 223; State v. Littlefield, 70 Me. 452, 35 Am. Rep. 335. MASS. —Com. v. Roby, 29 Mass. (12 Pick.) 496; Com. v. Evans, 101 Mass. 25. N. Y.—Burnes v. People, 1 Park. Cr. Rep. 182. TEX.—Curtis v. State, 22 Tex. App. 227, 58 Am. Rep. 635, 3 S. W. 86. ENG.—Nicholas's Case, Foster Cr. L. 64;

4. *Practice Under Plea.*

§ 1413. PLEA MUST BE SPECIAL. A former conviction for the same offense, even though in the same court, should be specially pleaded;[1] the plea, when there are several counts, designating the count it meets.[2] It can not be put in evidence under the general issue,[3] or avail in arrest of judgment,[4] or on habeas corpus,[5] or on demurrer.[6] The plea may go only to part of a divisible count.[7]

§ 1414. AUTREFOIS ACQUIT MUST BE PLEADED FIRST. When autrefois acquit and not guilty are pleaded together, the former must be tried first.[1] In strict practice, the two pleas can not be concurrently pleaded.[2] Autrefois acquit comes first; and if determined against the defendant, he then pleads over.[3] But the verdict must be special.[4] When the justice of the case requires, as when the ground

see R. v. Morris, L. R. 1 C. C. 90; R. v. Salvi, 10 Cox C. C. 481 n.; supra, §§ 1395, 1396.

See criticism of text in 17 Am. Law Reg. N. S. 746.

1 ALA.—DeArman v. State, 77 Ala. 10. GA.—Wilson v. State, 68 Ga. 827. N. H.—State v. Buzzell, 58 N. H. 257, 42 **Am. Rep.** 586; State v. Buzzell, 59 N. H. 65. TENN.—Zachary v. State, 66 Tenn. (7 Baxt.) 1. TEX.—Williams v. State, 13 Tex. App. 285. VA.—Justice v. Com., 81 Va. 209.

Prior record should be set out.—See Grisham v. State, 19 Tex. App. 504.

2 Campbell v. People, 109 Ill. 565, 50 **Am. Rep.** 621.

3 ALA.—Rickles v. State, 68 Ala. 538. IND.—Clem v. State, 42 Ind. 420, 13 **Am. Rep.** 369. LA.—State v. Washington, 28 La. Ann. 129. MASS.—Com. v. Chesley, 107 Mass. 223.

Aliter in Illinois: Hankins v. People, 94 Ill. 628.

4 State v. Barnes, 32 Me. 530; State v. Salge, 2 Nev. 321; Com. v. Maher, 16 Phila. (Pa.) 451, 4 Crim. Law Mag. 411.

5 Pitner v. State, 44 Tex. 578.

6 United States v. Moller, 16 Blatchf. 65, Fed. Cas. No. 15794.

7 State v. Littlefield, 70 Me. 452; Com. v. Curtis, 28 Mass. (11 Pick.) 133.

1 Supra, § 1348, and cases cited; also, Foster v. State, 39 Ala. 229; Clem v. State, 42 Ind. 421, 13 **Am. Rep.** 369; Com. v. Merrill, 90 Mass. (8 Allen) 545; Solliday v. Com., 28 Pa. St. 13; Davis v. State, 42 Tex. 494.

Compare: Faulk v. State, 52 Ala. 415.

2 See People v. Briggs, 1 Dak. 302, 46 N. W. 451; R. v. Roche, 1 Leach C. C. 135.

3 Supra, § 1349; infra, § 1422.

4 People v. Helbing, 59 Cal. 567.

of the plea arises after plea, the plea may be filed when such defense is first presented.[5]

§ 1415. VERDICT MUST GO TO THE PLEA. A verdict of guilty on the two is bad,[1] and so, when tried together, of a verdict upon one plea alone.[2]

§ 1416. IDENTITY OF OFFENDER AND OFFENSE TO BE ESTABLISHED. The plea must consist of two matters: first, matter of record, to-wit: the former indictment and acquittal, or conviction for the count; second, of matters of fact, to-wit: the identity of the person acquitted, and of the offense of which he was acquitted, which is for the jury.[1] To support the first matter, it is necessary to show by the record that the defendant was legally acquitted or convicted on an indictment free from error in a court having jurisdiction.[2]

§ 1417. IDENTITY MAY BE PROVED BY PAROL. The prosecution, however, may tender an issue as to the identity of the defendant, or the identity of the offense, as well as to the existence of the record.[1] When such issue is ten-

5 People v. Stewart, 64 Cal. 60, 28 Pac. 112.

1 Mountain v. State, 40 Ala. 344.

2 Nonemaker v. State, 34 Ala. 211; Moody v. State, 60 Ala. 78; People v. Helbing, 59 Cal. 567; People v. Fuqua, 61 Cal. 377; Solliday v. Com., 28 Pa. St. 13.

As to waiver, see Dominick v. State, 40 Ala. 680, 91 Am. Dec. 496.

1 2 Hale P. C. 241, Hawk. b. 2, ch. 35, § 3; Burn. J., Indictment xi.; 1 M. & S. 188; 9 East 438; 2 Leach 712; 4 Co. Rep. 44; Smith v. State, 52 Ala. 407; Rocco v. State, 37 Miss. 357; Com. v. Myers, 3 Wheel. Cr. Cas. (N. Y.) 550.

Such a plea is sufficient.—See Austin v. State, 2 Mo. 393; State v. Cheek, 63 Mo. 364.

2 4 Bl. Com. 335; 2 Hawk., ch. 35, § 1; Com. v. Sutherland, 109 Mass. 342; Com. v. Hanley, 140 Mass. 457, 5 N. E. 468; Com. v. Maher, 16 Phila. (Pa.) 451, 4 Crim. Law Mag. 411; Jacobs v. State, 72 Tenn. (4 Lea) 196; supra, §§ 1364 et seq.

For forms of replication and rejoinder, see Whart. Prec. 1155, 1156; Burk v. State, 81 Ind. 128.

1 2 Whart. Crim. Ev. (Hilton's ed.) § 593; Buhler v. State, 64 Ga. 504; State v. Vines, 34 La. Ann. 1079.

As to identity of defendant, see R. v. Crofts, 9 Carr. & P. 219, 38 Eng. C. L. 137.

dered, the burden of proof (the plea being one of confession and avoidance) is on the defendant.[2] To prove it, he has, first, to produce the record;[3] and, secondly, to prove, orally or otherwise, the averment of identity contained in his plea.[4] Hence, in cases of dispute, parol testimony is admissible to prove (what the record can not sufficiently show) that the offenses are or are not identical, or that the party charged is or is not the party tried on the former procedure.[5]

§ 1418. PLEA, IF NOT IDENTICAL, MAY BE DEMURRED TO. If the plea on its face exhibits a variance between itself and the record, the plea may be demurred to when defective on its face,[1] or, when otherwise, advantage may be taken of the variance upon a replication of nul tiel rec-

As to identity of offense, infra, §§ 1417, 1419.

For forms of pleas, see Whart. Prec. 1150 et seq.

2 Infra, § 1419. IND.—Cooper v. State, 47 Ind. 61; Dunn v. State, 70 Ind. 47. MASS.—Com. v. Daley, 70 Mass. (4 Gray) 209. MO.—State v. Small, 31 Mo. 197; State v. Moore, 66 Mo. 372. OHIO—Bainbridge v. State, 30 Ohio St. 264.

Compare: State v. Smith, 22 Vt. 74.

3 Supra, § 1367.

Where second indictment preferred at 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.—R. v. Parry, 7 Car. & P. 836, 32 Eng. C. L. 898.

Where previous acquittal was at previous term in the same jurisdiction or in a different jurisdiction, it can only be proved by the entire record.—R. v. Bowman, 6 Car. & P. 101, 337, 25 Eng. C. L. 898.

4 See 2 Russ. on Crimes (9th Am. Ed.) 721, n.; Faulk v. State, 52 Ala. 415; State v. Thornton, 37 Mo. 360.

5 2 Whart. Crim. Ev. (Hilton's Ed.) § 693; supra, § 1416; IND.—Porter v. State, 17 Ind. 415. KY.—Duncan v. Com., 36 Ky. (6 Dana) 295. MASS.—Com. v. Dillane, 77 Mass. (11 Gray) 67. MO.—State v. Andrews, 27 Mo. 267; State v. Small, 31 Mo. 197. ENG.—Flitters v. Allfrey, L. R. 10 C. P. 29; R. v. Bird, 2 Den. C. C. 94; 5 Cox C. C. 20.

That the defendant is entitled to have the issue determined as one of fact, see Troy v. State, 10 Tex. App. 319.

That name may be prima facie proof of identity, see State v. Kelso, 11 Mo. App. 91; 76 Mo. 505; 1 Whart. Crim. Ev. (Hilton's Ed.) § 802.

1 State v. Locklin, 59 Vt. 654, 10 Atl. 464.

ord.[2] But if the variance be non-essential, demurrer will not be sustained.[3]

Where the only issue is the identity of the offenses, a technical difference between the description of property in the first indictment and the second will be disregarded, when no proof is offered to show the offense was the same.[4]

§ 1419. BURDEN OF PROOF IS ON DEFENDANT. The burden of proving a prior conviction of the offense charged against a defendant being upon him,[1] must be sustained by a preponderance of proof.[2]

[2] McQuoid v. People, 8 Ill. (3 Gilm.) 76; Hite v. State, 17 Tenn. (9 Yerg.) 357; see Shubert v. State, 21 Tex. App. 551, 2 S. W. 883; R. v. Bowman, 6 Car. & P. 101, 337, 25 Eng. C. L. 342, 462.

[3] Goode v. State, 70 Ga. 752; see Buhler's Case, 64 Ga. 504.

[4] People v. McGowan, 17 Wend. (N. Y.) 386; see 2 Whart. Crim. Ev. (Hilton's Ed.) § 593.

[1] Jenkins v. State, 78 Ind. 133; Hozier v. State, 6 Tex. App. 501; Willis v. State, 24 Tex. App. 586, 6 S. W. 857.

[2] Supra, § 1417; see 2 Hale 241. ALA.—Rake v. Pope, 7 Ala. 161. MASS.—Com. v. Daley, 70 Mass. (4 Gray) 209. MO.—State v. Small, 31 Mo. 197; State v. Thornton, 37 Mo. 360. VA.—Page v. Com. 68 Va. (27 Gratt.) 954. ENG.—R. v. Parry, 7 Car. & P. 836, 32 Eng. C. L. 898.

See 1 Kerr's Whart. Crim. Law, § 80.

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 (the second indictment being exactly the same as the first, with the omission only of the fourth prisoner), they pleaded autrefois acquit to the second indictment, averring the identity of the offenses, and to this plea there was a replication that the offenses 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 offenses 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.—R. v. Parry, 7 Car. & P. 836, 32 Eng. C. L. 898; supra, § 463.

If there be a replication of fraud, the burden of such replication is on the prosecution.[3]

If there be no replication, the similiter will be assumed if not at the time formally filed, or may be filed nunc pro tunc.[4]

§ 1420. WHEN REPLICATION IS NUL TIEL RECORD ISSUE IS FOR COURT. Wherever the offenses charged in the two indictments are capable of being legally identified as the same offense by averments, it is a question of fact for a jury to determine whether the averments be supported and the offenses 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 offenses 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.[1]

3 State v. Buzzell, 58 N. H. 257, 42 Am. Rep. 586.

Judge Allen said in this case of the plea of autrefois acquit: "It being new affirmative matter, and not a denial of any allegation of the indictment, the burden of proof, on a traverse of the plea, is on the defendant" (citing Com. v. Daley, 70 Mass. (4 Gray) 209, 210; State v. Small, 31 Mo. 197; R. v. Parry, 7 Car. & P. 836, 839, 32 Eng. C. L. 898; 1 Arch. Cr. Pr. & Pl. 113, n.), and he has the opening and close.—R. v. Sheen, 2 Car. & P. 634, 638, 639, 12 Eng. C. L. 776.

— **"But if the state replies fraud,** or other new affirmative matter, the burden of proof on the latter issue is on the state. In some jurisdictions, when, after an acquittal on part of an indictment, there is a new trial of the rest, a special plea in bar of the further maintenance of so much of the charge as has been disposed of is not required," citing State v. Little, 1 N. H. 257; State v. Buzzell, 59 N. H. 65; State v. Martin, 30 Wis. 216, 222, 223, 11 Am. Rep. 567.

4 Supra, § 339; Swepson v. State, 81 N. C. 571.

1 Hite v. State, 17 Tenn. (9 Yerg.) 357.

Duty of court to declare legal effect of a record which is offered to sustain the plea of autrefois acquit or discontinuance, and the record itself can not 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.—Mar-

§ 1421. A REPLICATION OF FRAUD IS GOOD ON DEMURRER. 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.[1] The demurrer admits the allegation of fraud.

§ 1422. ON JUDGMENT AGAINST DEFENDANT HE IS USUALLY ALLOWED TO PLEAD OVER. 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 offense itself.[1] In England, however, though this is allowed in felonies, it is not in misdemeanors.[2] Of the injustice of this distinction a pregnant illustration is found in a case which, in 1850, attracted great attention in England.[3] On the plea of autrefois acquit to an assault, issue was taken by the crown, and after verdict, judgment entered against the

tha v. State, 26 Ala. 72; see State v. Haynes, 36 Vt. 667.

On general question of pleading, see Foster v. State, 39 Ala. 229.

1 State v. Brown, 16 Conn. 54; State v. Reed, 26 Conn. 202; State v. Little, 1 N. H. 257; State v. Clenny, 38 Tenn. (1 Head) 270; Com. v. Jackson, 4 Va. (2 Va. Cas.) 501; supra, § 1381.

As cases of practice under plea and replication, see Dacy v. State, 17 Ga. 439; see Com. v. Curtis, 28 Mass. (11 Pick.) 134.

In other states, similar provisions exist.

In Massachusetts, by Gen. Stat. 1864, ch. 250, § 4, it is sufficient in autrefois acquit or convict to set forth simply a prior lawful acquittal or conviction.

1 MASS.—Com. v. Goddard, 13 Mass. 455; Com. v. Golding, 80 Mass. (14 Gray) 49. OHIO—Hirn v. State, 1 Ohio St. 16. PA.—Barge v. Com., 3 Pen. & W. 262, 23 Am. Dec. 81; Foster v. Com., 8 Watts & S. 77. TENN.—Falkner v. State, 50 Tenn. (3 Heisk.) 33. WIS.—McFarland v. State, 68 Wis. 400, 60 Am. Rep. 867, 32 N. W. 226.

See, supra, §§ 1330, 1331, 1349.

2 R. v. Taylor, 3 Barn. & C. 502, 10 Eng. C. L. 231; 5 Dow. & Ry. 422; R. v. Gibson, 8 East 107.

See fully, supra, § 1439.

3 R. v. Bird, 15 Jur. 193; 2 Eng. L. & E. R. 448; 2 Den. C. C. 94; 5 Cox C. C. 11. For a fuller report of this case, see, supra, § 1395.

As to pleading over, supra, §§ 1330-1333, 1349.

prisoners, who were 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 offense for which he was never tried. "I can not but feel," he said, addressing the prisoners, "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."[4] 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 district judge, who since the conviction and the application for sentence had died.[5] 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.[6]

§ 1423. Prosecution may rejoin on its demurrer being overruled. Where the prosecution 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.[1]

§ 1424. Issue of fact for jury. In cases where the defendant pleads over to the felony at the same time with

4 Supra, §§ 1348, 1349.

5 State v. Abram, 4 Ala. 272; People v. Shaw, 63 N. Y. 36, 2 Cow. Cr. Rep. 280; United States v. Harding, 1 Wall. Jr. 127, 6 Pa. L. J. 14, 3 Pa. L. J. Rep. 473, 3 Leg. Int. 41, Fed. Cas. No. 15301. See, infra, § 1847.

6 State v. Green, 16 Iowa 239; People v. Taylor, 3 Den. (N. Y.) 91; and see, supra, §§ 1336-1340.

1 State v. Nelson, 7 Ala. 610; supra, § 1332.

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.[1] But when both pleas are submitted to the jury at the same time, there must be a verdict on each, and it is error to take a verdict on the plea of not guilty alone.[2] An arbitrary discharge of the jury before verdict may bar future prosecutions.[3]

§ 1425. NOVEL ASSIGNMENT NOT ADMISSIBLE. A novel assignment is not admissible in a criminal case, and the proper mode of replying to a plea of a former conviction is to traverse the alleged identity.[1]

VII. ONCE IN JEOPARDY.[1]

§ 1426. CONSTITUTIONAL LIMITATION TAKEN FROM COMMON LAW. By the Constitution of the United States it is provided: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb;"[2] and although this restriction does not affect cases arising distinctively in the states,[3] yet the same restriction, taken

1 See Burks v. State, 24 Tex. App. 326, 6 S. W. 300; R. v. Sheen, 2 Car. & P. 634, 12 Eng. C. L. 776; R. v. Cogan, 1 Leach C. C. 448; R. v. Vandercomb, 2 Leach C. C. 708; supra, §§ 1348, 1349.

2 See People v. Kinstrey, 51 Cal. 278; Soliday v. Com., 28 Pa. St. 14; supra, § 1415.

3 People v. Jones, 48 Mich. 554, 12 N. W. 848.

1 Duncan v. Com., 36 Ky. (6 Dana) 295.

1 For plea of "Once in Jeopardy," Wharton's Prec. 1157. See, also, this subject further examined, infra, §§ 1647, 1760.

2 Const. U. S. Amend., art. 5, 9 Fed. Stats. Ann., 1st ed., p. 264.

3 CONN.—Coit v. Ives, 12 Conn. 243. N. Y.—Barker v. People, 3 Cow. 686, 15 Am. Dec. 322; qualifying People v. Goodwin, 18 Johns. 187, 9 Am. Dec. 203; People ex rel. Kemmler v. Durston, 55 Hun 64, 7 N. Y. Cr. Rep. 364, 7 N. Y. Supp. 364. PA.—Com. v. Cook, 6 Serg. & R. 577, 9 Am. Dec. 465. S. C.—State v. Shivers, 20 S. C. 392. W. VA.—State v. Sutphin, 22 W. Va. 490. FED.—Fox v. Ohio, 46 U. S. (5 How.) 410, 12 L. Ed. 213; Sexton v. California, 189 U. S. 323, 47 L. Ed. 834, 23 Sup. Ct. Rep. 544; United States v. Keen, 1 McL. 429, Fed. Cas. No. 15510; United States v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15204.

Misdemeanors punishable by fine, only, are not within the pro-

from the federal constitution, exists in most of the state constitutions. 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.[4] It has, therefore, been generally agreed, that after a verdict of either acquittal or conviction on a valid indictment or appeal, the party indicted can not afterward be indicted again upon a charge of having committed the same supposed offense.[5] In other words, at common law, as the rule is applied in England, when there has been a final verdict, either of acquittal or conviction, on an adequate indictment, the defendant can not a second time be placed in jeopardy for the particular offense; and at the first glance the constitutional provision appears nothing more than a solemn asseveration of the common law maxim.[6]

vision of the constitutional amendment.—Moundsville v. Fountain, 27 W. Va. 182.

As doubting this position, see Com. v. Purchase, 19 Mass. (2 Pick.) 521, 13 **Am. Dec.** 452.

4 4 Co. Rep. 40; 4 Bla. Com. 335; 2 Hawk., ch. 35, § 1; infra, §§ 1455, 1647, 1760.

5 2 Hawk., ch. 35, § 1; 4 Bla. Com. 335.

For English rule, see, infra, § 1455.

6 Ned v. State, 7 Port. (Ala.) 188; United States v. Gibert, 2 Sumn. 19, 41, Fed. Cas. No. 15204.

In Richard and William Vaux Case, 4 Co. 44a, 76 Eng. Rep. 992, a leading case, 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 put in jeopardy for one and the same offense; and that is the reason and cause why autrefois acquitted or convicted of the same offense 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," etc. And in England it is settled that the maxim, that a man can not be put in peril twice for the same offense, means that a man can not be tried again for an offense upon which a verdict of acquittal or conviction has been given, and not that a man can not be tried again for the same offense where

"Thus we see," says Mr. Justice Story, in commenting on the rule, "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.[7]

§ 1427. —— BUT IN SOME COURTS HELD MORE EXTENSIVE. 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 offense, 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 offense.[1] But between the pleas of autrefois acquit or convict, and once in jeopardy, there is this important distinction, that the former presupposes a verdict, the latter, the discharge of the jury without verdict, and is in the nature of a plea puis darrein continuance. The cases in this respect may

the first trial has proved abortive, and no verdict was given. Hence, as a judge has, by the English law, a discretionary power, in cases of necessity, to discharge the jury, even without the prisoner's consent, this discharge is no bar to a second trial. And such necessity exists when the jury have shown themselves unable to agree. The exercise of this discretion can not be renewed on error affirmed on appeal.—Winsor v. R., 6 Best & S. 143, 118 Eng. C. L. 141; 1 L. R. Q. B. 289; 1 L. R. Q. B. 390; R. v. Winsor, Ex. Ch. 7 Best & S. 490. See, also, R. v. Charlesworth, 1 Best & S. 460, 101 Eng. C. L. 459; R. v. Charlesworth, 9 Cox C. C. 44; R. v. Ward, 10 Cox C. C. 573.

7 United States v. Gibert, 2 Sumn. 19, 42, Fed. Cas. No. 15204. For a learned article on this head, see 4 West. L. J. 97.

1 ALA.—Ned v. State, 7 Port. 187. N. C.—State v. Garrigues, 2 N. C. (1 Hayw. L.) 241; Spier's Case, 12 N. C. (1 Dev. L.) 491. PA.—Com. v. Cook, 6 Serg. & R. 577, 9 Am. Dec. 465; Com. v. Clune, 3 Rawle 498. TEX.—Powell's Case, 17 Tex. App. 345; Pizano v. State, 20 Tex. App. 139, 54 Am. Rep. 511. VA.—Williams v. Conn., 43 Va. (2 Gratt.) 567, 44 Am. Dec. 403.

be placed in two general classes: First, where any separation of the jury, except in case of such overruling 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.[2]

§ 1428. RULE MAY EXTEND TO ALL INFAMOUS CRIMES. In Pennsylvania the rule is now held to be applicable only to such cases as are capital in that state.[1] In other states it has been extended to all infamous crimes.[2] And there are authorities in states holding the first view, which apply to all cases except misdemeanors.[3]

§ 1429. IN PENNSYLVANIA, ANY SEPARATION IN CAPITAL CASES, EXCEPT FROM ACTUAL NECESSITY, BARS FURTHER PROCEEDINGS. 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 capital 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

2 For a discussion of the general question how far a jury may be allowed to separate, see, infra, §§ 1657, 1664, 1721, 1753, 1760, 1771, 1776, 1902, etc.

1 Infra, §§ 1429 et seq.

2 Williams v. Com., 78 Ky. 93; State v. Connor, 45 Tenn. (5 Coldw.) 315.

3 Infra, § 1456.

In Lange, Ex parte, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872, it was held that under the constitutional provision, when a court has imposed a fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, it can not, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence. And Miller, J., in the opinion of the court, argues that the provision is applicable to misdemeanors where corporal punishment is inflicted.

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 anything 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?"[1] 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.[2] 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

1 Duncan, J., in this 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 offense. 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 can not mean a verdict given. Whenever the jury are charged with a prisoner, where the offense is punishable by death, and the indictment is not defective, he is in jeopardy of life."

2 Com. v. Cook, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; but see Com. v. McFadden, 23 Pa. St. 12, 62 Am. Dec. 308.

See, infra, §§ 1454, 1657, 1753, 1763.

"no discretionary power whatever exists with the court in such a case to discharge."[3]

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.[4] "The law is undoubtedly settled," says 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."

But in a capital case, where there is no consent, the record must show absolute necessity to justify a discharge.[5]

It has since been held that the plea of "once in jeopardy for the same offense" will not avail where the jury were discharged on account of disagreement, in a case of burglary.[6]

§ 1430. —— IN 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 can not be again put in jeopardy;[1] 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.[2] By the code of 1873 the court may discharge in all cases whenever the jury, in its opinion, can not agree, or whenever there is a manifest necessity for such discharge. But in such case the action of the trial court is reviewable in error.[3]

§ 1431. —— IN NORTH CAROLINA. The same question came before the Supreme Court of North Carolina in a

3 Com. v. Clue, 3 Rawle (Pa.) 498.

4 Peiffer v. Com., 15 Pa. St. 468, 53 Am. Dec. 605.

5 Hilands v. Com., 111 Pa. St. 1, 56 Am. Rep. 235, 2 Atl. 70.

6 McCreary v. Com., 29 Pa. St. 323.

1 Williams v. Com., 43 Va. (2 Gratt.) 567, 568, 44 Am. Dec. 403.

2 Com. v. Fells, 36 Va. (9 Leigh) 613.

As to West Virginia, contra by statute.—Crookham v. State, 5 W. Va. 510.

3 Wright v. Com., 75 Va. 914.

very early case,[1] and again at a later period,[2] 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, etc., for the same offense, holding, 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, that the prisoner could not be tried again.[3] In a still later case in the same state, it was held that a jury, charged in a capital case, can not be discharged before returning the verdict, at the discretion of the court; they can not 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.[4] Honest inability to agree, for six days, however, is ground for discharge.[5] And when one of the jurors procured himself to be fraudulently empaneled on a jury, in a capital case, in order to secure an acquittal, the jury should be discharged; nor is the defendant put in jeopardy by such

1 State v. Garrigues, 2 N. C. (1 Hayw. L.) 241.

2 Spier's Case, 12 N. C. (1 Dev. L.) 491.

3 Spier's Case, 12 N. C. (1 Dev. L.) 491; State v. McGimpsey, 80 N. C. 377, 30 Am. Rep. 90.

The general rule, however, is the contrary.—Infra, § 1450.

4 State v. Ephraim, 19 N. C. (2 Dev. & B. L.) 162. See, to same effect, State v. Prince, 63 N. C. 528; State v. Alman, 64 N. C. 364; State v. Jefferson, 66 N. C. 309; State v. Wiseman, 68 N. C. 203; State v. McGimpsey, 80 N. C. 377, 30 Am. Rep. 90.

5 State v. Honeycutt, 74 N. C. 391; State v. Carland, 90 N. C. 668.

act;[6] nor is he put in jeopardy by fraudulent conduct on the part of a juror necessitating a discharge.[7] A new trial granted, also, in a capital case, at request of the prisoner during the first trial, upon a juror being withdrawn, does not vitiate the procedure.[8]

§ 1432. —— IN 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;[1] but that opinion was subsequently reviewed in a case of great deliberation. In the latter case,[2] the jury were empaneled on Thursday evening at two 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. But it is now held lawful to discharge, even without defendant's consent, whenever the court concludes that agreement is impossible.[3]

§ 1433. —— IN ALABAMA. In Alabama, after a careful review of the subject, the following points were made: 1. That courts have not in capital cases a discretionary authority to discharge a jury after evidence given. 2.

6 State v. Bell, 81 N. C. 591; infra, § 1784.

7 State v. Washington, 89 N. C. 535, 45 Am. Rep. 700; State v. Washington, 89 N. C. 664.

8 State v. Davis, 80 N. C. 384.

1 State v. Waterhouse, 8 Tenn. (Mart. & Y.) 278.

2 Mahala v. State, 18 Tenn. (10 Yerg.) 532, 31 Am. Dec. 591; see State v. Rankin, 44 Tenn. (4 Coldw.) 145, cited, supra, § 1369.

3 State v. Hays, 70 Tenn. (2 Lea) 156; State v. Pool, 72 Tenn. (4 Lea) 363.

That a jury is, ipso facto, discharged by the determination of the authority of the court to which it is attached. 3. 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. 4. That sudden illnesses of a prisoner or juror, so that the trial can not proceed, are ascertained cases of necessity, and that many others exist, which can only be defined when particular cases arise. 5. That a court does not possess the power, in a capital case, to discharge a jury because it can not or will not agree.[1] 6. That therefore the unwarrantable discharge of a jury, after the evidence is closed, in a capital case, is equivalent to an acquittal.[2] 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 can not 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.[3]

§ 1434. —— In California. In California it is held that a discharge, without the prisoner's consent, unless from a legal necessity, or from cause beyond the control of the court, such as death, sickness, or insanity of some one of the jury, of the prisoner, or of the court, protects the defendant from a re-trial.[1] But absolute inability to agree is such a necessity.[2] A discharge on the ground that

1 Ned v. State, 7 Port. (Ala.) 188.

2 Ibid. 187. See, infra, §§ 1657, 1760.

3 State v. Abram, 4 Ala. 272. See, infra, §§ 896-898.

As to judge sitting in a case in which he heard only part of the evidence, see, infra, §§ 1845-1847.

1 People v. Webb, 38 Cal. 467. See Ex parte McLaughlin, 41 Cal. 215, 10 Am. Rep. 275; People v. Curtis, 76 Cal. 57, 17 Pac. 941; People v. Smalling, 94 Cal. 112, 29 Pac. 421; People v. Nash, 15 Cal. App. 325, 114 Pac. 786.

2 People v. Cage, 48 Cal. 323, 324, 17 Am. Rep. 436. See People v. James, 97 Cal. 400, 32 Pac. 317.

Discharging jury for failure to agree is such a necessity.—Dreyer v. People, 188 Ill. 48, 58 N. E. 622; but deliberation from 4 p. m. to 9:30 next morning does

the defendant, on a trial for manslaughter, was guilty of murder, is a bar.[3]

§ 1435. —— RULE ELSEWHERE. On the other hand, we have a series of courts holding that the separation 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 McLean, J., sitting in their several circuits; and of the courts of Massachusetts, New York, New Jersey, Iowa, Maryland, Ohio, Indiana, Michigan, Nebraska, Nevada, Georgia, Missouri, Illinois, Kentucky, Texas, and Mississippi.

§ 1436. IN THE FEDERAL COURTS A DISCRETIONARY DISCHARGE IS NO BAR. "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 had 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

not constitute disagreement justifying discharge.—Dreyer v. Illinois, 187 U. S. 85, 47 L. Ed. 86, 23 Sup. Ct. Rep. 33.

3 People v. Hunckeler, 48 Cal. 331. See People v. Ny Sam Chung, 94 Cal. 304, 28 Am. St. Rep. 132, 29 Pac. 642.

Assault and battery charged in trial of court of criminal correction; judge discharged jury and held accused for grand jury, which indicted for murder and there was a conviction of assault. Held that plea of former jeopardy did not avail.—State v. Buenete, 256 Mo. 241, Ann. Cas. 1915D, 879, 165 S. W. 344.

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 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 the discharge, or upon a motion in arrest of judgment."[1]

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,

[1] United States v. Watson, 3 Ben. 1, Fed. Cas. No. 16651; cited supra, § 1366; United States v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14858; United States v. Shoemaker, 2 McL. 114, Fed. Cas. No. 16279; United States v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15204,

without the consent of the prisoner, is a bar to any future trial for the same offense. 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 defense. 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 impossible 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."[2]

United States v. Haskell, 4 Wash. 409, Fed. Cas. No. 15321; Kelly v. United States, 27 Fed. 616.

Compare: Infra, §§ 1657, 1753, 1760.

[2] United States v. Perez, 22 U. S. (9 Wheat.) 579, 6 L. Ed. 165. See United States v. Bigelow, 3 Mock. (D. C.) 407; United States v. Jim Lee, 123 Fed. 742.

In the United States Circuit Court for New York, it has been held that a man is not put in jeopardy by the empaneling and swearing of a jury by inadvertence, when it was dismissed before he is arraigned.[3]

§ 1437. —— So in Massachusetts and Connecticut. In Massachusetts the practice, from an early period, was to discharge juries at the discretion of the court, in cases both capital and otherwise.[1] But in 1823 a case came up where a jury, in a capital trial, 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 until verdict, said: "By necessity can not 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."[2] And the practice in this state is to

See, supra, § 1428; infra, §§ 1716, 1853, 1926.

A general rule in all jurisdictions. See among many other cases, Andrews v. State, 174 Ala. 50, **Ann. Cas.** 1914B, 760, 56 So. 1011; People v. Ham Tong, 155 Cal. 581, 132 **Am. St. Rep.** 110, 24 **L. R. A.** (N. S.) 481, 102 Pac. 264; State v. Jorgensen, 3 Idaho 622, 32 Pac. 1130; State v. Costello, 29 Wash. 370, 69 Pac. 1100.

As qualifying the Pereye Case, see Lang, Ex parte, 85 U. S. (18 Wall.) 163, 21 **L. Ed.** 872.

Discharge of jury deliberating when it has been out only from 4 o'clock p. m. until 9:30 o'clock the next morning, will not bar a plea of former jeopardy.—Dreyer v. Illinois, 187 U. S. 85, 47 **L. Ed.** 86, 23 Sup. Ct. Rep. 33.

3 United States v. Riley, 5 Blatchf. 204, Fed. Cas. No. 16164.

1 Com. v. Bowden, 9 Mass. 494. See Com. v. Sholes, 95 Mass. (13 Allen) 554; and infra, §§ 1657, 1753, 1760.

2 Com. v. Purchase, 19 Mass. (2 Pick.) 521, 13 **Am. Dec.** 452. Infra, §§ 722, 821.

regard the constitutional provision as a mere expression of the common-law rule.[3]

In Connecticut a discharge, in a murder case, in consequence of the incompetency of a juror, which incompetency was not discovered until after the trial began, does not bar a subsequent trial.[4]

§ 1438. —— So in 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 offense 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; and, 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 offense; 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

3 As to peculiar practice in this state, infra, § 1654.

4 State v. Allen, 46 Conn. 531.

the same offense." And the court accordingly held, that the discharge of the jury before giving a verdict was no bar to another trial of the defendant.[1]

In 1862, however, in the Court of Errors, it was held, that when the defendant had been once put in jeopardy and convicted, and the judgment reversed for an error in the sentence, the other proceedings being regular, he could not afterwards be tried.[2] And in 1863, in the same court, the same rule was applied to a case of murder, and in aid of the rule the constitutional provision was expressly invoked.[3] But as a general rule, under the statute, a discharge of the jury without rendering a verdict is no bar to a second trial.[4]

Under the Constitution of New Jersey the same view obtains.[5]

§ 1439. —— So in Maryland. In Maryland, in 1862, the view of the Supreme Court of the United States was expressly adopted.[1]

§ 1440. —— So in Mississippi, Missouri, and Louisiana. In Mississippi, after a cursory review of the authorities,

1 People v. Goodwin, 18 John. (N. Y.) 187, 9 Am. Dec. 203. See, also, People v. Olcott, 2 John Cas. (N. Y.) 301, 1 Am. Dec. 168.

2 Shepherd v. People, 25 N. Y. 407; supra, § 1364.

3 People v. Hartung, 26 N. Y. 167, 28 N. Y. 400, 23 How. Pr. 314.

4 Canter v. People, 38 How. Pr. (N. Y.) 91 (1867).

After the cause was committed to them, and before they had rendered or agreed upon a verdict, the jury separated without having been legally discharged; it was held in 1871, that, as any verdict in the case, to be afterwards rendered by that jury, would have been invalid and set aside, there was a necessity for the exercise of the power of the court in its discretion, and in furtherance of justice, to discharge the jury. And that such power having been exercised by a competent court, the discharge constituted no bar to a new trial of the prisoner.—People v. Reagle, 60 Barb. (N. Y.) 527. See, also, McKenzie v. State, 26 Ark. 334.

5 Smith v. State, 41 N. J. L. (12 Vr.) 598.

1 Hoffman v. State, 20 Md. 425. In this case the court treated the provision in the state constitution as convertible with that in the federal constitution.

the same result was reached.[1] In 1860 it was held, that though a discharge, merely because the jury were "unable to agree on a verdict," there being no evidence as to the length of deliberation, worked an acquittal, yet it is otherwise when the term of the court is about to expire, and there is no possibility of agreement.[2] An illegal or improper discharge is in any view a bar;[3] but this is not the case when the discharge is on account of the inability of the jury, after deliberation sufficiently protracted, to agree. But a deliberation of three and a half hours is not sufficient.[4] In Missouri[5] and Louisiana[6] the question is largely left to the discretion of the court.

§ 1441. —— So in Illinois, Ohio, Indiana, Iowa, Nebraska, Michigan, Nevada, Arkansas, and Texas. In Illinois, the same view was taken, and in this state the rule laid down by the federal courts must be considered as obtaining.[1]

In Ohio, in 1863, it was determined that when the jury had been long enough together "to leave very little doubt that their opinions must have been inflexibly formed," and were unable to agree, the court, at its discretion, could discharge.[2] And now, by the Code of Criminal Procedure, this is established by statute. But the record should set forth the necessity of the discharge.[3]

1 Moore v. State, 1 Miss. (Walker) 134, 12 Am. Dec. 541; Price v. State, 36 Miss. 531, 533, 72 Am. Dec. 195.

2 Josephine v. State, 39 Miss. 613; Woods v. State, 43 Miss. 364.

3 Finch v. State, 53 Miss. 363; Teat v. State, 53 Miss. 439, 24 Am. Rep. 708.

4 Whitten v. State, 61 Miss. 717.

5 See, supra, § 1442. State v. Jeffers, 64 Mo. 376; State v. Copeland, 65 Mo. 497; State v. Dunn, 80 Mo. 681.

6 **In Louisiana** it is held that when there is a trial not imputable to the prosecution there is no jeopardy.—State v. Blackman, 35 La. Ann. 483.

1 State v. Stone, 3 Ill. (2 Scam.) 326.

2 Dobbins v. State, 14 Ohio St. 493.

3 Hines v. State, 24 Ohio St. 134; and see, infra, § 1754.

In Mitchell v. State, 42 Ohio St. 383, it was held that a discharge is only to be sustained where the defendant has consented to the discharge, or been guilty of such

The same test is now adopted in Indiana, though after some vacillation in the earlier cases.[4] But there should be no discharge as long as the court thinks agreement possible; and a discharge without good cause shown on record operates as an acquittal.[5] And an arbitrary and capricious separation of the jury, however, on their own motion, may be a bar.[6]

In Michigan,[7] Iowa,[8] Nebraska,[9] Nevada,[10] and Texas,[11] the same views prevail. In Arkansas, while a capricious discharge is a bar,[12] it is otherwise when the discharge is from settled inability to agree.[13]

§ 1442. —— So in Kentucky and Georgia. In Kentucky it was originally ruled that it is not possible to support the defense of a former acquittal by anything short of a final judgment or verdict, on a second indict-

fraud in respect to the conduct of the trial as that he was in no real peril, or where there is urgent necessity for the discharge, such as the death or serious illness of the presiding judge or a juror, the serious illness of the prisoner, the ending of term before verdict, or the inability of the jury to agree, after spending such length of time in deliberation as, in the opinion of the judge, sustained by the facts disclosed in the record, renders it unreasonable and improbable that there can be an agreement.

4 State v. Nelson, 26 Ind. 366; Shaffer v. State, 27 Ind. 131.

Allowing the jury to go unattended to a public square, operates as a discharge.—State v. Leunig, 42 Ind. 541. Infra, §§ 1662, 1753.

5 State v. Walker, 26 Ind. 346; Shaffer v. State, 27 Ind. 131.

6 Maden v. Emmons, 83 Ind. 331.

7 People v. Harding, 53 Mich. 48, 51 **Am. Rep.** 95, 18 N. W. 555, 19 N. W. 155.

8 State v. Redman, 17 Iowa 329; State v. Vaughan, 29 Iowa 286.

See State v. Parker, 66 Iowa 586,. 24 N. W. 225, where it was held that a discharge agreed to by defendant was no bar.

9 Card v. People, 2 Neb. 357.

10 Maxwell, Ex parte, 11 Nev. 428. The record, however, must show the necessity.

11 Moseley v. State, 33 Tex. 671; Parchman v. State, 2 Tex. App. 228, 28 **Am. Rep.** 435, where it is held that there is no jeopardy until verdict.

In Varnes v. State, 20 Tex. App. 107, it is held that under the code the discharge may be at discretion of court.—Brady v. State, 21 Tex. App. 659, 1 S. W. 462. See Powell's Case, 17 Tex. App. 345; Pizano v. State, 20 Tex. App. 129.

12 Williams v. State, 42 Ark. 35.

13 Potter v. State, 42 Ark. 29.

ment for the same offense.[1] But recently this view has been recalled, and it is now held that an arbitrary discharge may be a bar.[2]

A discharge, in Georgia, on account of disability to agree, does not necessarily work an acquittal.[3]

§ 1443. —— So in South Carolina. In South Carolina the rule is regarded simply as an expression of the common-law doctrine of autrefois acquit.[1]

Judge Story, in his treatise on the Constitution, mentions that the question of discharge of a jury from inability to agree is largely at the discretion of the trial court.[2] Judge Tucker, an eminent Virginia jurist, distinguished for his general tendency to give a strict interpretation to all constitutional limitations, takes substantially the same ground, advising, however, that the question of discharge should become a matter of record, so as to be the subject of revision.[3]

§ 1444. No jeopardy on defective indictment or process. Where, however, there is no jurisdiction,[1] or where

1 Com. v. Olds, 15 Ky. (5 Litt.) 140; same principle in O'Brian v. Com., 69 Ky. (6 Bush) 563.

Overruled in Wilson v. Com., 66 Ky. (3 Bush) 105.

2 O'Brian v. Com., 72 Ky. (9 Bush) 333, 15 Am. Rep. 715.

In Williams v. Com., 78 Ky. 93, the court was called on to act on § 243 of the Criminal Code, which provides that "the attorney of the commonwealth, with permission of the court, may, at any time before the case is finally submitted to the jury, dismiss the indictment as to all or a part of the defendants, and such dismissal shall not bar a future prosecution for the same offense." This was held to be unconstitutional so far as it attempts to authorize, after jeopardy attaches, dismissal of an indictment for felony so that it may not operate as a bar to a future prosecution for the same offense. It was, however, conceded that even after jeopardy has attached, and in cases of necessity, an indictment may be dismissed or a prosecution discontinued without operating as a bar to a future prosecution for the same offense.

3 Lester v. State, 33 Ga. 329.

1 State v. Shiver, 20 S. C. 392.

2 3 Story on the Const. 660.

3 1 Tuck. Black. App. 305.

1 Supra, § 1368; Montross v. State, 61 Miss. 429. See Ogle v. State, 43 Tex. Cr. Rep. 219, 66 Am. St. Rep. 860, 63 S. W. 1009.

the indictment is 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.[2] Even partial endurance of punishment under a defective indictment will be no bar when the proceedings are re-

[2] Supra, § 1388; infra, §§ 1657, 1760. ALA.—White v. State, 49 Ala. 344. ARK.—State v. Cheek, 25 Ark. 206. CAL. — People v. March, 6 Cal. 543; People v. McNealy, 17 Cal. 333. CONN.—State v. Woodruff, 2 Day 504, 2 **Am. Dec.** 122. DEL. — State v. Crutch, 1 Houst. 204. ILL.—Gerard v. People, 4 Ill. (3 Scam.) 363; Bedee v. People, 73 Ill. 320; Phillips v. People, 88 Ill. 160. MD.—State v. Williams, 5 Md. 62; Hoffman v. State, 20 Md. 425. MASS.—Com. v. Purchase, 19 Mass. (2 Pick.) 521, 13 **Am. Dec.** 452; Com. v. Loud, 44 Mass. (3 Metc.) 328, 37 **Am. Dec.** 139; Com. v. Keith, 49 Mass. (8 Metc.) 531. MISS.—Kohlheimer v. State, 39 Miss. 548, 77 **Am. Dec.** 689. MO.—State v. Hays, 78 Mo. 600; State v. Owen, 78 Mo. 367. NEB.—State v. Priehnow, 16 Neb. 131, 19 N. W. 628. N. H.—State v. Sherborn, 58 N. H. 535. N. Y.—People v. Barrett, 1 John. 66. N. C.—State v. Garrigues, 2 N. C. (1 Hayw.) 241; State v. England, 78 N. C. 552. PA.—Com. v. Cook, 6 Serg. & R. 577, 9 **Am. Dec.** 465; Com. v. Clue, 3 Rawle 498. R. I. — State v. Watson, 31 R. I. 354, 78 **Am. St. Rep.** 871, 39 Atl. 193. S. C.—State v. Bay, 1 Rice L. 1, 33 **Am. Dec.** 90. TENN.—Pritchett v. State, 35 Tenn. (3 Sneed) 285. VA. — Robinson v. Com., 73 Va. (32 Gratt.) 866. FED.—United States v. Jones, 31 Fed. 725.

As English rulings to same effect, see Vaux's Case, 4 Co. 44a, 97 Eng. Repr. 992; R. v. Richmond, 1 Car. & K. 240, 47 Eng. C. L. 240.

Defective charge may sustain a former conviction. — State v. Bogard, 25 Ind. App. 123, 57 N. E. 722.

Indictment found by an unqualified grand jury.—Finley v. State, 61 Ala. 201; Kohlheimer v. State, 39 Miss. 548, 77 **Am. Dec.** 689.

Indictment voidable for matters dehors the record, raises former jeopardy on trial and final verdict. — Kohlheimer v. State, 39 Miss. 548, 77 **Am. Dec.** 689.

See, also, note, 58 **Am. Dec.** 538.

Judgment arrested on motion of the prosecution is no bar when indictment is defective.—R. v. Houston, 2 Craw. & D. 311; People v. Larson, 68 Cal. 18, 8 Pac. 517. See People v. Corning, 2 N. Y. 9.

The logical accuracy of the statement that there is no jeopardy on a defective indictment is disputed in an ingenious article in 4 Crim. Law Mag. 489 (July, 1883), though the fact that the courts unite in sustaining the position taken is not disputed. It is argued that as there is punishment inflicted on a defective indictment, therefore there is pro tanto jeopardy. If this be true, however, it

versed on the defendant's motion;[3] though it is otherwise when the judgment is unreversed.[4] But a judgment erroneously arrested on a good indictment may be a bar.[5]

Whether a judgment is necessary to the plea is elsewhere discussed.[6]

A trial in which the indictment has been dismissed for variance has been held not to constitute jeopardy.[7]

A defendant is not in jeopardy who has had leave to withdraw a plea in law, and to plead in abatement, which plea is found for him; and he may be indicted a second time in his true name.[8]

It has been held that when the jury has been discharged in consequence of the verdict being taken in the defendant's absence, there is no jeopardy.[9]

§ 1445. 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, etc., when the discharge becomes inevitable.[1] Thus, if a juryman, during the trial, be taken so ill as

would follow that there is jeopardy in a trial before an unauthorized court, and if so, jeopardy in a mob attack, and if so, jeopardy in the discipline inflicted by private revenge.

3 Jeffries v. State, 40 Ala. 382.

4 Supra, § 1364. See Cochrane v. State, 6 Md. 406.

5 Supra, § 1365.

6 See Gardiner v. People, 6 Park. Cr. Rep. (N. Y.) 155, and cases cited supra, § 1364.

7 Rogers, Ex parte, 10 Tex. App. 655, 38 Am. Rep. 654. Supra, § 1392.

8 Com. v. Farrell, 105 Mass. 189. See Com. v. Sholes, 95 Mass. (13 Allen) 554. Supra, § 1353.

9 Infra, § 1485; Ford v. State, 34 Ark. 649.

1 People v. Webb, 38 Cal. 467.

to be unable to attend to the evidence or deliberate on the verdict, the jury 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.[2] The escape of a juryman,[3] the sickness of the judge,[4] or that of a party,[5] and the closing of the term of the court,[6] have been said to have the same effect.[7] In such cases it is not necessary to say, as is said in some

[2] ALA.—Mixon v. State, 55 Ala. 129, 28 Am. Rep. 695. CAL.—People v. Webb, 38 Cal. 467. MO.—Hector v. State, 2 Mo. 135. TENN.—Mahala v. State, 18 Tenn. (10 Yerg.) 532, 31 Am. Dec. 591; State v. Curtis, 24 Tenn. (5 Humph.) 601; Fletcher v. State, 25 Tenn. (6 Humph.) 249. VT.—State v. Emery, 59 Vt. 84, 7 Atl. 129. VA.—Com. v. Fells, 36 Va. (9 Leigh) 613. FED. — United States v. Haskell, 4 Wash. 402, Fed. Cas. No. 15321. ENG.—R. v. Leary, 3 Craw. & D. 212; R. v. Barrett, Jebb 106; R. v. Scalbert, 2 Leach 620; R. v. Edwards, R. & R. 224.

See, infra, §§ 1647, 1760, 1899.

[3] State v. Hall, 9 N. J. L. (4 Halst.) 256; State v. McKee, 1 Bail. L. (S. C.) 651, 21 Am. Dec. 499; Hanscom's Case, 2 Hale P. C. 295.

[4] Infra, § 1451.

[5] Infra, § 1448.

[6] Infra, § 1450.

[7] Powell v. State, 19 Ala. 577.

According to the English practice, 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 is to have whatever refreshment may be beneficial. See Rulo v. State, 19 Ind. 298; Com. v. Clue, 3 Rawle (Pa.) 498.

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. See, by eleven judges, in R. v. Edwards, 3 Camp. 207. See R. v. Scalbert, 1 Leach 620; 1 Chit. Cr. L., 1st ed., 414, 655; 2 Hale 216; 1 Shower 131; R. v. Woodfall, 5 Burr. 2661, 2667, 98 Eng. Repr. 398, 401; How's Case, 1 Vent. 209, 86 Eng. Repr. 141; R. v. Beere, 2 Moo. & R. 472.

See, infra, §§ 1657, 1760.

In an English case where the eleven were all resworn 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

of the cases, that the defendant was not in jeopardy. He certainly was in jeopardy, if the court was one legally authorized to inflict punishment. But, on the other hand, it can not be said, on the second trial, that he has been put twice in jeopardy, since the jeopardy in which he was put on the first trial has never ceased to exist.[8]

What has been said of sickness of a juror applies to the misconduct of a juror breaking up the trial. Were it not so, it would be in the power of any one juror, by misconduct, to work an acquittal.[9] This is a fortiori the case where the juror's misconduct is imputable to the defendant.[10]

§ 1446. DISCHARGE OF JURY FROM INTERMEDIATELY DISCOVERED INCAPACITY OF JUROR NO BAR. 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 juror 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.[1] The same rule has been extended to other cases of incapacity.[2] But it has been elsewhere held that the court has no power to discharge the jury on such grounds, unless upon application of the defendant, or unless the defect was such that the defendant was really never in jeopardy.[3] If the defendant has been

it was true. 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.

8 On this point I accept the reasoning of the criticism in the article in 4 Crim. Law Mag. 487, already noticed.

9 State v. Hall, 9 N. J. L. (4 Halst.) 256; R. v. Ward, 10 Cox C. C. 574.

10 State v. Bell, 81 N. C. 591.

1 Watkins v. People, 60 Ga. 601; Stone v. People, 3 Ill. (2 Scam.) 326. See, also, People v. Damon, 13 Wend. (N. Y.) 351; United States v. Morris, 1 Curt. 23, Fed. Cas. No. 15815, and cases cited infra, § 1454.

See, also, infra, § 1784.

2 United States v. Haskell, 4 Wash. 402, Fed. Cas. No. 15321; R. v. Phillips, 11 Cox C. C. 142.

3 ARK. — Johnson v. State, 29 Ark. 31, 21 Am. Rep. 154. ILL.— Stone v. People, 3 Ill. (2 Scam.)

really in jeopardy, and the discharge is not necessitated by misconduct of a juror or of the defendant, such discharge is a bar to a subsequent trial.

§ 1447. CONVICTION NO BAR WHEN SET ASIDE ON DEFENDANT'S MOTION. A conviction set aside, on the defendant's motion, on account of erroneous ruling by the judge, is no bar to a second trial. The defendant, by setting up the position that the ruling was erroneous, is afterward estopped from disputing this. He affirms that he never was in legal jeopardy, and that the ruling of the judge against him, putting him in jeopardy, was not law. When he gains his point he can not afterward plead jeopardy.[1] And he waives jeopardy by a motion for new trial.[2]

§ 1448. —— AND SO OF DISCHARGE FROM SICKNESS OR ESCAPE OF DEFENDANT. Sickness of defendant has been sometimes held a sufficient ground, on the defendant'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.[1] Nor when the jury

327. KY. — O'Brian v. Com., 72 Ky. (9 Bush) 333, 15 **Am. Rep.** 715. OHIO—Poage v. State, 3 Ohio St. 239. S. C.—State v. McKee, 1 Bail. L. 651, 21 **Am. Dec.** 499. TENN.—McClure v. State, 9 Tenn. (1 Yerg.) 219. VA.—Com. v. Jones, 28 Va. (1 Leigh) 399. ENG.—R. v. Sullivan, 8 Ad. & El. 831, 35 Eng. C. L. 865; R. v. Sutton, 8 Barn. & C. 417, 15 Eng. C. L. 208; R. v. Wardle, 1 Car. & M. 647, 41 Eng. C. L. 351.

See, infra, § 1730.

In O'Brian v. Com., 72 Ky. (9 Bush) 333, 15 **Am. Rep.** 715, after the jury had been sworn, and while the evidence was being taken, one of the jurors arose and said that he had formed one of the grand jury which found the indictment, and thereupon the court, of its own motion and against the objection of the prisoner, discharged the juror and had another summoned. The court held that this amounted to an acquittal, and that the plea of autrefois acquit to a further trial was good.

1 See, infra, § 1730; Morrisette v. State, 77 Ala. 71; Thompson v. State, 9 Tex. App. 649.

2 Infra, § 1455.

1 ARK.—Lee v. State, 26 Ark. 260, 7 **Am. Rep.** 611. N. J.—Smith v. State, 41 N. J. L. (12 Vr.) 598. N. Y.—People v. Goodwin, 18 John. 187, 9 **Am. Dec.** 203. N. C.—State v. Wiseman, 68 N. C. 204. S. C.—State v. McKee, 1 Bail. L. 651, 21 **Am. Dec.** 499. VA. — Sperry v. Com., 36 Va. (9 Leigh) 623, 33

is discharged in consequence of the defendant's escape from the court during trial can he set up the trial as a bar.[2]

§ 1449. Discharge from surprise a bar. Surprise in sudden breaking down of case of prosecution, in New York and North Carolina, has been held, in misdemeanors, to be ground for withdrawing a juror.[1] But this is contrary to the better opinion, which is that in no criminal trial can such a power be exercised.[2]

§ 1450. Discharge from statutory close of court no bar. In those cases in which a statutory close of term of court occurs during the course of the trial, except in North Carolina,[1] this has been held to justify a discharge, which is no bar to a second trial.[2] In such a case a court,

Am. Dec. 261. ENG.—R. v. Streek, 2 Carr. & P. 413, 12 Eng. C. L. 646; R. v. Kell, 1 Craw. & D. 151; R. v. Stevenson, 2 Leach 546.

See, infra, §§ 1659, 1760.

Mr. Justice Talfourd (Dickins. Quar. Sess. 570) 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 (R. v. Stevenson, 2 Leach C. C. 546; R. v. Streek, 2 Cr. & P. 413, 12 Eng. C. L. 646. See R. v. Fitzgerald, 1 Cr. & K. 201, 47 Eng. C. L. 200; Foster's Crown Law 22, Wedderburn's Case); if not, the recognizances must be respited till the next session."

2 People v. Higgins, 59 Cal. 357.

1 People v. Ellis, 15 Wend. (N. Y.) 371 (though see Klock v. People, 2 Park. Cr. Rep. (N. Y.) 676); State v. Weaver, 35 N. C. (13 Ired. L.) 203. See, infra, §§ 1453, 1659, 1760.

2 Supra, § 1387; People v. Barrett, 2 Cain. (N. Y.) 305, 2 Am. Dec. 239; Klock v. People, 2 Park. Cr. Rep. (N. Y.) 676; United States v. Shoemaker, 2 McL. 114, Fed. Cas. No. 16279; R. v. Jeffs, 2 Str. 984, 93 Eng. Repr. 984; Kinlock's Case, 1 Fost. 16.

1 Spier's Case, 12 N. C. (1 Dev. L.) 491; State v. McGimpsey, 80 N. C. 377, 30 Am. Rep. 90.

Compare: State v. Tillotson, 52 N. C. (7 Jones L.) 114, 75 Am. Dec. 456.

2 ALA.—Ned v. State, 7 Port. 187; State v. Battle, 7 Ala. 259; Powell v. State, 19 Ala. 577. CAL.—People v. Cage, 48 Cal. 323, 17 Am. Rep. 436. IND.—Wright v. State, 5 Ind. 290, 61 Am. Dec. 90. MISS.—State v. Moor, 1 Miss. (Walker) 134, 12 Am. Rep. 541; Josephine v. State, 39 Miss. 613. MO.—State v. Jeffries, 64 Mo. 376.

however, can adjourn beyond the term to receive a verdict.[3]

§ 1451. —— AND SO FROM SICKNESS OF JUDGE. Sickness of judge, as has been already noticed, is a sufficient ground, under the same limitation, as the sickness of a juror.[1]

§ 1452. —— AND SO FROM DEATH OF JUDGE. The death of a judge, to whom a case was submitted by consent, for decision without a jury, such death being before decision rendered, does not relieve a defendant, in an indictment for misdemeanor, from a second trial.[1] And the same rule exists as to the death of a judge during a trial before a jury.[2]

§ 1453. —— BUT NOT FROM SICKNESS OR INCAPACITY OF WITNESS. The sickness of a witness is 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 defendant could not be tried again.[1] Such sickness has been held in America ground for postponing a trial, but not, unless misconduct of defendant be shown, for discharging a jury.[2]

S. C.—State v. McLemore, 2 Hill L. 680. TENN.—Mahala v. State, 18 Tenn. (10 Yerg.) 132; State v. Brooks, 21 Tenn. (2 Humph.) 70; Hines v. State, 27 Tenn. (8 Humph.) 597. VA.—Com. v. Thompson, 3 Va. (1 Va. Cas.) 319. ENG.—R. v. Newton, 13 Ad. & E. N. S. (13 Q. B.) 716, 66 Eng. C. L. 716; R. v. Bowen, 9 Car. & P. 509, 38 Eng. C. L. 300; R. v. Davison, 2 F. & F. 250; R. v. Newton, 3 Cox C. C. 489.

3 Briceland v. Com., 74 Pa. St. 463.

1 Nugent v. State, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746; State v. Tatman, 59 Iowa 471, 13 N. W. 632.

1 See People v. Webb, 38 Cal. 467; Bescher v. State, 32 Ind. 480; infra, §§ 1839, 1871.

2 People v. Webb, 38 Cal. 467. Infra, §§ 898, 929.

1 R. v. Kell, 1 Craw. & D. 151. See R. v. Wade, 1 Moo. C. C. 86; R. v. Oulaghan, Jebb's C. C. 270. Supra, § 1449.

2 Com. v. Wade, 34 Mass. (17 Pick.) 397; United States v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14858; see, infra, §§ 1657, 1760-1763.

Whether the court will adjourn a trial on account of the incapacity of a witness is hereafter discussed.[3]

§ 1454. UNTIL JURY ARE "CHARGED," JEOPARDY DOES NOT BEGIN. However discordant 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 offense, on an issue duly framed, that is to say, until the jury is sworn, and the case committed to them, the jeopardy does not begin.[1] Until this period the defendant is not technically "in jeopardy."[2] Even a juror who is found to be incompetent after swearing, but before opening the case, may be set aside without vitiating the procedure.[3] A fortiori, therefore, neither a nolle prosequi, when entered before empanelling a jury,[4] nor an ignoring by a grand jury,[5] nor a discharge on habeas corpus,[6] has the effect of relieving the defendant from further prosecution.

3 Infra, §§ 1657, 1760, and cases in this section.

1 CAL.—People v. Horn, 70 Cal. 17, 11 Pac. 470. GA.—Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281; Watkins v. State, 60 Ga. 601. KAN.—Atchison R. Co. v. Franklin, 23 Kan. 74. PA.—Alexander v. Com., 105 Pa. St. 1. TENN.—Taylor v. State, 79 Tenn. (11 Lea) 708.

Where, upon an indictment for murder, there is a preliminary trial, on a plea in abatement of misnomer, the defendant is not, on such preliminary trial, in jeopardy of his life or liberty, though the indictment was for murder; and it is discretionary with the court whether or not to keep the jury secluded during the trial of such issue. — Alexander v. Com., 105 Pa. St. 1.

2 MASS. — Com. v. Drew, 58 Mass. (3 Cush.) 376, 379, 50 Am. Dec. 741. N. Y.—People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501. PA.—Com. v. Miller, 2 Ashm. 611. TENN.—Hines v. State, 27 Tenn. (8 Humph.) 597. VA. — Com. v. Myers, 3 Va. (1 Va. Cas.) 188; Epes' Case, 46 Va. (5 Gratt.) 676. WIS.—State v. Clifford, 58 Wis. 113, 16 N. W. 25.

See, infra, § 1760.

3 Stone v. State, 3 Ill. (2 Scam.) 326; Com. v. McFadden, 23 Pa. St. 12, 62 Am. Dec. 308.

As to further rulings to same effect, see Bell v. State, 44 Ala. 10; Watkins v. State, 60 Ga. 601; State v. Redman, 17 Ind. 329; People v. Damon, 13 Wend. (N. Y.) 351, and cases cited, supra, § 1445.

4 Supra, § 1377.

5 Supra, § 1376.

6 Supra, § 1375.

"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, etc., laborer, for that he, on, etc. [*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."[7]

This does not take place until after the jury are sworn,[8] and is not usual in misdemeanors.[9]

A plea duly entered on arraignment is an essential prerequisite to "charging."[10]

The subject of the seclusion of the jury is hereafter discussed.[11]

§ 1455. Waiver by motion for new trial, writ of error, and motion in arrest. It has been frequently ruled that the defendant may waive his constitutional privilege by a consent to the discharge of the jury,[1] or to their separation,[2] and that this may be by a motion in arrest

7 **For a shorter form**, see trial of R. Smith, Philadelphia, 1816.

8 1 Chitty Cr. L. 555; Dicken. Q. Sess. 493; Mitchell v. State, 42 Ohio St. 383; Alexander v. Com., 105 Pa. St. 1.

9 Ibid. Infra, § 1756.

10 ALA. — Grogan v. State, 44 Ala. 9; Bell v. State, 44 Ala. 393. ARK.—Lee v. State, 26 Ark. 260, 7 Am. Rep. 611. IND.—Weaver v. State, 83 Ind. 289, 4 Crim. Law Mag. 27, and note thereto. WIS.—Davis v. State, 38 Wis. 487. FED.—United States v. Riley, 6 Blatchf. 204, Fed. Cas. No. 1504.

11 Infra, §§ 1662, 1753.

1 See, infra, § 1756. CAL.—People v. Webb, 38 Cal. 467. CONN.—State v. Tuller, 34 Conn. 280. ME.—State v. Gurney 37 Me. 156, 58 Am. Dec. 782. MASS.—Com. v. Andrews, 3 Mass. 126. N. Y.—People v. Rathbun, 21 Wend. 509. OHIO—Stewart v. State, 15 Ohio St. 156, 161, 45 Am. Dec. 565. ENG.—R. v. Deane, 5 Cox C. C. 501.

Defendant not excepting to irregular discharge of juror, after swearing, but before case opened, is deemed to consent to the discharge, and can not after conviction except.—Kingen v. State, 46 Ind. 132.

And this has been extended to all cases of non-objection to discharge.—State v. Sutfin, 22 W. Va. 771.

2 ALA.—Morrisette v. State, 77

or vacation of judgment.[3] It is conceded that this may be done by a motion for a new trial, which pervades the whole case, asking that it may begin de novo,[4] and also by writs of error.[5] It is true that it has been held that there can be no waiver of rights in capital cases,[6]

Ala. 71. GA.—Spencer v. State, 15 Ga. 562; Nolan v. State, 55 Ga. 521, 21 **Am. Rep.** 281. IND.—Quinn v. State, 14 Ind. 589. IOWA—State v. Falconer, 70 Iowa 416, 30 N. W. 655. MASS.—Com. v. Sholes, 95 Mass. (13 Allen) 555. MISS.—Friar v. State, 4 Miss. (3 How.) 422; Loper v. State, 4 Miss. (3 How.) 429. MO.—State v. Mix, 15 Mo. 153. NEV.—State v. McMahon, 17 Nev. 365, 30 Pac. 1000. N. Y.—Stephens v. People, 19 N. Y. 549. TENN.—Elijah v. State, 20 Tenn. (1 Humph.) 102; Murphy v. State, 47 Tenn. (7 Coldw.) 516. VA.—Williams v. Com., 43 Va. (2 Gratt.) 567, 44 **Am. Dec.** 403; Dye v. Com., 48 Va. (7 Gratt.) 662. ENG.—R. v. Stokes, 6 Carr. & P. 151, 25 Eng. C. L. 367.

When jury gives in its verdict in the defendant's absence, a motion to set aside this verdict is not such a waiver as will preclude the defendant from setting up on a second trial the plea of once in jeopardy.—Nolan v. State, 55 Ga. 521, 21 **Am. Rep.** 281.

3 Supra, §§ 1388, 1447. ILL.—Sipple v. People, 10 Ill. App. 144. IOWA—State v. Clark, 69 Iowa 196, 28 N. W. 537. MASS.—Com. v. Fishblatt, 45 Mass. (4 Metc.) 354. N. C.—State v. Arrington, 7 N. C. (3 Murph.) 571. VA.—Page v. Com., 36 Va. (9 Leigh) 683.

4 CAL. — People v. Keefer, 65 Cal. 232, 3 Pac. 818. KAN.—State v. Hart, 33 Kan. 218, 6 Pac. 288. MO.—State v. Patterson, 88 Mo. 88, 57 **Am. Rep.** 374. N. C.—State v. Greenwood, 2 N. C. (1 Hayw. L.) 141; State v. Jeffreys, 7 N. C. (3 Murph. L.) 480; State v. Lipsey, 14 N. C. (3 Dev. L.) 485; State v. Davis, 80 N. C. 384. PA.—Com. v. Murray, 2 Ashm. 41; Com. v. Clue, 3 Rawle 500; Com. v. Brown, 3 Rawle 207. S. C.—State v. Sims, 2 Bail. L. 29. VA.—Ball's Case, 35 Va. (8 Leigh) 726. FED.—United States v. Perez, 22 U. S. (9 Wheat.) 579, 6 **L. Ed.** 165.

See, supra, § 1447; infra, §§ 1664-1666, 1757, 1760.

5 Infra, §§ 1702 et seq.

New trial granted on defendant's motion in consequence of a defective verdict is such a bar. See Kendall v. State, 65 Ala. 492; State v. Jenkins, 84 N. C. 812, 37 **Am. Rep.** 643.

6 CAL.—People v. Backus, 5 Cal. 275. GA.—Nolan v. State, 55 Ga. 521, 21 **Am. Rep.** 281. LA.—State v. Populus, 12 La. Ann. 710. MISS.—Woods v. State, 43 Miss. 364. PA.—Peiffer v. Com., 15 Pa. St. 468, 53 **Am. Dec.** 605. TENN.—Wesley v. State, 30 Tenn. (11 Humph.) 502; Wiley v. State, 31 Tenn. (1 Swan) 256. UTAH—People v. Shafer, 1 Utah 260. ENG.—R. v. Kell, 1 Craw. & D. 151; R. v. Perkins, 1 Holt 403.

Compare: Infra, §§ 1760-1770.

In State v. Parish, 43 Wis. 395. it was held that an arrest of judgment on defendant's motion leaving the verdict unassailed, was not a waiver on which a new in-

and that as a general rule consent will not justify the taking of life or liberty.[7] Yet we must not forget that there are a multitude of cases in which a defendant may receive much benefit by arrangements between counsel, as well as by motions for revision. To say that in capital cases such agreements on his behalf are not binding would prevent any such agreements from being made.[8] And such agreements may be eminently beneficial when the object of the waiver is to save life or liberty.

Whether on a new trial being granted after a conviction for manslaughter the offense of murder is reopened is elsewhere considered.[9]

§ 1456. IN MISDEMEANORS, SEPARATION OF JURY PERMITTED. It is settled law, as we will see hereafter, that in misdemeanors the jury may be allowed to separate at any time.[1] That it is in some states extended to felonies has been already seen.[2]

§ 1457. PLEA MUST BE SPECIAL; RECORD MUST SPECIFY FACTS. It has been held that an allegation "that the said defendant had once before been put in jeopardy of his life for said offense, upon said indictment," is demurrable, if it does not show how or in what manner;[1] though it is otherwise if the facts constituting the jeopardy are alleged.[2] And when the record shows, in a case in which jeopardy attaches, that the jury was discharged, the record must also specially state the ground of discharge, so that the court in error may understand such ground of discharge.[3] The defendant, on proper application, is en-

dictment could be sustained, citing State v. Norvell, 10 Tenn. (2 Yerg.) 24, 24 Am. Dec. 458.

7 See 1 Kerr's Whart. Crim. Law, §§ 183 et seq.

8 See, infra, § 1668.

9 Supra, § 1396; infra, §§ 1725, 1837.

As to the alleged erroneous use of the word "waiver" in such cases, see 4 Crim. Law Mag. 493.

1 This subject will be considered more fully under a future head. Infra, §§ 1657, 1755, 1760, 1762.

2 Supra, § 1428.

1 See forms of pleas in Whart. Prec. 1157.

2 Atkins v. State, 16 Ark. 568; Wilson v. State, 16 Ark. 60.

3 ALA.—Powell v. State, 19 Ala.

titled to have such special facts incorporated in the record.[4] Whatever the record avers is subject of revision in an appellate court,[5] though in those jurisdictions where the whole matter is left to the discretion of the judge trying the case, a record of the discharge will not be ordinarily ground for reversal.[6]

VIII. PLEA OF PARDON.

§ 1458. PARDON IS A RELIEF FROM THE LEGAL CONSEQUENCES OF CRIME. Pardon, in its narrower sense, is a declaration on record by the sovereign that a particular individual is to be relieved from the legal incidents of a particular crime.[1] When used, as is the case under the

577; Barrett v. State, 35 Ala. 406. CAL.—McLaughlin, Ex parte, 41 Cal. 211, 10 Am. Rep. 272; Cage, Ex parte, 45 Cal. 248; People v. Cage, 48 Cal. 323, 17 Am. Rep. 436; People v. Lightfoot, 49 Cal. 226. GA.—Avery v. State, 26 Ga. 233. IND. — State v. Walker, 26 Ind. 347; State v. Nelson, 26 Ind. 366. MASS. — Com. v. Purchase, 19 Mass. (2 Pick.) 521, 13 Am. Dec. 452; Com. v. Townsend, 87 Mass. (5 Allen) 216. N. Y.—People v. Goodwin, 18 John. 187, 9 Am. Dec. 203. N. C.—State v. Bullock, 63 N. C. 571; State v. Almon, 64 N. C. 364; State v. Jefferson, 66 N. C. 309. OHIO—Poage v. State, 3 Ohio St. 230; Dobbins v. State, 14 Ohio St. 494; Hines v. State, 24 Ohio St. 134. TEX.—Moseley v. State, 33 Tex. 67.

4 R. v. Bowman, 6 Car. & P. 101, 25 Eng. C. L. 342; R. v. Middlesex Justices, 3 Nev. & M. 110.

As to English practice, see Winsor v. R., L. R. 1 Q. B. 289.

Former jeopardy is a constitutional plea which may be interposed at any time. — Pizano v. State, 20 Tex. App. 139, 54 Am. Rep. 511.

5 See cases cited supra, §§ 1426 et seq.; infra, § 1713.

6 People v. Green, 13 Wend. (N. Y.) 55; United States v. Perez, 22 U. S. (9 Wheat.) 579, 6 L. Ed. 165; Winsor v. R., L. R. 1 Q. B. 289.

1 United States v. Wilson, 32 U. S. (7 Pet.) 150, 8 L. Ed. 640; Ex parte Garland, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366; Osborn v. United States, 91 U. S. 474, 23 L. Ed. 388; Knote v. United States, 95 U. S. 149, 24 L. Ed. 442; Boyd v. United States, 142 U. S. 454, 35 L. Ed. 1078, 12 Sup. Ct. Rep. 294; United States v. Cullerton, 8 Biss. 171, Fed. Cas. No. 14899; In re Greathouse, 4 Sawy. 499, 2 Abb. U. S. 395, Fed. Cas. No. 5741; Singleton v. State, 38 Fla. 297, 56 Am. St. Rep. 177, 34 L. R. A. 251, 21 So. 21; Territory v. Richardson, 9 Okla. 584, 49 L. R. A. 440, 60 Pac. 245; Eastwood v. State, 34 Tex. Cr. Rep.

Constitution of the United States, as including amnesty, it is an extinction of the crime itself, so that the offender is to be treated as if it had never occurred.[2]

409, 31 S. W. 296; Edwards v. Com., 78 Va. 42, 49 Am. Rep. 379.

As to constitutional questions involved, see 1 Kerr's Whart. Com. Am. Law, §§ 638 et seq.

In Legmon v. Latimer, 3 Exch. D. 15, it was held that a pardon so obliterates the offense that it is defamatory to call a person pardoned of a felony a "convicted felon." But see Baum v. Clause, 5 Hill (N. Y.) 196; Deming, In re, 10 Johns. (N. Y.) 232, 483.

Bastardy bond, obligations of can not be released by governor. —Ex parte Champion, 79 Neb. 372, 112 N. W. 588.

Congress can not limit the President's pardoning power.—Garland, Ex parte, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366; Thompson v. Duehay, 217 Fed. 487.

Dismissal of proceedings against accused on granting of pardon.—Territory v. Richardson, 9 Okla. 586, 49 L. R. A. 440, 6 Pac. 246.

Governor's power to pardon not affected by pending bill of exception. — Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; People v. Marsh, 125 Mich. 410, 84 Am. St. Rep. 584, 51 L. R. A. 461, 84 N. W. 472.

Governor may pardon for contempt prisoner imprisoned by state court, in state's interest.—State ex rel. Van Orden v. Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115.

One part of a sentence can be remitted at one time and another part at another.—3 Op. 418.

Pardon by executive having jurisdiction restores right to vote, which the conviction forfeited.—Jones v. Board, 56 Miss. 766, 31 Am. Rep. 385.

And also the right to hold office. —Hildreth v. Hunt, 1 Ill. App. 82; Fugate's Case, 29 Va. (2 Leigh) 724; infra, § 1883.

—Otherwise when the pardon is by the President and the disfranchisement is by a state court (Ridley v. Sherbrook, 43 Tenn. (3 Coldw.) 569), or when the state constitution makes the disfranchisement indelible. — Opinion of Judges, 4 R. I. 583.

Pardon suspends proceedings in error.—Levien v. R. L. R., 1 P. C. C. App. 536.

Contra: Eighmy v. People, 78 N. Y. 330.

Power to pardon includes power to commute sentence. — State v. Rose, 29 La. Ann. 760.

President may commute sentence of four years each on two counts so that they will run concurrently instead of consecutively. —Thompson v. Duehay, 217 Fed. 487.

Prior conviction, carrying increased punishment, can not be urged where defendant pardoned for first offense. — Edwards v. Com., 78 Va. 42, 49 Am. Rep. 379.

Suspending sentence in certain criminal cases, power of conferred by statute is violative of the pardoning power.—Snodgrass v. State, 67 Tex. Cr. Rep. 626, 150 S. W. 166.

2 Infra, § 1462; Jones v. Board, 56 Miss. 766, 31 Am. Rep. 385.

In United States v. Klein, 80 U. S.

Pardon is susceptible of being viewed in three distinct relations:

§ 1459. PARDON BEFORE CONVICTION TO BE RIGIDLY CONSTRUED. First. Pardon before conviction, or abolitio, as it is called by the old writers, while it is included in a general grant of power to pardon,[1] is prohibited by the constitutions of several of the United States and of several European States. To enable such pardon to operate it is necessary that the offense should be specifically described.[2] When such a pardon takes the place of an amnesty or act of grace, it should be construed with especial liberality.[3] It has been held that where the executive is precluded by the constitution from pardoning before conviction, this function may be assumed by the legislature.[4] A legislative repeal of a statute making a par-

(13 Wall.) 128, 147, 20 L. Ed. 519, adopted in Knote v. United States, 95 U. S. 149, 24 L. Ed. 442, it was said that a "pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences." That a pardon does not reverse the conviction, though depriving it of legal effect, see Cook v. Freeholders, 26 N. J. L. (1 Spenc.) 326, 340.

1 Com. v. Bush, 63 Ky. (2 Duv.) 264; State v. Woolery, 29 Mo. 300; Rivers v. State, 10 Tex. App. 177.

2 See Birch, Ex parte, 8 Ill. (3 Gilm.) 449, 6 Cr. Law Mag. 476.

In Carlisle v. United States, 83 U. S. (16 Wall.) 147, 21 L. Ed. 426, it was said that "a pardon reaches both the punishment prescribed for the offense and the guilt of the offender." In the case of Gen. Lawton, in May, 1885, it was held by Attorney-General Garland that a pardon took the pardoned party absolutely out of the category of an offender in respect to the offense pardoned.

3 Supra, § 1462.

For cases of pardon before sentence, see: KY.—Com. v. Bush, 63 Ky. (2 Duv.) 264. LA.—State v. Benoit, 16 La. Ann. 273. PA.—Duncan v. Com., 4 Serg. & R. 449; Com. v. Hitchman, 46 Pa. St. 357. TEX.—State v. Dyches, 28 Tex. 535. VA.—Blair v. Com., 66 Va. (25 Gratt.) 850. FED.—Garland, Ex parte, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366; Armstrong's Case, 80 U. S. (13 Wall.) 154, 20 L. Ed. 614; Pargoud v. United States, 80 U. S. (13 Wall.) 156, 20 L. Ed. 646; 6 Op. Atty.-Gen. 20; 9 Op. Atty.-Gen. 478; United States v. Athens, 35 Ga. 354, Fed. Cas. No. 14473.

4 State v. Nichols, 26 Ark. 74, 7 Am. Rep. 600. See Butler v. State, 97 Ind. 373.

ticular act penal operates as a pardon of the parties committing such act when the statute was in force.[5]

§ 1460. PARDON AFTER CONVICTION MORE INDULGENTLY CONSTRUED. Second. Pardon after conviction, which is either full or conditional—plena vel minus plena. This is the ordinary form of pardon, and is granted sometimes because the sentence requires revision, sometimes from the good conduct of the defendant since conviction, sometimes from general motives of clemency. To this, as well as in other cases of grants, applies the position that in cases of doubt the presumption is to be in favor of the grantee.[1] Conviction in this sense, exists as soon as a verdict of guilty is rendered.[2] After endurance of punishment, pardon removes any remaining disability.[3] In the construction of such a pardon the usual rules as to application of parol evidence are in force.[4] An order by

[5] 1 Kerr's Whart. Cr. Law, §§ 41 et seq.; Com. v. Mott, (21 Pick.) 492; Com. v. Rollings, 8 N. H. 550.

[1] ALA. — Hawkins v. State, 1 Port. 475, 27 Am. Dec. 641. CAL.—People v. Brown, 43 Cal. 439, 13 Am. Rep. 148. MASS. — Com. v. Roby, 29 Mass. (12 Pick.) 196. N. H.—State v. Blaisdell, 33 N. H. 388. N. C.—State v. Sheldon, 64 N. C. 294. PA.—Com. v. R. R., 1 Grant 301. S. C.—Jones v. Harris, 1 Strobh. L. 160. VA.—Lee v. Murphy, 63 Va. (22 Gratt.) 789, 12 Am. Rep. 563. ENG.—Wyrral's Case, 5 Co. 49, 77 Eng. Repr. 130; see Leyman v. Latimer, 3 Exch. D. 352, 14 Cox C. C. 51.

Pardon must recite the conviction, see, infra, § 1472.

[2] Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; State v. Alexander, 76 N. C. 231, 22 Am. Rep. 675; State v. Fuller, 1 McC. (S. C.) 178; see Blair v. Com., 66 Va. (25 Gratt.) 850, and cases cited, infra, § 1474.

In Massachusetts, the governor, with the advice of the council, may grant a pardon of an offense after a verdict of guilty and before sentence, and while exceptions are pending in the supreme court for argument; and the convict, upon pleading the pardon, is entitled to be discharged.—Com. v. Mash, 48 Mass. (7 Metc.) 472; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699. See, also, State v. Alexander, 76 N. C. 231, 22 Am. Rep. 675; Duncan v. Com., 4 Serg. & R. (Pa.) 449.

[3] 2 Whart. Cr. Ev. (Hilton's ed.), § 525; State v. Foley, 15 Nev. 64, 37 Am. Rep. 458.

[4] Greathouse's Case, 2 Abb. U. S. 382, Fed. Cas. No. 5741.

the executive to release from prison is equivalent to a pardon;[5] and so is an order to remit a sentence.[6]

§ 1461. REHABILITATION IS RESTORATION TO STATUS. Third. Rehabilitation—restitutio ex capite gratiæ. This consists in a restoration to the pardoned person of the status and rights he possessed before his pardon. In our own practice this is illustrated by the removal of the technical infamy which incapacitates him as a witness, and the restoration of confiscated effects not vested in others.[1] But a pardon has been held not to rehabilitate so as to entitle an alien to naturalization[2] nor to confer special rights.[3]

§ 1462. AMNESTY IS ADDRESSED TO A CLASS OF PEOPLE, AND IS MORE IN NATURE OF COMPACT. Amnesty differs from pardon in some essential particulars.[1] It is addressed not to an individual, but to a population; and it is as much in the nature of a compact as of a grant.[2] It says, "Lay down your arms, and your rebellion shall be treated as if it did not exist." Nor is this altered by the fact that the party addressed is at the time conquered. No state that retains within its borders a perpetual revolt can last; and

5 Jones v. Harris, 1 Strobh. L. (S. C.) 160.

6 Hoffman v. Coster, 2 Whart. (Pa.) 453.

1 2 Whart. Crim. Ev. (Hilton's ed.), § 525.

An officer pardoned after court-martial is restored to former rank. —12 Op. Atty.-Gen. 547.

2 Spencer, In re, 18 Alb. L. J. 153, 5 Saw. C. C. 195, Fed. Cas. No. 13234, where Deady, J., held that where an alien has, during the time of his residence here, been convicted of perjury, he is not entitled to naturalization; and a pardon being only prospective, and not doing away with the fact of his conviction, does not relieve him from his disability. The pardon of the President, whether granted by general proclamation or by special letters, relieves claimants, under the captured and abandoned property act, from the consequences of participation in the rebellion. — Carlisle v. United States, 83 U. S. (16 Wall.) 147, 21 L. Ed. 426.

3 See Hart v. United States, 15 Ct. of Cl. 414.

1 See 6 Cr. Law Mag. 457.

2 Brown v. United States, McCahon (Kan.) 229, Fed. Cas. No. 2032.

it is to close the revolt, and to transmute enemies into willing subjects, that an amnesty is issued. Another point of distinction between pardon at common law and amnesty is, that the former relieves from the legal incidents of the offense, while the amnesty cancels the guilty act itself. It is an extinction even of the memory of the past—an amnestia—an act of oblivion.[3] Hence amnesties are always construed indulgently toward those by whom they are accepted.[4] "In dubio mitius," is a maxim which applies to them as well as to pardons. But to amnesties belongs the additional consideration that no government, without forfeiting all confidence in its faith, can prosecute those whom it induces to surrender themselves to it on the plea that the offense prosecuted should be treated as if it did not exist.[5] Such is the distinction taken at common law. Under the Constitution of the United States this distinction is not noticed, amnesty being included in pardon, and all pardon being amnesty.[6] As under the Constitution of the United States, the

3 Knote v. United States, 10 Ct. of Cl. 397, 95 U. S. 149, 24 L. Ed. 442.

4 **The President's amnesty proclamation** of December 8, 1863, extended to persons who, prior to the date of the proclamation, had been convicted and sentenced for offenses described in the proclamation. — In re Greathouse's Case, 4 Sawy. 487, 2 Abb. U. S. 382, Fed. Cas. No. 5741. See Lapeyre v. United States, 84 U. S. (17 Wall.) 191, 21 L. Ed. 606.

But the amnesty acts do not, in general, apply to crimes not growing out of the war.—State v. Blalock, 61 N. C. (Phil.) 242; State v. Shelton, 65 N. C. 294; State v. Haney, 67 N. C. 467.

Plea setting up an amnesty proclamation containing exceptions must aver that the respondent is not within the exceptions. — St. Louis Street Foundry, 73 U. S. (6 Wall.) 770, 18 L. Ed. 884.

5 See Herrman, de abolitionibus criminum; Bentham, Rat. in loco; Mittermaier, note to Feuerbach, § 63.

For construction of federal amnesty acts, see Armstrong v. United States, 80 U. S. (13 Wall.) 154, 20 L. Ed. 614; Hamilton v. United States, 7 Ct. of Cl. 444; Law, Ex parte, 35 Ga. 285, Fed. Cas. No. 8126; Brown v. United States, McCahon (Kan.) 229, Fed. Cas. No. 2032; Haddix v. Wilson, 66 Ky. (3 Bush) 523; State v. Keith, 63 N. C. 140; infra, §§ 1472 et seq.

6 Knote v. United States, 95 U. S. 149, 153, 24 L. Ed. 442.

President's right to declare an amnesty is included in his right to pardon, his right to declare an amnesty can not be amplified or diminished by congress.

§ 1463. EXECUTIVE PARDON MUST BE SPECIALLY PLEADED; OTHERWISE AMNESTY. Pardons may be viewed as either statutory or executive. A statutory pardon,[1] or act of grace or amnesty, need not, it is said, be pleaded, but may be put in evidence under the general issue.[2] If a public act, the courts, under such circumstances, are bound to take notice of it.[3] But it is more prudent specially to plead an act of amnesty, since, if the court should refuse to receive it under the general issue, the error might be too late to be repaired.[4] And it is also to be remembered that when the function of pardon (which, as has been seen, includes amnesty) is vested in the executive, it can not be modified or restrained by legislative act. But a legislative pardon by being signed by the executive becomes an executive act.[5]

An executive pardon should be specially pleaded, and should be produced under the great seal.[6] It is said that it may be orally pleaded,[7] but it is better that it should be pleaded formally in writing. Unless specially pleaded, it will not be noticed by the court.[8] And it may be pleaded at any period of the case, whenever it is received;[9]

1 See People v. Stewart, 1 Ida. 546; Singleton v. State, 38 Fla. 297, 56 Am. St. Rep. 177, 34 L. R. A. 251, 21 So. 21.

As to legislative power to grant pardon, see note, 34 L. R. A. 251.

2 2 Hawk. P. C. 37, § 58.

3 See State v. Keith, 63 N. C. 140; State v. Blalock, 61 N. C. (Phill.) 242.

4 **As to statutes of amnesty,** see State v. Cook, 61 N. C. (Phill.) 535, and State v. Shelton, 65 N. C. 294.

5 People v. Stewart, 1 Ida. 546.

6 1 Chitty Cr. L. 468; Bullock v. Doods, 2 Barn. & Ald. 258; R. v. Harrod, 2 Car. & K. 294, 61 Eng. C. L. 293; 1 Whart. Cr. Ev. (Hilton's ed.), § 153.

7 R. v. Garside, 4 Nev. & M. 33, 2 Ad. & El. 266, 29 Eng. C. L. 136.

8 State v. Blalock, 61 N. C. (Phill.) 242; Com. v. Shisler, 2 Phila. (Pa.) 256; United States v. Wilson, 32 U. S. (7 Pet.) 150, 8 L. Ed. 640; United States v. Wilson, Bald. 78, Fed. Cas. No. 16730; Whart. Prec. 1457.

9 R. v. Morris, L. R. 1 C. C. 92.

though, if not pleaded, it will not, as has been seen, be noticed in arrest of judgment.[10]

When the pardon is set up in bar, evidence is admissible to show the non-identity of the offense pardoned with the offense on trial.[11]

§ 1464. PARDONS CAN NOT BE PROSPECTIVE. Pardons are not applicable to offenses committed after the proclamation of pardon. That no sovereign in a state where the law-making power is distinct from the executive can dispense with a penal statute was established in England by the overthrow of James II, and the subsequent refusal of the courts to recognize his dispensations as valid. It is true that an executive may say, "under certain circumstances, I will decline to prosecute." This has been sometimes done in England by order of council. But this is not a pardon, i. e., it could not be pleaded in bar. It is simply a promise by a particular executive, that for a certain time, under the stress of a particular public exigency, he will decline to prosecute. He may at any time revoke such promise; and at the best, it is the exercise of a high and questionable prerogative, which the courts, should the matter come before them, would hold to be superseded by a prosecution subsequently brought.[1]

But when an offense has been committed, a pardon may be at common law interposed at any period of time, before prosecution, during trial, and after conviction;[2] though by the constitutions of some states pardons prior to conviction are prohibited.

10 United States v. Wilson, 32 U. S. (7 Pet.) 150, 8 L. Ed. 640; Com. v. Lockwood, 100 Mass. 339.

11 Weimer, Ex parte, 8 Biss. 321, Fed. Cas. No. 17362; State v. McCarty, 1 Bay L. (S. C.) 334.

1 See 12 Coke 29; 2 Hawk. P. C. 540; R. v. Williams, Comb. 18; R. v. Wilcox, Salk. 458; R. v. Garside, 4 N. & M. 33, 2 Ad. & El. 266, 29 Eng. C. L. 136.

2 MASS.—Com. v. Mash, 48 Mass. (7 Metc.) 472; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699. MO.—Woollery v. State, 29 Mo. 300. PA.—Duncan v. Com., 4 Serg. & R. 449. FED.—United States v. Wilson, 32 U. S. (7 Pet.)

§ 1465. PARDON BEFORE SENTENCE, REMITS COSTS AND PENALTIES. Even in indictments partaking of the nature of civil process, a pardon before sentence, by the executive having jurisdiction, is a bar to costs and penalties, as well as to corporal punishment.[1] Thus, a pardon by the governor of Pennsylvania of a person convicted of fornication and bastardy, when pleaded before sentence, discharges, in Pennsylvania, the defendant from liability for costs, as well as from the maintenance of the child.[2] After judgment, however, a pardon does not discharge costs due elsewhere than to the state,[3] or a penalty vested

150, 8 L. Ed. 640; Garland, Ex parte, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366. ENG.—R. v. Crosby, 1 Ld. Raym. 39, 91 Eng. Repr. 293; R. v. Reilly, 1 Leach 454.

Compare: Supra, § 1459.

[1] KY.—Com. v. Bush, 63 Ky. (2 Duv.) 264. MISS.—White v. State, 42 Miss. 635; Gregory, Ex parte, 56 Miss. 164. N. C.—State v. Underwood, 64 N. C. 600. PA.—Com. v. Ahl, 43 Pa. St. 53. TEX.—State v. Dyches, 28 Tex. 535. FED.—Armstrong's Case, 80 U. S. (13 Wall.) 154, 20 L. Ed. 614; Pargoud's Case, 80 U. S. (13 Wall.) 156, 20 L. Ed. 646; United States v. Thomasson, 4 Biss. 336, Fed. Cas. No. 16479; United States v. McKee, 4 Dill. 1, 128, Fed. Cas. Nos. 15687, 15688.

[2] Com. v. Ahl, 43 Pa. St. 53. See Com. v. Hitchman, 46 Pa. St. 357; U. S. v. Athens Armory, 35 Ga. 344, Fed. Cas. No. 14473.

Pardon after sentence discharges penalties due to the county.—Cope v. Com., 28 Pa. St. 297. See Com. v. Shisler, 2 Phila. (Pa.) 256.

[3] IOWA—Estep v. Lacy, 35 Iowa 419, 14 Am. Rep. 498. MISS.—Phillips v. State, 58 Miss. 578. MO.—State v. McO'Blemis, 21 Mo. 272. N. Y.—Deming, In re, 10 Johns. 232. N. C.—State v. Underwood, 64 N. C. 599; State v. Mooney, 74 N. C. 98, 21 Am. Rep. 487. OHIO—Libby v. Nicola, 21 Ohio St. 414. PA.—Cope v. Com., 28 Pa. St. 297; Schuylkill v. Reifsnyder, 46 Pa. St. 445; Duncan v. Com., 4 Serg. & R. 449; McDonald, Ex parte, 2 Whart. 440. S. C.—State v. Williams, 1 N. & McC. L. 27. TENN.—Smith v. State, 74 Tenn. (6 Lea) 637. VA.—Anglea v. Com., 51 Va. (10 Gratt.) 698. FED.—Garland, Ex parte, 71 U. S. (4 Wall.) 334, 18 L. Ed. 366; Osborn v. United States, 91 U. S. 47, 23 L. Ed. 388; though see United States v. Thomasson, 4 Biss. 336. Fed. Cas. No. 16479; Brown v. United States, McCahon (Kan.) 229, Fed. Cas. No. 2032. ENG.—Pool v. Trumbal, 3 Mod. 56, 87 Eng. Repr. 35.

As to revenue forfeiture, see United States v. Morris, 23 U. S. (10 Wheat.) 246, 6 L. Ed. 314.

In United States v. Harris, 1 Abb. U. S. 110, 5 Int. Rev. Rec. 21, Fed. Cas. No. 15312, it was held that the pardoning power of the President does not extend to

in an individual.[4] Even costs due the state must be specially remitted by such pardon, or they will remain due.[5] This, however, does not apply to qui tam actions, or to cases where the informer's interest attaches in limine, by proceedings in rem. To these cases pardons, issued after commencement of suit, though before conviction, do not reach;[6] though it is otherwise when the informer has an indeterminate interest.[7] But, under the United States statutes, a pardon operates to bar confiscation before seizure,[8] and in such case the pardon relieves from forfeiture as much of the property as would have accrued to the United States.[9] It is otherwise as to pardon

the remission of moieties adjudged to informers.

— **Disapproved in United States v. Thomasson,** 4 Biss. 336, Fed. Cas. No. 16479.

The general rule is that the President's pardoning power extends to the remission of all fines, penalties, and forfeitures accruing to the United States for offenses against the United States.—United States v. Morris, 23 U. S. (10 Wheat.) 246, 6 L. Ed. 314; United States v. Lancaster, 4 Wash. 64, Fed. Cas. No. 15557; Pollock v. The Laura, 5 Fed. 133, 12 Rep. 453; 1 Op. Atty.-Gen. 418; 4 Op. Atty.-Gen. 593; 6 Op. Atty.-Gen. 393, 488.

4 Ibid.; Frazier v. Com., 51 Ky. (12 B. Mon.) 369; State v. Williams, 1 N. & McC. L. (S. C.) 27; Shoop v. Com., 3 Pa. St. 126.

5 See Libby v. Nicola, 21 Ohio St. 415, and cases cited above.

6 2 Hawk P. C. 543, 544. IND.—State v. Youmans, 5 Ind. 280. KY.—Frazier v. Com., 51 Ky. (12 B. Mon.) 369. N. J.—Code v. Freeholders, etc., 26 N. J. L. (2 Dutch) 329. PA.—Shoop v. Com., 3 Pa. St. 126. S. C.—State v. Williams, 1 N. & McC. L. 26. FED.—McLane v. United States, 31 U. S. (6 Pet.) 405, 8 L. Ed. 443; Osborn v. United States, 91 U. S. 479, 23 L. Ed. 388; Knote v. United States, 95 U. S. 149, 24 L. Ed. 442; United States v. Harris, 1 Abb. U. S. 110, 5 Int. Rev. Rec. 21, Fed. Cas. No. 15312; United States v. Lancaster, 4 Wash. 64, Fed. Cas. No. 15557. ENG.—Grossett v. Ogilvie, 5 Bro. C. C. 527.

7 United States v. Thomasson, 4 Biss. 336, Fed. Cas. No. 16479; The Laura, 19 Blatchf. 562, 8 Fed. 612.

8 United States v. Padelford, 76 U. S. (9 Wall.) 531, 19 L. Ed. 788; United States v. Armory, 35 Ga. 344, Fed. Cas. No. 14473; Brown v. United States, McCahon (Kan.) 229, Fed. Cas. No. 2032; United States v. Fifteen Hundred Bales, etc., 16 Pitts. L. J. 130, Fed. Cas. No. 15957.

9 Armstrong's Foundry, 73 U. S. (6 Wall.) 766, 18 L. Ed. 882; United States v. Padelford, 96 U. S. (9 Wall.) 531, 19 L. Ed. 788.

after judgment of forfeiture and delivery.[10] Unless money already paid to the public authorities is by the express terms of the pardon to be refunded, such a limitation being within the power of the executive, such money can not be refunded unless by legislative act.[11]

§ 1466. —— LIMITED IN IMPEACHMENTS. In impeachments, the pardoning power of the executive is usually restrained by constitutional limitation.[1]

§ 1467. —— —— AND SO AS TO CONTEMPTS. Commitments for contempt, whether legislative or judicial, have been said in England to be out of the reach of the crown; though so far as concerns parliamentary contempt, imprisonment may be relieved by prorogation. There is a strong reason for this limitation in the fact that if the executive could discharge from imprisonment witnesses imprisoned for contempt, no trial, legislative or judicial, could proceed without executive consent.[1] There are English limitations[2] similar to our American practice under which the right of executive pardon in cases of contempt has been asserted.[3]

10 See Confiscation Cases, 87 U. S. (20 Wall.) 92, 22 L. Ed. 320.

11 Cook v. Board, etc., 26 N. J. L. (2 Dutch) 326, 27 N. J. L. (3 Dutch) 657; Tombs v. Ethrington, 1 Lev. 120, 83 Eng. Repr. 327.

Compare: Flournoy v. Atty.-Gen., 1 Ga. 606.

As to generally, see 2 Op. Atty.-Gen. 329, 3 Op. Atty.-Gen. 418, 5 Op. Atty.-Gen. 43, 5 Op. Atty.-Gen. 532, 5 Op. Atty.-Gen. 579, 6 Op. Atty.-Gen. 293, 488, 8 Op. Atty.-Gen. 291, 10 Op. Atty.-Gen. 1, 452, 11 Op. Atty.-Gen. 35, 445.

In re Mullee, 7 Blatchf. C. C. 23-25, Fed. Cas. No. 9911, where the court went so far as to hold that the executive can even remit fines, going to private persons. This, however, may be questioned.—See 4 Op. Atty.-Gen. 458, 5 Op. Atty.-Gen. 579; infra, § 1922.

1 See R. v. Boyes, 1 Best & S. 311, 101 Eng. C. L. 309; Story Const., §§ 782, 1496; 1 Johnson's Trial 14; 2 Id. 497.

1 That this should be so as to contempts to legislature, see Story Const., § 1503.

2 See R. v. Watson, 2 Ld. Raym. 818, 92 Eng. Repr. 45.

3 4 Op. Atty.-Gen., U. S. 458. LA.—State ex rel. Van Orden v. Sauvenet, 24 La. Ann. 119, 13 Am. Rep. 115. MISS.—Hickey, Ex parte, 12 Miss. (4 Smed. & M.) 751. N. C.—Rhodes, In re, 65 N. C. 518; State ex rel. Herring v. Pugh, 126 N. C. 852, 36 S. E. 287. TENN.

§ 1468. —— MUST BE DELIVERED AND ACCEPTED, BUT CAN NOT BE REVOKED. To give effect to a pardon, it must be delivered either to the pardoned party or his agent,[1] or the officer having him in charge,[2] and must be accepted.[3] After such delivery and acceptance it can not be revoked.[4] But a delivery to the marshal has been held not to be a delivery to the prisoner,[5] though it has been held otherwise as to a delivery by a warden of the prison.[6] And a conditional or other pardon, not delivered, may be revoked by the successor in office of the executive by whom it was granted.[7] Personal delivery is not requisite in cases of amnesties or general pardon by proclamation.[8] Acceptance may be inferred from all the circumstances of the case; and ordinarily to show acceptance it is enough to prove that the party availed himself of any of the advantages of the pardon.[9]

—Shorp v. State, 102 Tenn. 9, 73 **Am. St. Rep.** 851, 43 **L. R. A.** 788, 49 S. W. 752.

Contra: Taylor v. Goodrich, 25 Tex. Civ. App. 109, 40 S. W. 515.

President's power to pardon in case of contempt, and to remit fine imposed.—See In re Mullee, 7 Blatchf. 23, 3 Am. Law Rev. 386, Fed. Cas. No. 9911, 3 Op. Atty.-Gen. U. S. 622; 4 Id. 458.

1 State v. Nichols, 26 Ark. 24; Reno, Ex parte, 66 Mo. 260; Knapp v. Thomas, 38 Ohio St. 377, 48 **Am. Rep.** 462; Lockhart, In re, 1 Disney (Ohio) 185; DePuy, In re, 3 Ben. 307, 316, Fed. Cas. No. 3814.

2 Powell, Ex parte, 73 Ala. 577; State v. Baptiste, 26 La. Ann. 134; Com. v. Halloway, 44 Pa. St. 210, 84 **Am. Dec.** 431.

Otherwise as to amnesties. See Lapeyre v. United States, 84 U. S. (17 Wall.) 191, 21 **L. Ed.** 606; United States v. Hughes, 1 Bond. 574, Fed. Cas. No. 15418.

3 United States v. Wilson, 32 U. S. (7 Pet.) 151, 8 **L. Ed.** 640; Callicot, In re, 8 Blatchf. 89, Fed. Cas. No. 2323.

4 Reno, Ex parte, 66 Mo. 260.

5 De Puy, Ex parte, 3 Ben. 307, Fed. Cas. No. 3814.

6 Powell, Ex parte, 73 Ala. 577; Com. v. Halloway, 44 Pa. St. 210, 84 **Am. Dec.** 431.

7 Ibid. See cases cited in prior notes to this section.

8 State v. Blalock, 61 N. C. (Phil.) 242.

9 Reno, Ex parte, 66 Mo. 266; Edymoin, In re, 8 How. Pr. (N. Y.) 478; Callicot, In re, 8 Blatchf. 89, Fed. Cas. No. 2323.

Party claiming benefit of pardon must show that he complied with its conditions.—Haym v. United States, 7 Ct. Claims 443; Waring v. United States, 7 Ct. Cl. 501; Scott v. United States, 8 Ct. Cl. 457.

§ 1469. —— VOID WHEN FRAUDULENT. A pardon fraudulently procured will, it has been held, be treated by the courts as void.[1] And this fraud may be by suppression of the truth as well as by direct affirmation of falsehood.[2] Yet this test should be cautiously applied by the courts, for there are few applications for pardon in which some suppression or falsification may not be detected. It is natural that it should be so, when we view the condition of persons languishing in prison, or under sentence of death; and if departure from rigid accuracy in appealing for pardon be a reason for canceling a pardon, there would be scarcely a single pardon that would stand. The proper course is to permit fraud to be set up to vacate a pardon only when it reaches the extent in which it would be admissible to vacate a judgment.[3] And an erroneous recital is no proof of fraud.[4]

§ 1470. CONDITIONAL PARDONS ARE VALID. Whether an executive can impose conditions in pardons has been doubted. It may now, however, be considered as settled that such conditions may, at common law, be made, and that on their violation the pardon does not take final

1 2 Hawk. P. C., §§ 9, 10, p. 535. GA.—Dominick v. Bowdoin, 44 Ga. 357. IND.—State v. Leak, 5 Ind. 539. N. C.—State v. McIntire, 46 N. C. (1 Jones L.) 1, 59 Am. Dec. 566. PA.—Com. v. Halloway, 44 Pa. St. 210, 84 Am. Dec. 431; Com. v. Kelly, 9 Phila. 586, 29 Phila. Leg. Int. 465. TEX.—Rosson v. State, 23 Tex. App. 287, 4 S. W. 897. ENG.—Roy v. Maddocks, 1 Sid. 430, 82 Eng. Repr. 1199.

Pardon fair on face and unconditional, courts will not inquire into regularity of process by which procured; that puts an end to any inquiry into method of procuring it.—In re Edymoin, 8 How. Pr. (N. Y.) 478; Knapp v. Thomas, 29 Alb. L. J. 83, 11 Am. Law Rec. 666.

Motives of the executive can not be inquired into.—See State v. Ward, 56 Tenn. (9 Heisk.) 100.

As to analogy of fraudulent acquittals, see, supra § 1331.

2 State v. Leak, 5 Ind. 359.

3 See Edymoin, In re, 8 How. Pr. (N. Y.) 478.

In Knapp v. Thomas, 39 Ohio St. 377, 48 Am. Rep. 462, it was held, after careful argument, that the court would release on habeas corpus a person convicted who has received a full pardon, though such pardon was obtained by false representations.

4 Com. v. Ahl, 43 Pa. St. 53.

effect, and the original sentence remains in force.[1] This is eminently the case when the offender, after being re-

[1] 4 Bl. Com. 401; Bac. Abr., tit. "Pardon," E.; Co. Lit. 274b; 5 J. Q. Adams' Memoirs 392. ALA.—Ex parte Hawkins, 61 Ala. 321, 54 **Am. St. Rep.** 209, 30 **L. R. A.** 736, 33 S. W. 106; Fuller v. State, 122 Ala. 37, 82 **Am. St. Rep.** 17, 45 **L. R. A.** 502, 26 So. 146. ARK.—Ex parte Hawkins, 61 Ark. 321, 54 **Am. St. Rep.** 209, 30 **L. R. A.** 736, 33 S. W. 106. CAL.—Marks, Ex parte, 64 Cal. 29, 49 **Am. Rep.** 684, 28 Pac. 109. FLA.—Ex parte Alvarez, 50 Fla. 24, 111 **Am. St. Rep.** 102, 39 So. 481. IDA.—In re Prout, 12 Ida. 498, 10 **Ann. Cas.** 199, 5 **L. R. A.** (N. S.) 1066, 86 Pac. 275. IOWA—Arthur v. Craig, 48 Iowa 264, 30 **Am. Rep.** 395; State v. Hunter, 124 Iowa 569, 104 **Am. St. Rep.** 361, 100 N. W. 510. MASS.—Parker v. Stevens, 41 Mass. (24 Pick.) 277; West, In re, 111 Mass. 443. MINN.—State ex rel. O'Connor v. Wolfer, 53 Minn. 135, 39 **Am. St. Rep.** 582, 19 L. R. A. 783, 54 N. W. 1065. MO.—Roberts v. State, 14 Mo. 138, 55 **Am. Dec.** 97; Ex parte Reno, 66 Mo. 266, 27 **Am. Rep.** 337. N. Y.—People v. Potter, 1 Edm. Sel. Cas. 235; People v. Potter, 1 Park. Cr. Rep. 47; People v. Burns, 77 Hun 92, 9 N. Y. Cr. Rep. 185, 28 N. Y. Supp. 300; affirmed 143 N. Y. 665, 39 N. E. 21. N. C.—State v. Twitty, 11 N. C. (4 Hawks) 248. OHIO—Huff v. Dyer, 4 Ohio C. C. 595, 2 Ohio Circ. Dec. 727. ORE.—Ex parte Houghton, 49 Ore. 232, 9 **L. R. A.** (N. S.) 737, 89 Pac. 801. PA.—Com. v. Philadelphia, 4 Brewst. 320; Com. v. Haggerty, 4 Brewst. 326; Flavel's Case, 8 Watts & S. 197. S. C.—State v. Smith, 1 Bailey L. 283, 19 **Am. Dec.** 679; State v. Addington, 2 Bailey L. 516, 23 **Am. Dec.** 150; State v. Fuller, 1 McC. L. 178; State v. Chancellor, 1 Strobh. L. 347, 47 **Am. Dec.** 557; State v. Barnes, 32 S. C. 14, 17 **Am. St. Rep.** 832, 6 **L. R. A.** 743, 11 S. E. 611. TEX.—Rivers v. State, 10 Tex. App. 177. VT.—In re Convicts, 73 Vt. 423, 56 **L. R. A.** 660, 51 Atl. 10. VA.—Com. v. Fowler, 8 Va. (4 Call) 35; Lee v. Murphy, 63 Va. (22 Gratt.) 789, 12 **Am. Rep.** 563. FED.—Wells, Ex parte, 59 U. S. (18 How.) 307, 15 **L. Ed.** 421; Osborn v. United States, 91 U. S. 474, 23 **L. Ed.** 388; Ruhl, In re, 5 Sawy. 186, Fed. Cas. No. 12124; United States v. Six Lots of Ground, 1 Woods 234, Fed. Cas. No. 16299; Haym v. United States, 7 Ct. of Cl. 443; Scott v. United States, 7 Ct. of Cl. 457. ENG.—R. v. Foxworthy, 7 Mod. 153, 87 Eng. Rep. 1159; R. v. Thorpe, 1 Leach 391; R. v. Madan, 1 Leach 224; R. v. Aickless, 1 Leach 294.

Compare: Com. v. Fowler, 8 Va. (4 Call) 35.

As affirming power in President of the United States to impose conditions on pardons and to substitute a milder punishment for death, see 1 Op. 327, 342, 482 (Wirt); 5 Op. 43 (Tousey, a case of court-martial); 5 Op. 368 (Crittenden); 14 Op. 599 (Williams). See Wells, Ex parte, 59 U. S. (18 How.) 307, 15 **L. Ed.** 421; United States v. Wilson, 32 U. S. (7 Pet.) 150, 8 **L. Ed.** 640.

As to Ohio Constitution, see Libby v. Nicola, 21 Ohio St. 414;

leased on condition he leaves the country, refuses to go, or surreptitiously returns.[2] But allowance in calculating departure will be made for sickness or incapacity.[3]

By the Massachusetts statute of 1867, ch. 301, convicts violating the conditions of conditional pardons may be rearrested, but the rearrest does not prolong the sentence.[4]

When a pardon is granted with a condition annexed,

Sterling v. Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

As to New Mexico, see Territory v. Webb, 2 N. M. 147.

Arkansas Constitution authorizes such pardon.—Hunt, Ex parte, 10 Ark. (5 Eng.) 284.

For federal statute, see Rev. St., § 5330, 2 Fed. Stats. Ann., 1st ed., p. 355.

For a case of rejection of conditional pardon, see O'Brien's Case, 1 Towns. St. Tr. 469.

Condition impossible of performance, which is a condition precedent, pardon does not take effect. —State v. McIntire, 46 N. C. (1 Jones L.) 1, 59 Am. Dec. 566.

Condition must appear upon the face of the instrument.—Ex parte Reno, 66 Mo. 266, 27 Am. Rep. 337.

Condition must be lawful.—United States v. Six Lots of Ground, 1 Woods 234, Fed. Cas. No. 16299.

Condition must be reasonable, capable of performance (State v. McIntire, 46 N. C., 1 Jones L., 1, 59 Am. Dec. 566) and compatible with the genius and constitution of our laws.—Com. v. Haggerty, 4 Brewst. (Pa.) 236.

Condition subsequent limited to the term of the grantee's sentence, unless the intention is otherwise manifested by the instrument.—Huff v. Dyer, 4 Ohio C. C. 595.

Inability at time to perform condition will be an excuse.—Ely v. Hallett, 2 Cai. (N. Y.) 57.

Indefinite suspension of sentence amounts to a conditional pardon.—State v. Hunter, 124 Iowa 569, 104 Am. St. Rep. 361, 100 N. W. 510.

No new prosecution is necessary, but that defendant may be summarily arrested on execution, see Arthur v. Craig, 48 Iowa 264, 30 Am. Rep. 395; and so on judicial warrant.—Com. v. Superintendent, 4 Brews. (Pa.) 320; State v. Smith, 1 Bailey (S. C.) 283, 19 Am. Dec. 679.

On refusal to comply with pardon the original sentence revives. —See Madan's Case, Leach C. C. 220; Watson's Case, 9 Ad. & E. 731, 36 Eng. C. L. 384; Waring v. United States, 7 Ct. of Cl. 504.

2 Ibid. Such condition, however, will be strictly construed in favor of liberty, and here it has been held that the condition, "depart without delay," is satisfied by leaving the state, although after the lapse of some time the party returned.—Hunt, Ex parte, 10 Ark. (5 Eng.) 284.

3 People v. James, 2 Cai. (N. Y.) 57.

4 West's Case, 111 Mass. 443.

the fact that the person pardoned is in prison, and must accept the condition before availing himself of the pardon, does not constitute such duress as will vacate his acceptance of the condition.[5] When the condition is for the defendant's benefit, acceptance may be inferred from acceptance of any of the privileges of the pardon.[6]

An inoperative or illegal condition is worthless, and the pardon to which it is attached is unconditional.[7] But a condition that the party (convicted of larceny) should abstain from the use of intoxicating liquors is not inoperative or illegal;[8] nor is a condition that the party will not by virtue of it claim confiscated property;[9] nor a condition that the party will leave the state permanently.[10]

§1471. PARDONS DO NOT REACH SECOND CONVICTION. A person convicted for the second time of a felony, and liable to be sentenced to a cumulative statutory punishment, can not plead, in exoneration of the increased punishment, an executive pardon of the former conviction.[1]

§ 1472. PARDON MUST RECITE CONVICTION. As we have already seen, retrospective pardons are construed indulgently, and if the offense pardoned be substantially described this will be enough. Yet when it is sought to re-

5 Wells, Ex parte, 59 U. S. (18 How.) 307, 15 L. Ed. 421; In re Greathouse, 4 Sawy. 487, 2 Abb. U. S. 383, Fed. Cas. No. 5741.

6 Victor, In re, 31 Ohio St. 206.

7 See People v. Pease, 3 Johns. Cas. (N. Y.) 333; People v. Potter, 1 Park. Cr. Rep. (N. Y.) 47; People v. Potter, 1 Edm. Sel. Cas. (N. Y.) 235; Com. v. Fowler, 8 Va. (4 Call) 35.

8 Arthur v. Craig, 48 Iowa 264, 30 Am. Rep. 395.

To same effect is a pardon by Governor Cleveland, noticed in 27 Alb. L. J. 241.

9 Lee v. Murphy, 63 Va. (22 Gratt.) 789, 12 Am. Rep. 563; Osborn v. United States, 91 U. S. 474, 23 L. Ed. 388.

10 Lockhard, Ex parte, 1 Disney (Ohio) 105; State v. Smith, 1 Bail. (S. C.) 283, 19 Am. Dec. 679.

Leaving the state instantly is satisfied by leaving and coming back.—Hunt, Ex parte, 10 Ark. (5 Eng.) 84.

1 Mount v. Com., 63 Ky. (2 Duv.) 93.

habilitate a convict, or to otherwise cancel a conviction by means of a pardon, the pardon must accurately recite the conviction,[1] and it covers only the offense recited.[2] But a mere technical variance will not make the pardon inoperative.[3]

§ 1473. CALLING A WITNESS AS STATE'S EVIDENCE IS NOT A PARDON. That an accomplice was called as a witness by the prosecution is not a ground for a plea in bar.[1] The practice is in such case to grant a pardon; but this is solely for the discretion of the executive.[2]

§ 1474. FOREIGN PARDONS OPERATIVE AS TO CRIMES WITHIN SOVEREIGN'S JURISDICTION. To foreign pardons, the analogy of foreign convictions may be applied:[1] "Was the defendant within the jurisdiction of the pardoning sovereign at the time of the pardon? Was the offense com-

1 People v. Bowen, 43 Cal. 439, 13 **Am. Rep.** 148; R. v. Harrod, 2 Car. & K. 294, 61 Eng. C. L. 293, 2 Cox C. C. 242; R. v. Gillis, 11 Cox C. C. 69.

2 State v. Foley, 15 Nev. 64, 37 **Am. Rep.** 458; Weimer, Ex parte, 8 Biss. C. C. 321, Fed. Cas. No. 17362.

3 Com. v. Ohio etc. R. Co., 1 Grant (Pa.) 329.

This is in conformity with the practice in respect to records of prior conviction or acquittal where set up in bar, in which cases identity may be proved by parol.—Supra, § 1417.

1 1 Whart. Crim. Ev. (Hilton's ed.), § 439. CAL.—People v. Bruzzo, 24 Cal. 41. FLA.—Newon v. State, 15 Fla. 610. MASS.—Com. v. Brown, 103 Mass. 422; Com. v. Woodsides, 105 Mass. 594. N. Y.—Linsday v. People, 67 Barb. 548, 5 Hun 104; affirmed, 63 N. Y. 143. N. J.—State v. Graham, 41 N. J. L. (12 Vr.) 15. N. C.—State v. Lyon, 81 N. C. 600, 31 **Am. Rep.** 518. VA.—Dabney's Case, 46 Va. (1 Rob.) 696, 40 **Am. Dec.** 717. FED.—United States v. Ford, 99 U. S. 594, 25 **L. Ed.** 399; United States v. Lee, 4 McL. 103, Fed. Cas. No. 15588.

2 See fully 1 Whart. Crim. Ev. (Hilton's ed.), § 443.

In Wright v. Rindskoff, 43 Wis. 344, it was said that it would be a fraud upon the court and an obstruction of public justice, if the public prosecutor should enter into an agreement, unsanctioned by the court (if such sanction could be given in such a case), offering immunity or clemency to several defendants, in several indictments, upon the condition that one of them become a witness for the prosecution upon still other indictments.

1 Supra, § 1371.

mitted within the territory of such sovereign? In the latter case, a pardon, based on the ground that no offense was committed, is a lex generalis, declaring that the act is not in that land to be made liable to criminal punishment. But in the former case it should appear, to give extra-territorial force to such pardon, first, that the offender was in the territory of the pardoning prince to such effect that he could there be prosecuted by the laws of such territory for the particular offense; secondly, that by the law of the country of the second trial the courts of the country of the first trial had jurisdiction; and thirdly, that the pardon should have been regular and fair, and after a due examination of the facts. Should these conditions exist, the tendency is, in municipal prosecutions, to regard a foreign pardon as conclusive. In prosecutions political, or semi-political, however, the case would be reversed. It would be preposterous, for instance, to suppose that a prosecution in the United States for treasonable offenses against the United States committed in Germany, or for perjury in Germany before a United States consul, could be barred by a pardon by the German sovereign within whose territory the offense was committed. The true issue, both here and in respect to acquittals, is, had the sovereign thus intervening the jurisdiction to pronounce a lex generalis as to the particular case? If so, his action is final. If otherwise, it is not."[2]

A federal pardon, therefore, can not remove penalties imposed by a state court.[3]

The question of removal of disability of witnesses by pardon is discussed in another volume.[4]

2 Whart. Confl. of L., § 938.

3 Ridley v. Sherbrook, 43 Tenn. (3 Coldw.) 569; Hunter, Ex parte, 2 W. Va. 122. Compare: Jones v. Board, 56 Miss. 766, 31 Am. Rep. 385.

4 1 Whart. Crim. Ev. (Hilton's ed.), § 365.

CHAPTER LXXXVIII.

PRESENCE OF DEFENDANT IN COURT.

§ 1475. Defendant's appearance must be in person.
§ 1476. In felonies defendant must be in custody at trial.
§ 1477. Right may be waived in misdemeanors of the nature of civil process.
§ 1478. —— In such cases waiver may be by attorney.
§ 1479. Removal of defendant for turbulent conduct does not militate against rule.
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§ 1481. Presence essential at arraignment and empaneling.
§ 1482. —— Also at reception of testimony.
§ 1483. —— Also at charge of court.
§ 1484. —— But not during making and arguing of motions.
§ 1485. Presence essential at reception of verdict.
§ 1486. —— And at sentence.
§ 1487. Presence presumed to be continuous.

§ 1475. DEFENDANT'S APPEARANCE MUST BE IN PERSON. In trials for cases in which corporal punishment is assigned, the defendant's appearance must ordinarily be in person, and must so appear on record.[1] There can be no judgment of conviction taken by default.[2] Nor does the

[1] That a court may amend its record during term to show this, see Johnson v. Com., 115 Pa. St. 369, 9 Atl. 78.

[2] ALA.—State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; Sylvester v. State, 71 Ala. 71. ARK.—Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102; Bearden v. State, 44 Ark. 331. COLO.—Smith v. People, 8 Colo. 457, 8 Pac. 920. FLA.—Gladden v. State, 12 Fla. 562; Lovett v. State, 29 Fla. 356, 11 So. 172. ILL.—Brooks v. People, 88 Ill. 327. LA.—State v. Johnson, 35 La. Ann. 208. MISS.—Scaggs v. State, 16 Miss. (8 Smed. & M.) 722; Dyson v. State, 26 Miss. 362; Rolls v. State, 52 Miss. 391. MO.—State v. Matthews, 20 Mo. 55; State v. Bucner, 25 Mo. 167; State v. Cross, 27 Mo. 332; State v. Jones, 61 Mo. 232. N. Y.—People v. Perkins, 1 Wend. 91. N. C.—State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 299, 2 S. E. 185. PA.—Dunn v. Com., 6 Pa. St. 387; Hamilton v. Com., 16 Pa. St. 121; Prine v. Com., 18 Pa. St. 103; Dougherty v. Com., 69 Pa. St. 286. TENN.—

necessity for the defendant's presence cease with the opening of the case.[3] Absence on his part during the trial, unless the absence be necessary and temporary,[4] will be ground for a new trial; and the fact that the presence does not appear on record is ground for writ of error.[5]

Clarke v. State, 23 Tenn. (4 Humph.) 254; Andrews v. State, 34 Tenn. (2 Sneed) 550. VA.—Sperry v. Com., 36 Va. (9 Leigh) 623, 33 **Am. Dec.** 261; Hooker v. Com., 54 Va. (13 Gratt.) 763. WASH.—Shapoonmash v. United States, 1 Wash. Ter. 188. W. VA.—Younger v. State, 2 W. Va. 579, 98 **Am. Dec.** 791; State v. Sheppard, 49 W. Va. 582, 39 S. E. 676. WIS.—Hill v. State, 17 Wis. 675, 86 **Am. Dec.** 736; French v. State, 85 Wis. 400, 39 **Am. St. Rep.** 855, 55 N. W. 566. FED.—Hoft v. People of Utah, 110 U. S. 574, 28 **L. Ed.** 262, 4 Sup. Ct. Rep. 202.

See, also, cases cited, § 1816.

3 **Absence of receiving of verdict** is reversible error.—Cook v. State, 60 Ala. 39, 31 **Am. Rep.** 31.

Cross-examining witness in absence of accused, conviction reversed.—State v. Greer, 22 W. Va. 800.

Discharge of jury, for failure to agree, in absence of accused, constitutes former jeopardy.—Rudder v. State, 29 Tex. App. 262, 15 S. W. 717.

Motion for new trial, in felony case, accused must be present when considered.—State v. Parsons, 39 W. Va. 464, 19 S. E. 876; Gibson v. State, 3 Tex. App. 437. But see Bond v. Com., 83 Va. 581, 3 S. E. 149.

Submitting cause to jury in absence of accused, reversible error.—Allen v. Com., 86 Ky. 642, 6 S. W. 645.

4 **Absence by prisoner for five minutes** in answering a telegram while his counsel was cross-examining a witness is held not to vitiate the trial.—People v. Bragle, 88 N. Y. 585, 42 **Am. Rep.** 269.

5 See, infra, §§ 1476 et seq., 1816; Martin v. State, 41 Ark. 364; State v. Johnson, 35 La. Ann. 208.

Formal averment of defendant's presence during trial is not necessary, when it can be inferred from the record.—Lawrence v. Com., 71 Va. (30 Gratt.) 845.

"Never has there heretofore been a prisoner tried for felony in his absence," said a late eminent judge. "No precedent can be found in which his presence is not a postulate of every part of the record. He is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment should not be pronounced against him. These things are matters of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime."—Gibson, C. J., in Prine v. Com., 18 Pa. St. 104, as quoted and adopted by Williams, J., in Dougherty v. Com., 69 Pa. St. 286. See, to same effect, Dyson

In misdemeanors, as will presently be seen, this right may be waived in cases in which no corporal punishment is imposed. In felonies, or cases involving corporal punishment, it can ordinarily neither be waived nor dispensed with.[6]

§ 1476. IN FELONIES DEFENDANT MUST BE IN CUSTODY AT TRIAL. In felonies and high misdemeanors, the defendant, though previously on bail, is in custody when the trial opens. His bail bring him to court, and their duty is then discharged;[1] though in offenses of a lighter grade, where the punishment is not necessarily corporal, this strictness is not exacted.[2] If violent and obstreperous, or if escape be threatened, a defendant may be placed in shackles during trial.[3] Such restraint, however, should

v. State, 26 Miss. 362; Rolls v. State, 52 Miss. 391; State v. Craton, 28 N. C. (6 Ired. L.) 164; Hooker v. Com., 54 Va. (13 Gratt.) 763.

No presumption indulged as to presence of accused, record must show that fact.—Douglas v. State, 3 Wis. 820; Davis v. State, 38 Wis. 487; French v. State, 85 Wis. 400, 39 **Am. St. Rep.** 855, 55 N. W. 566.

In Arkansas a statutory provision exists similar to that in Ohio, noted below.—Sweeden v. State, 19 Ark. 205.

In Massachusetts, by statute, "no person indicted for a felony shall be tried unless personally present during the trial; persons indicted for smaller offenses may, at their own request, by leave of the court, be put on trial in their absence, by an attorney duly authorized for the purpose."—Gen. Stat., ch. 172, § 8.

In Ohio, by statute, "no person indicted for a felony shall be tried unless personally present during the trial. Persons indicted for misdemeanor may, at their own request, by leave of court, be put on trial in their absence. The request shall be in writing, and entered on the journal of the court."—See Rose v. State, 20 Ohio 31; Laws, vol. 66, p. 307.

6 Reardon v. State, 44 Ark. 331; Smith v. People, 8 Colo. 457, 8 Pac. 920.

1 People v. Beauchamp, 49 Cal. 41; People v. Williams, 59 Cal. 674; R. v. Douglas, 1 Car. & M. 193, 41 Eng. C. L. 109; R. v. Simpson, 10 Mod. 248, 88 Eng. Repr. 713.

2 Infra, § 1477; R. v. Carlile, 6 Car. & P. 636, 25 Eng. C. L. 614.

3 See Burn's Just., tit. Arraignment, Talf. ed.; Kel. 8; Cent. L. J., Aug. 16, 1878; 13 Cent. L. J. 426; Faire v. State, 58 Ala. 74; Lee v. State, 51 Miss. 566; Poe v. State, 78 Tenn. (10 Lea) 673.

not be imposed except in cases of immediate necessity,[4] and where it appears, without such necessity, by the record, there will be a reversal.[5] The usual position of a prisoner is at the bar, or in the "dock," as it is sometimes called.[6]

§ 1477. RIGHT MAY BE WAIVED IN MISDEMEANORS OF THE NATURE OF CIVIL PROCESS. As to arraignment and plea, the defendant can waive the right to be present, it has been ruled, in such misdemeanors as partake of the nature of civil process, or in which the punishment is not necessarily corporal, in which cases he can appear and plead by attorney, and even be absent during trial.[1] But this privilege will not be allowed in cases where the court is not satisfied that imprisonment will not in any case be

4 People v. Harington, 42 Cal. 165, 10 **Am. Rep.** 296; State v. Kring, 64 Mo. 591; State v. Kring, 1 Mo. App. 438; R. v. Rogers, 3 Burr. 1810, 1812, 97 Eng. Repr. 1112.

5 Territory v. Kelly, 2 N. M. 297; though see Poe v. State, 78 Tenn. (10 Lea) 673.

6 R. v. De Zulueta, 1 Car. & K. 215, 225, 47 Eng. C. L. 213, 224, 1 Cox C. C. 20; R. v. Egan, 9 Car. & P. 485.

1 Infra, § 1636. ARK.—Martin v. State, 40 Ark. 364. CAL.—People v. Ebner, 23 Cal. 158. ILL.—Bloomington v. Heiland, 67 Ill. 278. IND.—Turpin v. State, 80 Ind. 148. PA.—Lynch v. Com., 88 Pa. St. 189, 32 **Am. Rep.** 445. VT.—Tracy, Ex parte, 25 Vt. 93. VA.—Price v. Com., 74 Va. (33 Gratt.) 819, 36 **Am. Rep.** 797. FED.—United States v. Santos, 5 Blatchf. 104, Fed. Cas. No. 16222; United States v. Mayo, 1 Curt. 433, Fed. Cas. No. 15754; United States v. Shepherd, 1 Hugh. 520, Fed. Cas. No. 16274.

As indicating a wider range, see Sahlinger v. People, 102 Ill. 241.

As to the constitutional question involved, see, infra, § 1668.

That the court may refuse to sanction a waiver, see Bridges v. State, 38 Ark. 510.

In People v. Higgins, 59 Cal. 557, the court held that such a flight was ground for discharging the jury. On the general question of waiver by misconduct, see, also: ALA.—State v. Hughes, 1 Ala. 655. ARK.—Owen v. State, 38 Ark. 572. CAL.—People v. Corbett, 28 Cal. 330. FLA.—Dixon v. State, 13 Fla. 744. GA.—Cook v. State, 26 Ga. 593. KAN.—State v. White, 19 Kan. 445, 27 **Am. Rep.** 137. MINN.—State v. Reckards, 21 Minn. 47. N. C.—State v. Epps, 76 N. C. 55. WIS.—Douglass v. State, 3 Wis. 820.

part of the sentence.[2] And so far as concerns presence in court during trial, there is a strong line of authority to the effect that such a waiver will not be held good in capital cases.[3]

§ 1478. —— IN SUCH CASES WAIVER MAY BE BY ATTORNEY. On principle, the better practice would be for the defendant to appear in court and there make the waiver.[1] But it has been held that it is sufficient if he execute, in the excepted cases of quasi civil prosecutions, a special power

2 ARK.—Warren v. State, 19 Ark. 214, 68 Am. Dec. 214; Bridges v. State, 38 Ark. 510; Owen v. State, 38 Ark. 512; Martin v. State, 41 Ark. 364. CAL.—People v. Ebner, 23 Cal. 158. CONN.—State v. Mann, 27 Conn. 281. ILL.—Nomaque v. People, 1 Ill. 109. N. Y.—People v. Taylor, 3 Den. 98, note; Maurer v. People, 43 N. Y. 1, 1 Cow. Cr. Rep. 335. N. C.—State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643. OHIO—Rose v. State, 20 Ohio St. 31. PA.—Prine v. Com., 18 Pa. St. 103; Com. v. Shaw, 1 Crumrine (Pitts.) 492 VT.—Tracy, Ex parte, 25 Vt. 93. VA.—Com. v. Crump, 3 Va. (1 Va. Cas.) 172; Jackson v. Com., 60 Va. (19 Gratt.) 656. FED.—United States v. Mayo, 1 Curt. 433, Fed. Cas. No. 15754.

See. infra, § 1817.

3 1 Kerr's Whart. Crim. Law, § 184, citing Smith v. Com., 14 Serg. & R. (Pa.) 69.

Under Kansas statutes there can be generally no waiver.—State v. Myrick, 38 Kan. 238, 16 Pac. 330.

On general doctrine of waiver, see, infra, § 1528, and see, also, Minich v. People, 8 Colo. 440, 9 Pac. 4.

Temporary absence during argument in non-capital cases (counsel being present), does not vitiate.—See State v. Paylor, 89 N. C. 539; State v. Sheets, 89 N. C. 544.

In Hope v. People of Utah, 110 U. S. 574, 28 L. Ed. 262, 4 Sup. Ct. 202, Harlan, J., gave the opinion of the court as follows:

"We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirements as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'can not legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority' (1 Bl. Com. 133)."—See Elick v. Territory, 1 Wash. Ter. 136.

1 See People v. Petry, 2 Hilt. (N. Y.) 523.

of attorney for this purpose, filing it in court.[2] In other cases the waiver must be by defendant personally.[3]

§ 1479. REMOVAL OF DEFENDANT FOR TURBULENT CONDUCT DOES NOT MILITATE AGAINST RULE. That a waiver may be so implied, was held in a trial for perjury, in the United States Circuit Court for New York, where the defendant's conduct during a portion of the trial was so violent that it was necessary to remove him from the court-room, and place him in sequestration.[1] And unless such a check be applied, the defendant, by violent and turbulent conduct, could at any time either bring his trial to an end, or compel its extension under circumstances destructive of public decorum. On the same reasoning rests a case already noticed, in which it was held in Ohio that a defendant in a case of counterfeiting, in which he was under bail, could not stop a trial by running away from the court.[2] And it was held in Illinois, in 1882, that where a prisoner, on trial for burglary, escaped from the court-room, this was a waiver of the privilege, after which the court might proceed to final judgment in his absence.[3]

§ 1480. INVOLUNTARY ILLNESS NOT A WAIVER. Involuntary illness is not to be regarded as a waiver; and hence, in an English trial for misdemeanor, where the defendant was taken ill, and was necessarily removed from the court-house, the judge discharged the jury, though the defendants' counsel consented to going on in his absence.[1]

2 United States v. Mayo, 1 Curt. C. C. 433, Fed. Cas. No. 15754.

Right of court to remove the defendant from the court-room under such circumstances was discussed by Mr. Wharton in a note to Guiteau's Case, 10 Fed. 161.

3 Shipp v. State, 11 Tex. App. 46.

1 United States v. Davis, 6 Blatchf. C. C. 464, Fed. Cas. No. 14923.

2 Fight v. State, 7 Ohio (pt. I) 180, 28 Am. Dec. 626.

3 Holliday v. People, 9 Ill. (4 Gilm.) 111; Sahlinger v. People, 102 Ill. 241; Wilson v. State, 2 Ohio St. 319. See, also, Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; Rose v. State, 20 Ohio St. 33; Hill v. State, 17 Wis. 697.

1 R. v. Streek, 2 Car. & P. 413, 12 Eng. C. L. 646.

It is otherwise as to temporary voluntary absence during one of the speeches of counsel.[2]

§ 1481. PRESENCE ESSENTIAL AT ARRAIGNMENT AND EMPANELING. By the old common law form, each juror is required to look on the prisoner and the prisoner on the juryman, before the juryman is sworn. Nor can the prisoner's presence at this period be dispensed with or waived in any cases in which corporal punishment may be inflicted.[1] Hence in felonies the record must show defendant to have been present at the arraignment,[2] and also at the calling and testing of the jurors.[3]

§ 1482. —— ALSO AT RECEPTION OF TESTIMONY. The constitutions of most of the United States, incorporating in this an old common law principle, provide that the accused, in criminal cases, shall have a right to meet the witnesses against him face to face. Even where this rule is not a part of the fundamental law of the land, it is held obligatory by the courts.[1] This rule, even in capital

2 State v. Grate, 68 Mo. 22.

1 Rolls v. State, 52 Miss. 391; Dunn v. Com., 6 Pa. St. 385; Dougherty v. Com., 69 Pa. St. 286.

2 Hall v. State, 40 Ala. 698; State v. Jones, 61 Mo. 232; Dodge v. People, 4 Neb. 220; Jacobs v. Com., 5 Serg. & R. (Pa.) 315.

In Texas this is limited to capital cases.—Nolan v. State, 8 Tex. App. 585; Grisham v. State, 19 Tex. App. 504.

3 State v. Sutfin, 22 W. Va. 771; Hopt v. People of Utah, 110 U. S. 574, 28 **L. Ed.** 262, 4 Sup. Ct. 202.

As to pleading not guilty in defendant's absence by his attorney, see State v. Jones, 70 Iowa 505, 30 N. W. 750.

1 ALA.—State v. Hughes, 2 Ala. 102, 36 **Am. Dec.** 411; Henry v. State, 33 Ala. 389. CAL.—People v. Kohler, 5 Cal. 72. FLA.—Holton v. State, 2 Fla. 476. KY.—Allen v. Com., 86 Ky. 642, 6 S. W. 645. MO.—State v. Cross, 27 Mo. 332; State v. Smith, 90 Mo. 37, 59 **Am. Rep.** 4, 1 S. W. 753. N. Y.—People v. Perkins, 1 Wend. 91. PA.—Dunn v. Com., 6 Pa. St. 385; Dougherty v. Com., 69 Pa. St. 286. TENN.—Andrews v. State, 34 Tenn. (2 Sneed) 550. VA.—Jackson v. Com., 60 Va. (19 Gratt.) 656.

Absence during substitution of juror, not ground for new trial.—State v. Brewer, 109 Mo. 648, 19 S. W. 96.

Additional instructions in absence of accused, ground for a new trial.—State v. Meagher, 49 Mo. App. 57.

Change of venue in absence of

cases, however, does not exclude dying declarations; nor the testimony of deceased witnesses previously taken on a trial of the same issue.[2] The defendant, also, as has been seen, may in misdemeanors waive this privilege either expressly or by implication; and in California, even in a murder case, it has been held that a defendant's absence from necessity or other strong reasons, during part of a trial, was no ground for reversing the sentence, if no prejudice arose to him from his absence.[3] A defendant, also, may, to defeat a motion for a continuance, agree to accept the statement of an absent witness as if it were proved.[4] But ordinarily no testimony should be taken in the defendant's absence. Even if the jury go to view the place of the crime, he should be present.[5]

§ 1483. —— ALSO AT CHARGE OF COURT. It is clear that the defendant must be present at the charge of the court.[1] Even where, after the jury had retired to deliberate upon their verdict, they returned into court and asked certain

prisoner, reversible error. — Ex parte Bryan, 44 Ala. 402.

Correcting erroneous instruction in absence of accused, reversible error.—See McCormick Harvesting Mach. Co. v. Gray, 111 Ind. 340, 16 N. E. 787.

Voluntary absence, verdict may be received during, under statute.—State v. Hope, 100 Mo. 347, 8 **L. R. A.** 608, 13 S. W. 490.

In State v. Greer, 22 W. Va. 546, it was held that such absence was not made less fatal by reading the testimony to him and telling the jury to disregard all done in his absence.

[2] 1 Whart. Cr. Ev. (Hilton's ed.), §§ 227, 277.

[3] People v. Bealoba, 17 Cal. 389; Rutherford v. Com., 78 Ky. 639; United States v. Santos, 5 Blatchf. 104, Fed. Cas. No. 16222.

Defendant's absence from courtroom for a few moments on business does not, under the New York statute, vitiate the proceedings.—People v. Bragle, 88 N. Y. 585, 42 **Am. Rep.** 269; People v. Bragle, 26 Hun (N. Y.) 378.

As to temporary absence of defendant during argument, see State v. Paylor, 89 N. C. 539.

[4] Infra, § 1528.

As to consent curing reception of evidence from a former trial, see State v. Polson, 29 Iowa 133; People v. Murray, 52 Mich. 288, 17 N. W. 843 (as to consent to receiving depositions), and see Minich v. People, 8 Colo. 440, 9 Pac. 4.

[5] Infra, § 1642. See Rutherford v. Com., 78 Ky. 639.

[1] CAL.—People v. Kohler, 5 Cal. 72. GA.—Wade v. State, 12 Ga. 25. N. C.—State v. Blackwelder,

questions of the court as to what had been the evidence on particular points, to which the court replied, giving the information requested in the defendant's absence, it was held that this was error, for which the conviction must be reversed,[2] and this though defendant's counsel were present.[3]

§ 1484. —— BUT NOT DURING MAKING AND ARGUING OF MOTIONS. Presence at the making and arguing of motions can not be exacted as an absolute rule, as there are some cases—e. g., motions to bring the prisoner into court—which presuppose his absence, and other cases, such as motions of course, in which to require his presence would be productive of great inconvenience, and might work sometimes prejudically to himself.[1] In misdemeanors in which the punishment is not corporal, it is clear that such presence, even as to motions for new trial, is not necessary.[2] And in the higher order of misdemeanors, and in felonies, the courts are not now disposed, on the hearing of motions, to insist on the defendant's presence.[3] Hence his absence will not invalidate such pro-

61 N. C. (1 Phil.) 38. TENN.—Wilt v. State, 45 Tenn. (5 Cold.) 11. VA.—Jackson v. Com., 60 Va. (19 Gratt.) 656.

See, infra, §§ 1738, 1770.

In Meece v. Com., 78 Ky. 586, it was held that absence at part of charge was not error where no prejudice was shown.

2 Wade v. State, 12 Ga. 25; State v. Davenport, 33 La. Ann. 231; Maurer v. People, 43 N. Y. 1, 1 Cow. Cr. Rep. 335; infra, § 1776.

Compare: Jackson v. Com., 60 Va. (19 Gratt.) 656.

In Ohio, however, it has been ruled not to be ground for new trial that the court, in the absence of the parties, sent a copy of the statutes of the state to the jury, calling their attention to particular sections.—Gandolfo v. State, 11 Ohio St. 114; and see State v. Pike, 65 Me. 111, and cases cited infra, § 1770.

3 Bonner v. State, 67 Ga. 510.

1 Hall v. State, 40 Ala. 698; Godfreidson v. People, 88 Ill. 284; State v. Outs, 30 La. Ann. 1155; State v. Elkins, 63 Mo. 159.

2 R. v. Parkinson, 2 Den. C. C. 459.

3 IND.—Epps v. State, 102 Ind. 539, 1 N. E. 491. LA.—State v. Clark, 32 La. Ann. 558. N. Y.—People v. Van Wyck, 2 Cai. 333. PA.—Jewell v. Com., 22 Pa. St. 94. ENG.—R. v. Caudwell, 17 Ad. & E. N. S. (17 Q. B.) 503, 79 Eng. C. L. 503; R. v. Boltz, 8 Dow. & Ry. 65, 5 Barn. & C. 334, 11 Eng. C. L. 486; R. v. Hollingberry, 6

ceedings,[4] unless in matters where his identification or assent is required.[5] On the making of a motion for new trial the defendant need not be present.[6]

In motions for arrest of judgment, and in error, the old practice was to require the attendance of the defendant.[7] In the United States, this presence has not been generally required;[8] nor is it usual to exact it in proceedings in error;[9] and in England, at least in misdemeanors, appearance on proceedings in error will not be required, where it appears that the defendant, who is plaintiff in error, can not attend without great inconvenience and risk of health.[10] But at the decision, at least, of motions for new trial, the defendant should be present.[11]

§ 1485. Presence essential at reception of verdict. In felonies, presence at verdict is essential; and there have been cases where the courts have refused to permit

Dow. & Ry. 344, 16 Eng. C. L. 262, 4 Barn. & C. 329, 10 Eng. C. L. 601; R. v. Scully, 1 Alc. & Nap. (Irish) 262.

See, also, infra, § 1833.

4 State v. Harris, 34 La. Ann. 118; Anonymous, 31 Me. 592; and see Com. v. Andrews, 97 Mass. 543; Com. v. Costello, 121 Mass. 371, 23 Am. Rep. 277.

Contra: Long v. State, 52 Miss. 23; Hooker v. Com., 54 Va. (13 Gratt.) 763.

5 See Simpson v. State, 56 Miss. 295; Rothschild v. State, 7 Tex. App. 519.

6 State v. Lewis, 80 Mo. 110.

7 R. v. Spragg, 2 Burr. 930, 993, 1827, 97 Eng. Repr. 637, 669, 680, 1 W. Black. 209, 96 Eng. Repr. 115.

8 See People v. Ormsby, 48 Mich. 494, 12 N. W. 671; Territory v. Young, 2 N. M. 93; but see, as requiring presence, State v. Hoffman, 78 Mo. 250.

9 State v. Buhs, 18 Mo. 319; Donelly v. State, 26 N. J. L. (2 Dutch.) 464, 601; Clark v. People, 1 Park. Cr. Rep. (N. Y.) 360.

Defendant need not be required to be present on the argument of motions for new trials and in arrest. See People v. Vail, 6 Abb. Sel. Ca. (N. Y.) 206; 57 How. Pr. 81; State v. Jefcoat, 20 S. C. 383.

Waiver will be presumed from attendance of counsel without objection to the defendant's absence. —State v. David, 14 S. C. 428.

10 Murray v. R., 3 D. & L. 100, 7 Ad. & El. N. S. (7 Q. B.) 700, 53 Eng. C. L. 698.

11 Berkley v. State, 4 Tex. App. 122; see Griffin v. State, 34 Ohio St. 299.

That this is necessary in capital cases, see Simpson v. State, 56 Miss. 267.

That right may be waived, see State v. Somnier, 33 La. Ann. 237.

this right to be waived.[1] Thus, a verdict of burglary was set aside in Pennsylvania, when it was taken in the defendant's absence, although his counsel waived his right to be present.[2] Where, however, the defendant, being out on bail, happens to be voluntarily absent for a few moments, during which time the jury come in and render their verdict, his counsel being present, it has been held, and not without reason, that such inadvertence is not ground for a new trial;[3] and so where the defendant escapes as the jury is coming in.[4] On the other hand, when

1 Supra, § 1477; infra, §§ 1668, 1680; Green v. People, 3 Colo. 68.

2 Prine v. Com., 18 Pa. St. 103; Dougherty v. Com., 63 Pa. St. 386; Andrew v. State, 34 Tenn. (2 Sneed) 550; Jackson v. Com., 60 Va. (19 Gratt.) 656; Smith v. State, 51 Wis. 615, 37 Am. Rep. 849, 8 N. W. 410.

Attorney of defendant need not be notified so that he can be present at reception of verdict.—Barnard v. State, 88 Wis. 656, 60 N. W. 1058.

Communication of judge with jury, after retirement, to deliberate on verdict, in absence of accused and his counsel, reversible error.—Havenor v. State, 125 Wis. 444, 4 Ann. Cas. 1052, 104 N. W. 116.

3 GA.—Barton v. State, 67 Ga. 653, 44 Am. Rep. 743. IOWA—State v. Vaughan, 29 Iowa 286. N. Y.—People v. Stephen, 19 N. Y. 549. PA.—Holmes v. Com., 25 Pa. St. 221. WIS.—Hill v. State, 17 Wis. 675, 86 Am. Dec. 736. FED.—United States v. Santos, 5 Blatchf. 104, Fed. Cas. No. 16222.

As to misdemeanors, see Sawyer v. Joiner, 16 Vt. 497.

As doubting, see R. v. Streek, 2 Car. & P. 413, 12 Eng. C. L. 647; and see, supra, § 1475.

Attorney's waiver of defendant's right to be present at reception of verdict must be repudiated by defendant before reception of the verdict; he will be estopped to repudiate thereafter.—Cawthon v. State, 119 Ga. 395, 46 S. E. 897.

In Georgia it is held that ordinarily the record need not show presence.—Smith v. State, 59 Ga. 513, 514, 27 Am. Rep. 393; Smith v. State, 60 Ga. 430.

In Virginia it has been held that presence is not necessary when the jury is brought into court, during its deliberation, as a mere matter of form.—Lawrence v. Com., 71 Va. (30 Gratt.) 845.

In Lynch v. Com., 88 Pa. St. 189, 32 Am. Rep. 445, it was held that where a prisoner on trial for larceny who is out upon bail has been present during the entire trial, but voluntarily absents himself just before the bringing in of the verdict, it is not error for the court, having had the prisoner called, to receive the verdict and sentence the prisoner without first having him brougl in.

4 State v. Kelly, 97 N. C. 404,

the defendant is a prisoner in custody of the court, absence during rendition of the verdict, without waiver, vitiates the proceedings, since his absence is not under such circumstances to be regarded as voluntary.[5] And in fact this, as we have seen, is exacted by the common law form, which requires the jury to look on the prisoner and the prisoner to look on the jury, when the verdict is rendered. If the verdict in a case of felony is taken in the defendant's absence this is a mistrial, but does not, in felonies not capital, entitle the defendant to a discharge.[6] And in some states this is the case even in capital cases.[7]

The better view is that in capital, if not in all felonies, the record must show that the defendant was present at trial, verdict, and sentence,[8] though as to misdemeanors less strictness is insisted on.[9]

2 **Am. St. Rep.** 299, 2 S. E. 185. See, supra, § 1475.

5 ALA.—State v. Hughes, 2 Ala. 102, 36 **Am. Dec.** 411; Cook v. State, 60 Ala. 39, 31 **Am. Rep.** 31. CONN.—State v. Hurlbut, 1 Root 90. KAN. — State v. Muir, 32 Kan. 481, 4 Pac. 812. LA.—State v. Ford, 30 La. Ann. 311; State v. Bailey, 30 La. Ann. 326. MISS.—Stubbs v. State, 49 Miss. 716. MO.—State v. Cross, 27 Mo. 332; State v. Braunschwieg, 36 Mo. 397 (under statute). N. Y.—People v. Winchell, 7 Cow. 521. OHIO—Tabler v. State, 34 Ohio St. 127 (but see Fight v. State, 7 Ohio 180, 28 **Am. Dec.** 626). TENN.—State v. France, 1 Tenn. 434; Clark v. State, 23 Tenn. (4 Humph.) 254. ENG.—Duke's Case, 1 Salk. 400, 91 Eng. Repr. 346.

Absence of one defendant does not preclude a verdict against a defendant who is present. See, supra, § 364; State v. Bradley, 30 La. Ann. (Pt. I) 326.

As to absence of counsel, see Lassiter v. State, 67 Ga. 739.

As to sealed verdict, see, infra, § 1673; and see, also, supra, § 1475.

6 State v. Jenkins, 84 N. C. 812, 37 **Am. Rep.** 643; supra, § 1455.

7 Supra, § 1444; State v. Conkle, 16 W. Va. 736.

8 ALA. — Sylvester v. State, 71 Ala. 17. GA.—Nolan v. State, 55 Ga. 521, 21 **Am. Rep.** 281. LA.—State v. Davenport, 33 La. Ann. 231. MISS.—Stubbs v. State, 49 Miss. 716; Rolls v. State, 52 Miss. 391. PA.—Dunn v. Com., 6 Pa. St. 385; Dougherty v. Com., 69 Pa. St. 286. WASH. — Hartigan v. Terr., 1 Wash. Ter. 447.

Compare: Smith v. State, 60 Ga. 430; State v. Collins, 33 La. Ann. 152.

See, also, infra, §§ 1674, 1845.

9 Grimm v. People, 14 Mich. 300; Stephens v. People, 19 N. Y. 549; State v. Craton, 28 N. C. (6 Ired. L.) 164; Holmes v. Com., 25 Pa. St. 221.

§ 1486. ——AND AT SENTENCE. Absence of the defendant is not permitted at sentence in any case punishable corporally.[1] Where, however, the offense is a misdemeanor, partaking of the nature of a civil process, and where the punishment is simply a fine, such absence, the defendant being under recognizance to submit to the sentence of the court, has been allowed.[2]

No constitutional bar being present, the setting aside the verdict for this cause does not interfere with a retrial.—State v. Hughes, 2 Ala. 102, 36 **Am. Dec.** 411; People v. Perkins, 1 Wend. (N. Y.) 91; Younger v. State, 2 W. Va. 579, 98 **Am. Dec.** 791.

Verdict rendered in a felony when prisoner is not in court, and a consequent discharge of jury, works, in capital cases, an acquittal of the defendant. — Cook v. State, 60 Ala. 39, 31 **Am. Rep.** 31.

In Illinois, if a prisoner escapes just before verdict, this does not interfere with the verdict being taken. — Sahlinger v. People, 102 Ill. 241. See, also, Barton v. State, 67 Ga. 633.

In Texas, defendant's presence is by statute not necessary in misdemeanors.—Gage v. State, 9 Tex. App. 259; see Mapes v. State, 13 Tex. App. 85.

1 ALA.—Peters v. State, 39 Ala. 681. CAL.—People v. Sprague, 54 Cal. 92. CONN.—State v. Hurlbut, 1 Root 90. MISS.—Stubbs v. State, 49 Miss. 716; Rolls v. State, 52 Miss. 391. PA.—Dougherty v. Com., 69 Pa. St. 286. FED.—Waterman, Ex parte, 33 Fed. 29.

Apparently contra: Price v. Com., 74 Va. (33 Gratt.) 819, 36 **Am. Rep.** 797.

If present when the verdict is returned, but absent when sentence is pronounced, he is not entitled to a new trial, but only to a new sentence. If the former judgment is reversed on error for the prisoner's absence, he is simply remanded for sentence according to law.—Cole v. State, 10 Ark. (5 Eng.) 318; Kelly v. State, 11 Miss. (3 Smed. & M.) 518; and see Lynch v. Com., 88 Pa. St. 189, 32 **Am. Rep.** 445.

2 ARK.—Warren v. State, 19 Ark. 214, 68 **Am. Dec.** 214. ILL.—Holliday v. People, 9 Ill. (4 Gilm.) 111. IOWA—Hughes v. State, 4 Iowa 354. KY.—Canada v. Com., 39 Ky. (9 Dana) 304. MISS.—Price v. State, 36 Miss. 531, 72 **Am. Dec.** 195. N. Y.—People v. Winchell, 7 Cow. 525; Son v. People, 12 Wend. 344. PA.—Hamilton v. Com., 16 Pa. St. 129, 55 **Am. Dec.** 485. FED.—United States v. Mayo, 1 Curt. 433, 435, Fed. Cas. No. 15754. ENG.—R. v. Templeman, 1 Salk. 55, 91 Eng. Repr. 54; Duke's Case, 1 Salk. 400, 91 Eng. Repr. 346; R. v. Constable, 7 Dow. & Ry. 663, 16 Eng. C. L. 312; R. v. Boltz, 8 Dow. & Ry. 663, 5 Barn. & C. 334, 11 Eng. C. L. 486.

§ 1487. Presence presumed to be continuous. When the record shows that the defendant was in court at the opening of the session, the presumption is that he continued in court during the entire day.[1] And this presumption has been extended to the whole trial.[2]

1 2 Whart. Crim. Ev. (Hilton's ed.), §§ 816, 829; Kie v. United States, 27 Fed. 351; State v. Lewis, 69 Mo. 92.

2 ALA.—Speer v. State, 69 Ala. 159. ARK.—Bond v. State, 63 Ark. 509, 58 Am. St. Rep. 132, 39 S. W. 554. CAL.—People v. Sing Lum, 61 Cal. 538; People v. Jung Qung Sing, 70 Cal. 469, 11 Pac. 755. FLA.—Irvin v. State, 19 Fla. 872. KAN.—State v. Daugherty, 63 Kan. 479, 65 Pac. 695. NEB.—Folden v. State, 13 Neb. 328, 14 N. W. 412. N. M.—Territory v. Yarberry, 2 N. M. 391. OKLA.—Wood v. State, 4 Okla. Cr. 461, 112 Pac. 21. R. I.—State v. Cartwright, 13 R. I. 193. S. D. —State v. Swenson, 18 S. D. 205, 99 N. W. 1116. VA.—Cluverius v. Com., 81 Va. 787. FED.—Lewis v. United States, 146 U. S. 370, 36 L. Ed. 1011, 13 Sup. Ct. Rep. 136.

See, infra, § 1816.

Presence may be inferred from the averment that the prisoner was remanded. See Cluverius v. Com., 81 Va. 787.