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TOGETHER WITH

NOTES

ON CRIMINAL PLEADING AND PRACTICE,

EMBRACING

THE ENGLISH AND AMERICAN AUTHORITIES GENERALLY.

BY

FRANCIS WHARTON,

AUTHOR OF A TREATISE ON AMERICAN CRIMINAL LAW.

PHILADELPHIA:

JAMES KAY, JUN. & BROTHER, 183½ MARKET STREET,

LAW BOOKSELLERS AND PUBLISHERS.

1849.

PREFACE.

On submitting to the profession, in 1846, a Treatise on American Criminal Law, my first design was to have annexed to it a Collection of Precedents of Indictments and Pleas, suited to the use of practitioners throughout the Union. The great number of forms, however, which the varying systems of the federal and state courts made necessary, and the large amount of notes called for both by the newness of the material and by the increasing intricacy of criminal pleading, led to a variation from my original plan. The forms which are now presented, may be considered under three classes: first, those which have been directly sustained by the courts; second, those which have been prepared by eminent pleaders, but which have not been judicially tested; and third, those which have been drawn from the English books. Those composing the *first* class, wherever the pleading in the particular case is not set out in the report, have been made up by recourse to the records of the court in which the trial took place. In preparing the *second*, I have to acknowledge my indebtedness to the printed volume of Mr. Daniel Davis, for many years Solicitor-General of Massachusetts, and to a manuscript collection, begun in 1778 by Mr. Bradford, Attorney-General successively of Pennsylvania and of the United States, and continued by Mr. J. D. Sergeant, Mr. Jared Ingersoll, Mr. Charles Lee, Mr. Rawle, Mr. A. J. Dallas and Mr. Rush, who were either his cotemporaries or his immediate successors in the state or federal prosecutions. In selecting the forms which fall under the *third* head, I have relied chiefly on the treatises of Mr. Starkie, Mr. Archbold and Mr. Dickinson, introducing in addition a series of indictments, which have been sustained by the English courts since the date of those publications.

In the first book is given a general form of indictment with caption, commencement and conclusion, adapted to the federal courts and to those of the several states; and to each averment in the text is attached a note incorporating the doctrine bearing upon

it. The indictments relating to each individual offence are in like manner preceded by a general preliminary form, to which are appended notes divided on the same principle of analysis. On such a plan, the duty of the Editor is first to separate the authorities, English and American, into compartments corresponding in subject matter with the several averments in the indictment, and then to connect with each of them, in the order in which they stand, its own particular portion of commentary. It is plain, that the value of a work thus prepared must depend upon the fidelity with which both in text and note the settled law is observed; and I have thought it judicious, therefore, when referring to the English learning, to depend chiefly on the expression given to it by the recognized English commentators. On this principle, I have placed great reliance on the very elaborate and lucid notes by Mr. Serjeant Talfourd to Dickinson's Quarter Sessions, many of which I have incorporated at large, and which may be safely referred to, as containing not only the most modern but the most succinct exposition of English crown law. I should be doing great injustice, also, not only to myself, but to others to whose prompt and intelligent kindness I am under the strongest obligations, did I withhold, at the close of this undertaking, my thanks to the many professional brethren, both here and throughout the Union, from whom I have received aid during its progress.

Philadelphia, November, 1848.

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ERRATA.

For "first apprehended," on p. 18, 8th line from top, *read* "first brought."
" "Harrison," on p. 23, note, *read* "Harrington."
" "7 Peters 38," on p. 32, 3d line from foot, *read* "7 Peters 138."
" "post. p. 85, n. g.," on p. 33, 29th line from top, *read* "post p. 83, n. f."
" "Com. v. Bowen, 15 Mass.," on p. 38, 1st line of note, *read* "Com. v. Bowen, 13 Mass."
" "People v. Kingsley, 6 Cow.," on p. 13, 22d line from top, *read* "People v. Kingsley, 2 Cow."
" "People v. Stearns, 21 Wend.," on p. 136, 8th line from foot, *read* "People v. Stearns, 2 Wend."
" "People v. Stearns, 21 Wend.," on p. 154, 11th line from foot, *read* "People v. Stearns, 2 Wend."
" "People v. Davis, 21 Wend.," on p. 168, 5th line from foot, *read* "People v. Davis, 2 Wend."
After "falsely," on p. 239, 7th line from top, *insert* "and designedly."
" "falsely," on p. 245, 4th line from foot, *insert* "and designedly."
" "falsely," on p. 254, 19th line from foot, *insert* "and designedly."
For "her," on p. 254, 15th line from top, *read* "prosecutor."
" "ante," on p. 320, 12th line from foot, *read* "8 C. & P."
" "Com. v. Kingsbury, Mass. 106," on p. 333, 23d line from top, *read* "Com. v. Kingsbury, 5 Mass. 106.
" "R. v. Cross, 2 Campb. 224," on p. 403, 10th line from top, *read* "R. v. Cross, 3 Campb. 227."
" "Stat. 1825, c. 1841," on p. 484, 20th line from top, *read* "Stat. 1825, c. 184."

BOOK THE FIRST.

GENERAL FORM OF INDICTMENT.

CHAPTER I.

CAPTION.

General Form.

WASHINGTON. (*Stating the name of county*). At(*a*) the general quarter sessions of the peace (*stating style of court*),(*b*) holden at Washington (*stating county town, or wherever the court is holden*) in and for the county aforesaid,(*c*) the day of in the year of our Lord one thousand eight hundred and forty,(*d*) before A. B. and C. D., esquires, and others their associates, justices of the said state, assigned to keep the peace of the said state, and also to hear and determine divers felonies, trespasses and other misdemeanors, in the said county committed, by the oath of (*naming the grand jurors*),(*e*) good and lawful men(*f*) of the county aforesaid,(*g*) then and there sworn and charged(*h*) to inquire for the said state, and for the body of the county aforesaid, it is presented that, &c.(*i*)

(*a*) This is equivalent to saying that the jury were sworn in open court; Weinzorpflin v. State, 7 Blackford 186.

(*b*) The style should properly represent the court, so as to show it to have jurisdiction, this being the chief object of the caption; Dean v. State, Mart. & Yerg. 127; State v. Lisle, 5 Halst. 348; 2 Hale 165; 2 Hawk. c. 25, s. 116, 117, 118, 119, 120; Burns' Just. 29th ed., Indict. ix.

(*c*) "County aforesaid" is not enough, unless there be express reference to the county in the margin; 2 Hale 180; 3 P. Wms. 439; U. S. v. Wood, 2 Wheel. C. C. 336.

(*d*) Neither the term nor, it seems, the date need be set out; State v. Haddock, 2 Hawks 462.

(*e*) It is no ground for arresting judgment after conviction on an indictment, that it appears from the record that the grand jury, who found the bill, consisted only of fifteen persons; State v. Davis, 2 Iredell 153. By the common law, a grand jury may consist of any number between twelve and twenty-three. The North Carolina statute upon the subject of a grand jury, is only directory to the court, and does not dèclare void a bill or pre-

sentment found by a grand jury consisting of the common law number; State *v.* Davis, 2 Iredell 153.

(*f*) The adequacy of this averment, together with those that follow, was discussed by the Supreme Court of Indiana, in a late learned opinion; Beauchamp *v.* State, 6 Blackford 304. "This general representation of the qualifications of grand jurors," it was said, "has always been held to be sufficient, even when the record comes from a court of special and limited jurisdiction; if it comes from a superior court, even the omission of these words is not fatal, because all men shall be presumed to be 'good and lawful' until the contrary appears; 1 Chit. C. L. 333; Bac. Abr. Indictment i.; 2 Hawk. c. 25, s. 17, 3. It is alleged there is uncertainty in the time and place of swearing and charging the grand jury. The caption shows that at the *May* term, 1841, of the *Vigo* Circuit Court, and on the third day of that month, the jurors (naming them) appeared in court, and being duly sworn and charged, &c. The defect complained of is the omission of the words 'then and there' before 'sworn and charged.'

"The case of The People *v.* Guernsey, 3 Johns. Cases 265, is relied on to support this objection. It appears to us that it has a contrary bearing. The omission of the words 'then and there,' in reference to the swearing and charging the grand jury, was, indeed, held to be a fatal defect in the caption of the indictment. But the decision turned on the fact, that the record was certified from a court of inferior jurisdiction, and it admitted that the law is otherwise when the indictment is from a superior court. Our circuit courts are vested with public and and very ample jurisdiction, and are not in contemplation of law inferior courts. That writs of error lie to them from the Supreme Court, does not give them that character. Writs of error run to the *English* Common Pleas from the King's Bench, and to both from the Exchequer Chamber; but these tribunals have always been ranked among the superior courts, the highest indeed in the kingdom. The principal object of the caption is to show the jurisdiction of the court in which the indictment was found. More certainty therefore is requisite, when it is brought from a court of special jurisdiction, than when it comes from a superior court. In the latter case the omission of the words 'then and there,' in respect to the swearing and charging the grand jury, is not fatal; and it may be well doubted whether it is in any case; 1 Chit. C. L. 334; 2 Hawk. c. 25, s. 126; Bac. Abr. Indictment i.; Arch. C. P. 24."

As to the strictness requisite in drawing the caption, great variety of sentiment exists. In North Carolina, the courts have gone so far as to pronounce no necessity to exist for a caption at all, except where the court acts under a special commission; State *v.* Brickell, 1 Hawks 354; State *v.* Haddock, 2 Hawks 462; see 1 Saunders 250, d. n. i. Where it is wholly omitted in the court below, it may be supplied on error by the minute of the clerk on the bill at the time of presentment, and the general record of the term; State *v.* Gilbert, 13 Verm. 647; State *v.* Murphy, 9 Port. 486; State *v.* Smith, 2 Harringt. 532; Kirkpatrick *v.* State, 6 Miss. 471; State *v.* Thompson, Wright's R. 617; State *v.* Rose, 1 Alabama 29. In fact in most of the states it is now rarely tacked on, except in error. In Pennsylvania, Pa. *v.* Bell, Add. 156; in South Carolina, State *v.* Williams, 2 M'Cord 301; Vandyke *v.* Dail, 1 Bail. 65; in Indiana, Moody *v.* State, 7 Blackford 424; and in New Jersey, State *v.* Jones, 4 Halst. 457, it seems it can be amended when in the court below, by reference to the records of the term, or when in error, by proper evidence of the facts.

FORMS OF CAPTIONS.

Circuit Court of the United States of America, for the Southern District of New York in the Second Circuit.

Form of Captions.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the City of New York, within and for the circuit and district aforesaid, on the of in the year of our Lord one thousand eight hundred and

(Also) at a Special Term, &c.

At an additional sessions of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held at the City of New York, within and for the circuit and district aforesaid, on the of in the year of our Lord one thousand eight hundred and

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York in the Second Circuit, begun and held at the City of New York, within and for the circuit and district aforesaid, on the day of in the year of our Lord one thousand eight hundred and and continued by adjournment (or adjournments) to the day of in the year last aforesaid.

District Court of the United States of America for the Southern District of New York.

Form of Captions.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held at the City of New York, within and for the district aforesaid, on the first Tuesday of in the year of our Lord one thousand eight hundred and

At a Special Term, &c.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held at the City of New York, within and for the district aforesaid, on the first Tuesday of in the year of our Lord one thousand eight hundred and and continued by adjournment (or adjournments) to the day of in the year last aforesaid.

State of New Jersey, Sussex County, ss.

Be it remembered, That at a Court of Oyer and Terminer and General Gaol Delivery, holden at Newton, in and for said County of Sussex, on the fourth Tuesday in May, in the year of our Lord one thousand eight hundred and twenty-seven, before the Honourable Gabriel H. Ford Esq., one of the justices of the Supreme Court of Judicature of the State of New Jersey, and John Gustin, Joseph Y. Miller, Walter L. Shee, Aaron Hazen, and others, their fellows, judges of the Inferior Court of Common Pleas in and for the said county, according to the form of the statute in such case made and provided, by the oaths of Elijah Emitt, Absalom Dunning, John Layton, Nathaniel Vanauken, Isaac Bedell, Philip Smith, Philip Wyker, Thomas A. Dildine, Thomas B. Egbert, Joseph Greer, William D. Johnson, Abraham Dunning, Andrew Wilson, David Cumpton, Lewis Shuman, Nicholas J. Cox, John Lennington, Zenas Hurd, and by the solemn affirmation of William Green, who alleges himself to be conscientiously scrupulous of taking an oath, good and lawful men of the said county, sworn, affirmed and charged to inquire for the state, in and for the said body of the said County of Sussex, it is presented in manner and form following, that is to say: Sussex County, ss. The jurors of the state of New Jersey, for the body of the county of Sussex, upon their oaths and affirmation, William Green, one of the said jurors, being the only person who affirmed, on the said jury, alleging himself to be conscientiously scrupulous of taking an oath, present that Zachariah Price, late of the township of Vernon, in the County of Sussex aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and twenty-seven, with force and arms, &c., at the township aforesaid, in the county aforesaid, and within the jurisdiction of this court, one barn of the property of one Nicholas Ryerson, not parcel of the dwelling house of the said Nicholas Ryerson there situate, wilfully and maliciously did burn and caused to be burned, to the great damage of the said Nicholas Ryerson, to the evil example of all others in the like case offending, contrary to the form of the statute in such case made and provided, against the peace of this state, the government and dignity of the same. And afterwards, that is to say, at the same Court of Oyer and Terminer and General Gaol Delivery, holden at Newton aforesaid, in the county aforesaid, on Monday the twenty-eighth day of May, in the year last aforesaid, before the said Honourable Gabriel H. Ford Esq., justice of the Supreme Court of Judicature, and John Gustin, Joseph Y. Miller, Walter L. Shee, Aaron Hazen, and others their fellows, judges of the Inferior Court of Common Pleas in and for the said county, cometh the said Zachariah Price, in his proper person according to the condition of the recognizance by himself, and his pledges in that behalf heretofore made and now here, touching the premises in the said indictment above specified and charged upon him, being asked in what manner he will acquit himself thereof, he says he is not guilty thereof, and of this he puts himself upon the county; and the said Alpheus Gustin Esq., who prosecutes for the state in this behalf, does likewise the same; wherefore let a jury thereupon come, to wit, on Monday the twenty-eighth day of May, in the year of our Lord eighteen hundred and twenty-seven, and as yet of the said term of May, before the said the Honourable Gabriel H. Ford Esq., one of the justices of the Supreme Court of Judicature, and John Gustin, Joseph Y. Miller, Walter L. Shee and Aaron Hazen Esqrs., and others their fellows, judges of the Inferior Court of Common Pleas in and for the said county, of good and lawful men of the County of Sussex aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Zachariah Price, to recognize upon their oaths, whether the said Zachariah Price be guilty of the misdemeanor in the indictment aforesaid above specified, or not guilty, because as well the said Alpheus Gustin Esq., who prosecutes for the state in this behalf, as the said Zachariah Price, have put themselves upon the said jury, and the jurors of the said jury, by Benjamin Hamilton Esq., high sheriff of the said

County of Sussex, for this purpose empanneled and returned, agreeably to the statute in such case made and provided, to wit, John Cummins, Matthew Ayres, Lewis Havens, Sylvenus Adams, William Milcham, Jacob Miller, Nicholas Ackerson, Gabriel Post, Lewis Peters, Joseph Predmon, Lewis Dennis and Samuel H. Hibler, who being elected, tried and sworn and affirmed, the said Lewis Dennis, one of the said jurors, being the only person who was affirmed on the said jury, alleging himself to be conscientiously scrupulous of taking an oath to speak the truth of and concerning the premises, upon their oaths and affirmation, say that the said Zachariah Price is guilty of the misdemeanor aforesaid on him above charged in the form aforesaid, and as by the indictment aforesaid is above supposed against him; and upon this it is forthwith demanded of the said Zachariah Price if he hath or knoweth of any thing to say wherefore the said justice and judges, and their fellows as aforesaid here, ought not upon the premises and verdict aforesaid, to proceed to judgment against him, who nothing further saith, unless as he before had said; whereupon all and singular the premises being seen, and by the said justice and judges, and their fellows as aforesiad, here fully understood, it is considered by the court here that the said Zachariah Price be confined and imprisoned at hard labour in the state's prison for the term of ten years.

The caption to the panel of the grand jury was as follows:

List of the names of persons summoned to attend at the Court of Oyer and Terminer and General Gaol Delivery, to be holden at Newton, in and for the County of Sussex in the State of New Jersey, in the term of May, in the year of our Lord one thousand eight hundred and twenty-seven, pursuant to the statute in such case made and provided, by me, viz. A. B., C. D., &c., naming the jurors.

Subscribed. B. H., *Sheriff*.—(State *v.* Price, 6 Halst. 204, 205, 206).

City and County of New York, ss.

Be it remembered, That at a Court of General Sessions of the Peace, holden at the Halls of Justice of the City of New York, in and for the City and County of New York, on the first Monday of in the year of our Lord one thousand eight hundred and forty- before Esquire of the said City of New York, and two of the aldermen of the said city, judges of the said court, assigned to keep the peace of the said City and County of New York, and to inquire, by the oaths of good and lawful men of the said county, of all crimes and misdemeanors committed or triable in the said county, and to hear, determine, and punish according to law, all crimes and misdemeanors in the said City and County, done and committed, not punishable with death.

By the oath of foreman, (here setting forth grand jurors).

It was presented as follows, that is to say, City and County of New York, ss: The jurors of the people of the State of New York, in and for the body of the City and County of New York, upon their oath present that, &c.

State of Vermont, Windsor County, ss.

Be it remembered, That at the county court begun and holden at Woodstock, within and for the County of Windsor, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and forty-five: The grand jurors within and for the body of the County of Windsor aforesaid, now here in court duly empanneled and sworn, upon their oath present that, &c. (See State *v.* Nixon, 18 Verm. 70; State *v.* Munger, 15 Verm. 290).

(g) The jury must appear to be of the "county aforesaid;" Tipton *v.* State, Peck's R. 8; Cornell *v.* State, Mart. & Yerg. 147; Wh. C. L. 631; though the allegation, "empanneled and sworn in and for the county of Wilkinson and state of Mississippi," may supply its place; Woodsides *v.* State, 2 How. Miss. R. 655.

In New Jersey, where the caption states the finding to be on the oath *and affirmations* of the grand jury, it must appear that the affirming jurors were persons entitled by law to take affirmations instead of oaths; State *v.* Harris, 2 Halst. 457; see note *postea*, p. 22. This particularity does not seem elsewhere to have been held necessary; see Archbold's C. P. 5th Am. ed. 34.

(h) The omission of the allegation "then and there sworn and charged," in New York, has been held fatal; People *v.* Guernsey, 3 Johns. 265; though in Mississippi, "then and there" are not considered indispensable; Woodsides *v.* State, 2 How. Miss. R. 655; and they do not appear in the precedent given by Mr. Archbold; Archbold's C. P. 5th Am. ed. 34. As appears in note *f*, p. 2, the omission in Indiana is considered no error.

(i) See as to this form generally, Archbold's C. P. 5th Am. ed. 33; 2 Hale 166; R. *v.* Fearnly, 1 Leach 425; Wh. C. L. 63.

CHAPTER II.

GENERAL FRAME OF INDICTMENT AT COMMON LAW.

The jurors for, &c.,(*a*) inquiring for, &c.,(*b*) upon their oath(*c*) do present that A. B.(*d*) late of the said county, yeoman,(*e*) on the(*f*) with force and arms,(*g*) at aforesaid, in the county aforesaid,(*h*) and within the jurisdiction of the said court, in and upon, &c., one E. F., &c.,(*i*) with intent, &c.,(*j*) against the form of the statute (*or statutes*) in such case made and provided, and against the peace and dignity (*of the sovereign authority*).(*k*)

2d count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. B. aforesaid, to wit, on the day and year aforesaid, at in the county and within the jurisdiction aforesaid, did, &c.(*l*)

(*Conclude as in first count*).

(*a*) The jurors "of" instead of "for," is not bad on arrest of judgment; R. *v.* Turner, 2 M. & Rob. 214, Parke J.; see 1 Chit. C. L. 327.

(*b*) At Common Law the jurors must appear to be of the county; Whitehead *v.* R., 14 Law J. (M. C.) 165; see *postea*, p. 14, *et seq.*, for the forms and authorities in the several states.

(*c*) Where the jurors entertain conscientious objections to taking an oath, the proper course is to insert "oaths and affirmations;" Dickinson's Q. S. 200; Key's case, 9 C. & P. 78; and this is always the case in Pennsylvania, though in the remaining states, the practice has been relaxed, and the phrase "oath" seems adopted as a settled form.

(*d*) In this note will be considered first, in what way the defendant's name is to be set out; and secondly, in what cases several defendants may be joined.

1st. *In what way the defendant's name is to be set out.*

The christian and surname of the defendant, if known, should be stated with correctness; except in an indictment against the inhabitants of a county or parish, who may be so described without naming any of them; Hawk. b. 2, c. 25, s. 68; Archbold's C. P. 25. Wh. C. L. 65. In Pennsylvania, under an act directing the "president, managers and company" of a certain road to remove a particular gate, it was held that an indictment of those officer or officers individually for a violation of the act, was bad; though the court declined saying whether they would have sustained an indictment charging the defendants as a corporation; Com. *v.* Demuth, 12 S. & R. 389. But the weight of authority elsewhere is that the members of a corporation when indicted for a corporation offence, must be charged individually; State *v.* Great Works, 20 Maine 41; Com. *v.* Swift-Run Gap, 2 Va. Cases 362. But if the name of a prisoner is unknown, and he refuses to disclose it, an indictment may be sustained against him as "a person whose name is to the jurors unknown, but who is personally brought before the said jurors by , the keeper of the prison of ; R. *v.* , R. & R. 489. A man cannot be indicted with an *alias dictus* of the christian name, as "*John*, otherwise *Robert*," though to an alias of the surname there is no objection; 1 Ld. Raym. 560; surnames being originally acquired by assumption. See cases collected, 5 M. & W. 447; see also per Lord Stowell, Wakefield *v.* Wakefield, 1 Hagg. Cons. R. 400; Barlow *v.* Bateman, 3 P. Wms. 64. An indictment was quashed *before* plea, because an addition was placed, not after the first name, but after the *alias dictus*; R. *v.* Semple, 1 Leach 420; but this defect is cured by plea, R. *v.* Hannam, *ib.* n.; see Cro. Jac. 482, 610. The cases tend to show that if a defendant has more than one christian name given him in baptizm, as John Thomas, they are considered in law as forming one christian name, and must be set out correctly in their order; Com. *v.* Perkins, 1 Pick. 388; Jones *v.* Macquillon, 5 T. R. 195; 3 East 111; Willes 554; Evans *v.* King, Pouget *v.* Tomkins, 1 Phill. R. 499: Stanhope *v.* Baldwin. 1 Addams' R.

93; see 1 M. & Gr. 783, n., though in New York it is declared that a middle name is surplusage, and its omission to be disregarded; Roosevelt *v.* Gardiner, 2 Cow. 463. The proper name of a bastard is that he has gained by reputation, and not his mother's name, unless so gained; R. *v.* Clark, R. & R. 358.

2d. (*In what cases several defendants may be joined*). Where the felony is such as several may join in, *e. g.* house-breaking, larceny, &c., and it is believed that several have joined in committing it, in several degrees, *e. g.* as principal in the first or second degree, or as accessaries before or after the fact, they may all be indicted jointly; 2 Hale 173; Kane *v.* People, 9 Wend. 203; Com. *v.* Elwell, 2 Met. 190; Com. *v.* Gillespie, 7 S. & R. 469; Reg. *v.* Putham, 9 C. & P. 280; and the like in misdemeanors, where all are principals, *e. g.* extortion, battery, &c.; a keeping a gaming house, &c., 2 Burr. 984; adultery, Com. *v.* Elwell, 2 Met. 190; and the same rule bears though the several parties may have acted separately, if the grievance, *e. g.* the nuisance, is the result of all their acts jointly, they may be joined in an indictment stating the acts to have been several; R. *v.* Stafford and others, 1 B. & Ad. 874. This in England is said by Mr. Serjeant Talfourd to be the more usual and convenient course; though a distinct indictment might, in point of law, be maintained against each, as all offences are, in their nature, several; Reg. *v.* Atkinson *et al.*, Ld. Raym. 1248; Salk. 32; Com. *v.* Harley, 7 Met. 462. A joint indictment, however, prepared on this basis, is in its nature several also; for the issues upon it are joined distinctly between the prosecution and each defendant; the defendants may plead in different ways, and although they plead similar pleas, may, in case of felony, procure several trials by severing in their challenges. So also some may be convicted and others acquitted, except where the offence is one which cannot be committed by less than two, as conspiracy; or less than three, as riot; when if the jury acquit all the parties charged on the record but one, in the first case, or two in the second, all must be acquitted, unless it is laid and found that the offence was committed with others to the jurors unknown. Thus, several may be joined in an indictment for publishing a libel, where all joined in the publication; R. *v.* Benfield and Saunders, 2 Burr. R. 980; and for obtaining money under false pretences, when all were present aiding and assisting in the common object of fraud; Reg. *v.* Young *et al.*, 1 Leach 505; Com. *v.* Call, 21 Pick. 515; Com. *v.* Harley, 7 Met. 462. Three were *jointly* charged with procuring certain other persons to utter a forged will. The only evidence for the crown was of *separate acts*, done at separate times and places by each of the persons charged as accessaries; at the end of that evidence, one pleaded. For the rest it was said, that only *one* could on the evidence be convicted. It was held, however, that the rest might be convicted; Reg. *v.* Barker and others, C. & K. 442.

But where the offence of each is entirely distinct in its nature, or arises out of some personal duty or omission, each ought to be separately indicted, or, at all events, severally charged. Thus, indictments against two or more jointly for perjury, as common scolds, or for exercising a trade without serving an apprenticeship, are bad; for the act complained of are essentially and necessarily several; R. *v.* Phillips and others, 2 Strange 921; Reg. *v.* Hodson, 6 Mod. 210. And though several defendants may be included in one indictment for several distinct misdemeanors of the same kind, as for severally keeping disorderly houses; 2 Hale 174, cited R. *v.* Kingston and others, 8 East R. 4; it is neither discreet or proper, for the court might (at all events before plea, or as it seems, even before the jury is charged with them; Reg. *v.* Norton, 8 C & P. 196), quash such an indictment for any inconvenience shown to arise from the joinder of different counts against different offenders; *ib.*, see Lord Raym. 1248; or, if the objection is not made till after the jury has been charged, might put the prosecutor to his election; see p. 191 Dickinson's Q. S. Objection to an indictment for improper joinder of defendants in it, is too late after verdict; Reg. *v.* Hayes, 2 M. & Rob. 155.

To support conspiracy it is necessary that two or more defendants should be charged to have been engaged; R. *v.* Kinnersely, 1 Strange 193; R. *v.* Sudbury, 12 Mod. 262; 13 East 412; 1 Ld. Raym. 484; State *v.* Allison, 3 Yerg. 428; People *v.* Howell, 4 Johns. 296; Turpin *v.* State, 6 Blackf. 72; though it is sufficient to aver the offence to have been committed by one defendant particularly named, together with others to the inquest unknown; and the same law applies to riot, with the exception that in the latter offence three or more defendants must be joined; see Wharton's C. L. 110, 491, 527.

If two or more be jointly charged with having committed a single offence, they cannot be separately convicted of separate parts of it. But both may be convicted, or one only, and the other acquitted of the whole charge; see R. *v.* Hempstead, R. & R. 344; also R. *v.* Batterworth, and R. *v.* Messingham, 1 Mood. C. C. 257. In R. *v.* Harris, Balls & Moses, 7 C. & P. 416, three were jointly indicted at the central criminal court for feloniously using plates containing impressions of forged notes. It was held that a singly using the plates by each of the three while alone, would not suffice for a conviction; but the jury must select some one particular time after all three had become connected, *viz.* a time

when they were all *present together* at one act, or assisting in such one act, as by two using and one watching at the door to prevent disturbance, and the like.

(*e*) (*Proper addition of the accused party*). The statute 1 Hen. V. c. 5, enacts, that in all indictments on which process of outlawry lies, additions shall be made to the *defendants*' names, of their estate or degree, or mystery, and of the towns or hamlets, or places, and the counties of the which they were or are conversant. This statute has been either recognized as in force in those states where the question has been brought up independent of local legislation, or has been substantially re-enacted; Wharton's C. L. 68; State *v.* Hughes, 2 Har. & M'H. 479; Com. *v.* Sims, 2 Va. Cases 374; Com. *v.* Lewis, 1 Met. 151; State *v.* Bishop, 15 Maine 122.

In England, if an accused have several titles, he must be described by the most honourable; and if he have none by birth, office, creation, or reputation, and is described by any such, or if a *gentlewoman* be named merely *spinster*, or a *yeoman* is named *gentleman*, the indictment will be defective; 2 Inst. 699. But a trader may be sued either by his degree or rank in society, independent of his trade, or by the name of his vocation; Erskine *v.* Murray, 2 Ld. Raym. 1542. A mis-description, however, calculated to throw contempt on the defendant, is bad, and on this ground an indictment was held vicious in abatement, which described the defendant as a lottery vender, when he was in fact a lottery broker; State *v.* Bishop, 15 Maine 122.

By stat. 8 Hen. VI. c. 10, s. 1, 2, the indictment ought to contain the addition of the *place and county* where the party indicted is "conversant and dwelling." The county in the margin refers to the place where the offence was committed, and not to the habitation of the party. Accordingly an outlawry for perjury was reversed on error, for the party was indicted by the name "N. L., late of the *parish* of A.," without showing in what county A. is, though "Middlesex" was in the margin; Leech's case, Cro. Jac. 167.

Neither yeoman or labourer are good additions for that of a woman; and widow, singlewoman, wife of A. B. and spinster, are good additions of the estate and degree of a woman; but burgess, and citizen, and servant, are all of them too general, and therefore not good additions of the estate or degree either of a man or woman; Hawk. b. 2, c. 23, s. 111; 2 Inst. 668; 1 Bla. C. 405; Ld. Raym. 1179; 6 M. & S. 38; R. *v.* Checketts, 6 M. & S. 38. As to yeomen, see 1 Bla. C. 406; 2 Inst. 595, 668. Indictment for assault, addition was stated as gentleman. Plea that he was an esquire and no gentleman, overruled. Per Fortescue J., "this is in addition only, not in the name, and they are the same, and every esquire is a gentleman, and gentlemen are called esquires;" Reg. *v.* Chapman, cited by Fortescue J., in Williams *v.* Francis, Fort. R. 354. Wife was amended to widow, in a case where the prisoner, charged with murdering her husband, was described as H., the wife of J. O., late of, &c., labourer; Reg. *v.* Orchard, 8 C. & P. 565, Lord Abinger; see Reg v. T. and M. Woodward, 8 C. & P. 561. Prisoners jointly indicted for stealing clothes, M. W. being described in indictment as "Margaret Woodward, *singlewoman*," and she pleaded to that indictment. The only evidence was that the prisoners addressed each other as husband and wife, and passed and appeared as such, and were spoken of as such by witnesses for crown. Patteson J.: This is evidence on which the jury must say whether they are satisfied that the prisoners are in fact husband and wife, even though the woman has pleaded to indictment charging her as "singlewoman." She ought to have been described as wife, *not* as singlewoman. The woman was acquitted: the man convicted. There are few cases in the American books where the niceties of the English law of additions have been recognized. A want of an addition *in toto* is ground for a motion to quash; but I apprehend that the additions "yeoman," "spinster," "gentleman," "labourer," may be relied upon universally in their proper places as sufficient. In Virginia, it is true, in an old case, the difference between "labourer" and "yeoman" was held material; Com. *v.* Sims, 2 Va. Cases 374; but the present tendency is to regard the existence of any additions, however general, as enough. Perhaps "yeoman" is the most general and unexceptionable. Where a slave is charged with an offence, the proper addition seems to be, "that a negro slave, the property of B." &c.; State *v.* Cherry, 3 Murph. 7.

(*Several defendants with same additions*). If several defendants have the same addition, it is safest to repeat the addition after each name, applying it particularly to every one of them; and where a father has the same name and the same addition with a defendant, being his son, an indictment is defective unless it add the addition of *the younger* to the other additions; but where the father is a defendant without his son, it is clear that there is no need of the addition of *the elder*. Where L. W. Sr. and L. W. Jr. lived in the same town, on an indictment against L. W. evidence is not admissible of acts done by L. W. Jr., as it is to be presumed that the indictment means L. W. Sr.; State *v.* Vittum, 9 N. Hamp. 519; Jackson, *ex dem*; Pell *v.* Provost, 2 Caines 165; but see Com. *v.* Perkins, 1 Pick. 388; State *v.* Grant, 22 Maine 171; Coit *v.* Starkweather, 8 Conn. 280; see *postea*, p. 11.

In Indiana it seems no addition is necessary; thus in State *v.* M'Dowell, 6 Blackf. 49,

Dewey J. said: "The objection urged against the indictment is, that the defendant is not described by the addition of his degree, or mystery, and place of residence. By the common law no *addition* was required in indictments against persons under the degree of a knight; 1 Chit. C. L. 204. The statute of additions, 1 Hen. V. c. 5, enacts that defendants shall be described by adding to their names their estate, degree, or mystery, and place of residence, in all cases in which "the *exigent* shall be awarded." It has been held, in the construction of this statute, that in prosecutions which cannot be attended by the process of outlawry, the indictment need not give the *addition* of the defendant; 1 Chit. C. L. 206; Bacon Abr. Indictment ii.; *ib.* Misnomer 2; Rex *v.* Brough, 1 Wils. 244; Cro. Eliz. 148. The *exigent*, being a step in the proceedings of outlawry, is unknown to our law. It is therefore evident that the statute of additions, from its own terms, is not applicable to prosecutions in this state; and it is equally clear, that the common law does not require the defendant to be described by his addition.

(*Mystery at time of finding*). The additions of estate, degree, and mystery of the defendant, are not sufficient unless they be the same which he had at the time of the finding of the indictment; and in this respect such additions differ from that of place, which is sufficiently shown by naming the defendant *late* of such a place; and such additions must be expressed in such manner that it may plainly appear to refer to the party; and therefore it is not well expressed by the addition of his mystery, naming him son of A. of B., butcher, because butcher refers to it rather than to the son; 2 Inst. 670; 2 Hale 177.

(*Place of residence of defendant*). With respect to residence, it is a good addition of this kind to name the party *late* of a township named; see Dickinson's Q. S. p. 203; R. *v.* Yandell, 4 T. R. 521; in which respect this addition differs from that of the *estate*, *degree*, or *mystery;* and it is said that if the defendant be named commorant in A. late of B. it is sufficient; Cortizos *v.* Munoz, Stra. 924. As will be seen in the forms hereafter given, the residence in most of the states is held to be satisfied by the allegation "late of the county aforesaid," or "late of county;" see also Wh. C. L. 70. In England greater exactness is required; and where in an indictment for an assault, defendant was described as late of A. in the county of B., without stating that A. was a parish, it was holden bad; although the offence was laid to have been committed at the *parish aforesaid;* for some certain venue must appear on the face of the record, and here the offence is laid *at the parish aforesaid*, and no parish is mentioned; R. *v.* Mathews, 2 Leach 664; 5 T. R. 162. In the city of New York the practice is to charge "late of ward in the city of New York."

With respect to addition of *place*, the best and most convenient course is to state that in which the prisoner committed the offence; for he is considered as conversant of that place, and by this means the confusion of stating two places in the indictment is void; Hawk. b. 2, c. 27, s. 125, 126.

(*How error in name or addition operates*). The only mode by which at any time advantage can be taken by a prisoner of any error in his name or addition, is by plea in abatement; State *v.* Lorey, 2 Brevard 395; Lynes *v.* State, 5 Port 236; State *v.* Hughes, 2 Har. & M'H. 479; see State *v.* Newman, 2 Car. Law Rep. 74; Com. *v.* Dedham, 16 Mass. 146; Turns *v.* Com., 6 Met. 225; Com. *v.* Sayers, 8 Leigh 722; R. *v.* Granger, 3 Burr. 1617; though where *no* addition is given, or where there is no christian name, the proper course is to move to quash. If he once pleads the general issue *not guilty*, he cannot afterwards take advantage of any such error, for he is precluded and estopped by his plea; and he is not obliged to take advantage of an error in these respects by pleading in abatement, in order to make his acquittal a valid bar to any subsequent prosecution for the same offence; for if he be afterwards indicted for the same offence by another name or addition, he may show himself to be the same person by averment and evidence, and rely with success on his previous acquittal, notwithstanding the variance; Hawk. b. 2, c. 23, s. 103, 104. A plea in abatement must be verified by affidavit exposing the defendant's real name, additions, or mystery, as the case may be; Com. *v.* Sayers, 8 Leigh 722; R. *v.* Granger, 3 Burr. 1607; Rev. Stat. Mass. c. 136, s. 31. An error as to one party of several can only be taken advantage of, in any stage, by him, and does not affect the indictment as to the others; 2 Hale 177. A plea in abatement was always of small benefit to the party accused, because he was bound to set out his true name and addition in it; and, if successful, might be indicted for the same felony; while if unsuccessful, in the English practice, sentence followed in misdemeanor; 1 Chit. C. L. 461; though here the inclination of authority, judging from the doctrines arising in demurrer, is that the judgment would be respondeat ouster; Wh. C. L. 133–4; State *v.* Wilkins, 17 Verm. 152; Ross *v.* State, 9 Miss. 696.

(*f*) Though some precise day, month, and year must be charged; State *v.* Beckwith, 1 Stew. 318; Wh. C. L. 72; R. *v.* Taylor, 3 B. & C. 502; it is not necessary to sustain the precise allegation in proof, if the time stated be previous to the finding the indictment; Starkie C. P. 58; Shelton *v.* State, 1 Stew. & Port. 208; but it is material to show that

the prosecution was commenced in due time, where it is enacted that it shall be commenced within a particular time; see Salk. 369, 378; Carth. 501; 5 Mod. 446; 1 Ld. Raym. 582; 10 Mod. 248; and where the offence is statutory, the time laid must be subsequent to the passage of the statute by which the offence was created. It is not, however, necessary to allege *time* to any charge of mere negation or omission; R. *v.* Holland, 5 T. R. 616; Starkie's C. P. 61. If the offence is laid on an uncertain or impossible day, or on a future day, or on different days, or on such a day as renders the indictment repugnant to itself, the objection is fatal in arrest of judgment even after verdict. Thus judgments were arrested when the date charged was November, 1801, and the 25th year of American Independence, the dates being inconsistent; State *v.* Hendricks, Conf. N. C. R. 369; where on a charge of compounding felony, the date of the commission of the offence was laid anterior to the date fixed for the commission of the larceny; State *v.* Dandy, 1 Brevard 395; and where the crime was alleged to have been committed on September 30, 1033; Serpentine *v.* State, 1 How. Miss. R. 260. So if the date be left blank; State *v.* Beckwith, 1 Stewart 318; State *v.* Roach, 2 Hay. 552; Tam *v.* State, 3 Miss. 43. Where, however, an indictment tried in the *first* year of George IV., stated the offence as having been committed "on the 20th July, in the *fourth year of the* reign of king George the Fourth," it was holden that the words "*fourth year of the*" might be rejected as superfluous, and the indictment sustained; R. *v.* Gill, R. & R. 431; see R. *v.* Scott, R. & R. 414; 1 Russ. C. M. 562, S. C. Thus, where it was made a statutory misdemeanor to exhibit lights to persons at sea "between September and April," an allegation that the defendant exhibited lights *on the 9th March* was held sufficient without specifically averring that he did so "*between* September and April;" 6 Geo. IV. c. 164, s. 52; R. *v.* Brown, M. & M. 163; per Littledale and Gaselee, Js.; see note to Harding *v.* Stokes, Tyr. & Gr. 599. It seems that where an offence is laid contrary to the form of a statute, it is not necessary to state it to have been committed "after the passing of the act," though it took place very recently before, if the time when it took place is laid and proved to be after the act passed; see judgment of Parke B., in Harding *v.* Stokes, Tyr. & Gr. 605. If, in point of fact, an offence is committed after a day fixed by a statute, as that on and after which an offence may be laid and tried as if committed in the county in which the offender is apprehended, and the statute does not vary the nature and character of the offence, the having laid the day in the indictment before the day fixed by the statute, will not vitiate; R. *v.* Treharne, 1 Mood. C. C. 298. Clerical errors, however, in setting forth the date, are liberally treated. Thus, "first March" was held sufficient for "first of March;" Simmons *v.* Com., 1 Rawle 142; and where the caption was "December Sessions, 1818," the date was held sufficiently well expressed by the averment "in the year aforesaid;" Jacob *v.* Com., 5 S. & R. 315. The setting forth the date in Arabic figures is enough; State *v.* Gilbert, 13 Verm. 647; State *v.* Smith, Peck 165; State *v.* Hodgdon, 3 Verm. 481. The word "*being*" (*existens*) will, unless necessarily connected with some other matter (*e. g.* by the word *then*), relate to the time of the indictment rather than of the offence; see 1 Chit. C. L. 2d ed. 220, and Reg. *v.* Silversides, 3 Q. B. R. 405; Wh. C. L. 75.

(*Hour of committing offence*). It is not necessary to state the hour of committing the offence, except where its indictable nature or character is made by statute to depend on the hour of its being committed. Thus, as burglary cannot be committed in twilight, it is necessary in case of that offence to allege a certain hour in the night at which it was committed, in order that the fact might appear on the face of the indictment to have been done after the twilight of the evening, and before that of the morning; R. *v.* Waddington, 2 East P. C. 513; 1 Hale 549; 2 Hawk. c. 25, s. 76, 77; State *v.* G. S., 1 Tyler 295; Thompson *v.* Com., 4 Leigh 652; State *v.* Mather, Chip. 32. It is not enough to lay this offence as having been committed between the hour of twelve at night and nine the next morning; State *v.* Mather, Chip. 32.

(*g*) (*Vi et armis*). Whatever may once have been thought of the magic of these words, it is now settled that they are wholly unessential. The statute 37 Hen. VIII. c. 8, clearly dispenses with them, even if before that they possessed any signification or importance; and the current of authority, even in those states where that statute is not in force, is to reject them altogether; 2 Hawk. c. 25, s. 90; 3 P. Wms. 497; Wh. C. L. 102; State *v.* Kean, 10 N. Hamp. 347; State *v.* Munger, 15 Verm. 290; 2 Tyler 266; Tipton *v.* State, 2 Yerg. 542; Territory *v.* M'Farlane, 1 Mart. 224; State *v.* Thomson, 2 Rice's Dig. 386. In Com. *v.* Martin, reported 2 Barr 244, the exception taken to the indictment, which was for assault and battery, was the want of those words, and though it does not distinctly appear so on the face of the report, the intimation of the court is clear that they are wholly unnecessary.

(*h*) In this country the usual practice in averring place is by charging the offence to have taken place in the county where it was committed; Wh. C. L. 77; Duncan *v* Com., 4 S. & R. 448. In Massachusetts, however, it has been held, that if from the terms of

the location of a town or district by the act of incorporation, the court cannot conclude that the whole town, district, or unincorporated place lies in the same county, both town and county must be averred; Com. *v.* Springfield, 7 Mass. 9; and in the same case it was declared, that the proper course in that state in all capital cases, is to lay both county and town. In the city of New York the practice is to name the *ward*, in the city of New Orleans the parish.

(*Repeating time and place to every material fact*). When time and place have been once named with precision, the words "*then and there*," referring to the last antecedent, will afterwards sufficiently express both; Wh. C. L. 74; Stout *v.* Com., 11 S. & R. 177. Where the circumstances stated in indictments for misdemeanors are merely continuous, as in assaults with aggravation, one mention of time and place as applicable to *all* circumstances, will suffice; but this is otherwise in felonies where distinct and independent circumstances are necessary to the charge; 2 Hale 178; R. *v.* Cotton, Cr. El. 738. But the mere qualification "and" without the word "then" is insufficient to extend the original allegation of time to the averment thus introduced; Wh. C. L. 74. Where the time and place are immaterial, they may be introduced by the words *to wit;* though without a *scilicet* in such case, a variance would not prejudice; and as in cases where they are of the essence of the charge, a *scilicet* will not aid a variance in proof; Busby *v.* Watson, Bla. Rep. 1050; it is rarely ever useful; Dickinson's Q. S. 6th ed. 212.

(*i*) (*The description of the party against whose person or property the offence was committed*). The indictment must be so certain as to the party against whom the offence was committed, as to enable the prisoner to know and understand who that party is, and what charge he is called on to answer; 2 Curw. Hawk. 319. And an error in setting forth the names of such party, is much more serious than in setting forth the name of the defendant himself, as the latter can only be taken advantage of by abatement, but the former is proper ground for acquittal, in case of variance in evidence, or arrest of judgment in case of variance on record; Wh. C. L. 71. The mis-spelling of a surname, when its usual pronunciation is satisfied by the manner in which it is written in the record, as "Whyneard" for "Winyard," is sufficient; R. *v.* Foster, R. & R. 412; and in one case the court went so far as to say that "Harrison" was not a fatal variance from "Harris;" State *v.* France, 1 Overton's R. 434; though in Pennsylvania, in Com. *v.* Gillespie, 7 S. & R. 469, the extreme position was taken that "Burrall" was sufficient to arrest judgment where the proof was that the name was Burril. The word, however, it must be observed, occurred in the copy of a lottery ticket, pretended to be set out in the indictment. A mere statement, it seems, of the christian name, without any surname, will not suffice; Hawk. b. 2, c. 25, s. 71. Where the name and addition of the injured party cannot be ascertained, as where a body of a murdered person is found who cannot be identified, or goods are found on a highwayman, &c., the indictment may allege the party to be "to the jurors *unknown;*" 2 Hale 181; see 2 B. & Ald. 580. To support the description of "unknown," remarks Mr. Serjeant Talfourd, it must appear that the name could not well have been supposed to have been known to the grand jury; Reg. *v.* Stroud, C. & K. 187. "Unknown" was held sufficient where there was evidence that the party injured, a bastard child who died at twelve days old unbaptized, had been called by its mother Mary Ann; R. *v.* Smith, 1 Mood. C. C. 295; S. C. 6 C. & P. 151. A bastard which had never acquired a name, is sufficiently identified by showing the name of its parent thus—"a certain illegitimate male child then lately born of the body of A. B. (the mother);" Reg. *v.* Mary and Jane Hogg, 2 M. & Rob. 380; see Reg. *v.* Hicks, 2 *ib.* 302; where an indictment for child-murder was held bad for not stating the name of the child or accounting for its omission. A bastard must not be described by his mother's name till he has acquired it by reputation; R. *v.* Clark, R. & R. 358; Wakefield *v.* Mackey, 1 Phill. R. 133, *contra.* A bastard child, six weeks old, who was baptized on a Sunday, and down to the following Tuesday had been called by its name of baptizm and mother's surname, was held by Erskine J. to be properly described by both those names in an indictment for its murder; Reg. *v.* Crans, 8 C. & P. 765; but where a bastard was baptized "Eliza," without mentioning any surname at the ceremony, and was afterwards, at three years old, suffocated by the prisoner, an indictment, styling it "Eliza *Waters*," that being the mother's surname, was held bad by all the judges, as the deceased had not acquired the name of *Waters* by reputation; R. *v.* Ellen Waters, 1 Mood. C. C. 457. (N. B. No baptizmal register or copy of it was produced at either trial. *Semb.:* "Eliza" would have sufficed; see Reg. *v.* Stroud, C. & K. 187, and cases collected; Williams *v.* Bryant, 5 M. & W. 447). In the previous case of R. *v.* Frances Clark, R. & R. 358, an indictment stated the murder of "*George Lakeman Clark*, a base-born infant male child, aged three weeks," by the prisoner, its mother. The child had been christened *George Lakeman*, being the name of its reputed father, and was called so, and not by any other name known to the witnesses. Its mother called it so. There was no evidence that it had been called by or obtained its mother's name of *Clark*. The court held him improperly laid *Clark*, and as nothing but

the name identified him in it, the conviction was held bad; see also R. *v.* Sheen, 2 C. & P. 634. However, in Reg. *v.* Biss, 8 C. & P. 773, an indictment against a married woman for murder of a legitimate child, which stated "that she, in and upon a certain *infant male child of tender years*, to wit, of the age of six weeks, and not baptized, feloniously and wilfully, &c., did make an assault, &c.," was held insufficient by all the judges, as it neither stated the child's name, nor that it was "to the jurors unknown." *Semble:* it would have sufficed to state him as "a certain male child, &c., of tender age, that is to say, about the age of six weeks, and not baptized, born of the body of C. B.;" see 2 C. & P. 635, n.; see also R. *v.* Sheen, 2 C. & P. 634. Where a party is as usually known by one name as another, he may be described by either, and by the name which he has assumed, even though shown not to be his right name; R. *v.* Norton, R. & R. 509; R. *v.* Berriman, 5 C. & P. 601; Anon., 6 C. & P. 408. So where an indictment charged the name of the person slain as Marie Gardiner *alias* Maria Bull, and the proof showed her real name to be Maria Frances Bull, though she was generally known by the name in the indictment, it was held sufficient; State *v.* Gardiner, Wright's R. 392. If a false description be added to the name, as if a female feloniously married by a man whose wife is still alive, be described a "widow," when she is known to be a singlewoman, the error will be fatal, though no description of her was requisite; R. *v.* Deeley, 1 Mood. C. C. R. 303; 4 C. & P. 579 (A. D. 1831). Where the party injured has a mother or father of the same name, it is better to style the prosecutor "the younger," as it may be presumed that the parent is the party meant; for George Johnson means G. J. the elder, unless the contrary is expressed; Singleton *v.* Johnson, 9 M. & W. 67. But this was held immaterial, where it is sufficiently proved who Elizabeth Edwards, the party described assaulted, was, viz. the daughter of another Elizabeth Edwards; R. *v.* Peace, 3 B. & Ald. 519; see *ante*, p. 7. A variance in the name or identity of the party laid as injured, will entitle the prisoner to acquittal; Dickinson's Q. S. 6th ed. 213. See also generally on this head, 2 Hale's Pleas of the Crown, p. 239, ed. by Stokes and Ingersoll, n. 1, to which work the practitioner is referred as being at the same time the most satisfactory edition of Hale extant, and as containing a series of notes of singular learning and accuracy.

(*j*) (*Allegation of intent*). What the law forbids to be done, it becomes illegal to do wilfully; Fergus *v.* State, 6 Yerg. 345; Wh. C. L. 168; on which account the doing it will be the subject matter of an indictment as contempt of the statute; Crowther's case, Cro. El. 655; without the addition of any corrupt motives; per Ashurst J., R. *v.* Sainsbury, 4 T. R. 451, cited 2 A. & E. 612; for disobedience of an act of the legislature, is indictable on the principles of the common law, though a pecuniary penalty may also be provided for it; R. *v.* Jones, Strange 1146; indictment for not taking on defendant the office of overseer on a regular appointment; R. *v.* Harris, R. *v.* Crorsley, 10 A. & E. 132. But the intention of the party at the time he commits an act charged as an offence, is often as necessary to be proved as any other fact laid, though it can only be proved by overt acts, every man being supposed to intend the necessary consequence of his own acts; R. *v.* Harrington, R. & R. 207. When more than one criminal intent is averred, the averment is divisible, and only one need to be proved; *e. g.* if a person is charged with assaulting a child with intent to abuse *and* carnally know her, he may be convicted of an assault with an intent to abuse her only; R. *v.* Dawson, 2 Stark. 62; Shaw's case, 2 R. 789; Figgins *v.* Cogswell, 3 M. & S. 369. As to intent in uttering a counterfeit half-crown in charity, see Page's case (on 2 W. IV. c. 34, s. 7), 8 C. & P. 22; and Alldy's case for erasing and altering a stamped post-horse license, both before Ld. Abinger C. B., 8 C. & P. 136.

In R. *v.* Hunt and another, 2 Camp. 583, an information charged that defendant "composed, printed and *published*" a libel. The proof was of publication only; Ld. Ellenborough held it sufficient for a conviction, adding, "If an indictment charges that the defendant 'did *and caused* to be done' a particular act, it is enough to prove either. The distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified."—Defendants convicted.

In R. *v.* Williams, 2 Camp. 646, defendant was charged with "composing, *printing* and publishing" a libel. His MSS. was produced and shown to have been delivered by him to a printer, who printed and sold copies by his orders. These copies differed from the indictment, and from the MSS. which was adhered to in it. Lawrence J., "defendant may be acquitted of 'printing,' and found guilty of 'composing and publishing.'"—Defendant convicted. See also 3 M. & S. 371; 2 Bla. R. 789.

(*k*) (*Conclusion of indictments at common law*). The old reason of the ordinary conclusion of an indictment at common law, "*against the peace of our said lady the queen, her crown and dignity*," was that these words were always necessary in order to show to whom the forfeiture accrued. Whether in misdemeanor, R. *v.* Taylor, 3 B. & C. 502; common law felony, R. *v.* Cook, R. & R. C. C. 176; 2 Russ. C. & M. 172; or felony

created by statute, *ib.*; 1 Bla. C. 116. The only exception was in an indictment for a mere nonfeasance at common law, when it is said their omission would not prejudice; per Holt C. J.; Fortescue, 131 R.; and they are always necessary in an offence against a statute. In this country, though the reason no longer works, the form is preserved, and is in many instances made imperative by constitutional enactment, as will be seen in the next chapter. In offences of all characters, the "*contra pacem*" is essential; and the point on which any discretion may be exercised is in the omission or introduction of the conclusion, "*contra formam statuti.*" And here it may be observed that in all cases of doubt, it is proper to introduce this conclusion, and even in a clear common law case, it may always be disregarded as surplusage; Ld. Raym. 149, 1164; R. *v.* Matthews, 5 T. R. 162, 4 *ib.* 202; 1 Saund. 135, n. 3; State *v.* Buckman, 8 N. Hamp. 203; Knowles *v.* State, 3 Day 103; State *v.* Cruiser, 3 Harris. 108; Southworth *v.* State, 9 Conn. 560; Com. *v.* Gregory, 2 Dana 417; Com. *v.* Hoxey, 16 Mass. 385; Resp. *v.* Newell, 3 Yeates 407; Pa. *v.* Bell, Add. 171; 2 Hale 190; Alleyn 43; 1 Salk. 212–13; 5 T. R. 162; 2 Leach 584; 2 Salk. 460; 1 Ld. Raym. 1163; 4 T. R. 202; Hawk. b. 2, c. 25, s. 115; Bac. Ab. Indictment H. 2; Burns' Just. Indictment ix.; Haslip *v.* State, 4 Hay. 273. In a large class of offences, however, its introduction is imperative. Thus, where an offence is created, or where a misdemeanor is raised into a felony by statute, the words "contrary to the form of the statute in such case made and provided," *must* be inserted either before or after the words "against the peace," &c; 2 Hale 192; 2 Hawk. c. 25, s. 116; 1 Salk. 370; 2 R. & R. 38; Wh. C. L. 104. Where the matter charged is no offence at common law, the omission of these words will so entirely vitiate, that no judgment can be given on it; 1 Hale 172, 189, 192. For every offence for which a party is indicted is supposed to be prosecuted as an offence at common law, unless the prosecutor, by reference to a statute, shows that he means to proceed on it; and without such express reference, if it be no offence at common law, the court will not look to see if it be an offence by statute; per Lawrence J. in Lee *v.* Clark, 2 East 333; Doct. Plac. 332; 2 Hawk. c. 25, s. 116; R. *v.* Deacon, R. & M. N. P. C. 27. But where the matter charged was an offence at common law, and is afterwards prohibited by statute without being altered in degree, as from misdemeanor to felony, though the statute provides some new corporal or other punishment, *e. g.* for perjury by 5 El. c. ix., or for larceny by 7 & 8 C. IV. c. 28, s. 11; Reg. *v.* Blea, 8 C. & P. 735; the omission of *contra formam statuti* will not wholly avoid the indictment, but judgment may pass for the punishment inflicted in such case by the common law; 2 Hale 190, 192; 1 Chit. C. L. 290, 1st ed.; Arch. C. P. & Ev. 8th ed. 55; People *v.* Enoch, 13 Wend. 175; State *v.* Ripley, 2 Brevard 382; State *v.* Tim, 3 Murph. 3; State *v.* Crans, 7 Gill & J. 290; Warner *v.* Com., 1 Barr 154; *à fortiori* if the statute does not alter the offence, though it defines limits within which alone it can be committed, or prohibits it, and the *punishment* is only reduced; Reg. *v.* Polly and another, C. & K. 77; Reg. *v.* Andrews, *ib.* So it seems, that under the provisions of the New York Revised Statutes, a common law indictment for murder is proper; but a defendant cannot be convicted on such an indictment of a felonious homicide, with malice aforethought, unless the evidence is such as to bring the case within the statutory definition of murder; People *v.* Enoch, 13 Wend. 159. In Pennsylvania, the statutory penalty can be inflicted after conviction on an indictment for murder at common law; Com. *v.* White, 6 Binn. 183.

Numerous distinctions have been taken in the old books as to the proper conclusion where there were more statutes than one referring to the offence, whether it should be contrary to the form of the statute or statutes; and the English doctrine used to be that if one statute be relative to another, as where the former makes the offence and the latter adds a penalty, the indictment should conclude *contra formam statutorum;* Westwood's case, 2 Hale 173. The more recent authorities, however, seem to countenance the opinion that in all cases a conclusion in the singular will suffice; Clanricarde (Earl) *v.* Stokes, 7 East 520, and cases cited 1 Chit. C. L. 292, n. If one statute subjects an offence to a pecuniary penalty, and a subsequent statute makes it a felony, an indictment for the felony concluding against the form of the statute in the singular, is right; R. *v.* Pim, R. & R. 425; though in Maryland, State *v.* Cassell, 2 H. & G. 470, and in N. Carolina, State *v.* Pool, 2 Dev. 202, the old rule is adhered to.

Besides these necessary parts of the conclusion, it was formerly usual to introduce others of mere moral inference, as "to the great displeasure of Almighty God," "to the evil example of all others," and "to the great damage" of the party directly aggrieved; but these are all clearly unnecessary, and should be omitted. Dickinson's Q. S. 6th ed. 225.

(*l*) (*Of the joinder of offences in an indictment*). In point of law, several offences, which may be tried by the same rules, and which have the same legal class and character, i. e. several felonies, or several misdemeanors, may be charged in several counts in one indictment; 2 Hale 173; 1 Chit. C. L. 1st ed. 254; State *v.* Phelps, 11 Verm. 116; Baker *v.* State, 4 Pike's Arkansas 56; People *v.* Rynders, 12 Wend. 425;

Res *v.* Hevice, 2 Yeates 14; Carlton *v.* Com., 5 Met. 532; Kane *v.* People, 9 Wend. 203; Carg *v.* State, 3 Port. 186; Com. *v.* Gillespie, 7 S. & R. 496; State *v.* Williams, 2 M'Cord 301; Com. *v.* Hope, 22 Pick.; Josslyn *v.* Com., 6 Met. 236. Thus counts for felony at common law may be joined with counts for felony by statute; counts for a felony with aggravation which render it capital, with counts for a felony which is not capital; counts for riots and aggravated assaults, punishable by hard labour, with counts for common assaults, for which that punishment cannot be inflicted. The rule deduced from the English authorities is that where not only the degree, but the legal character of the offence is different, and the modes and incidents of trial differ, no charge of felony should be joined with a charge of misdemeanor. The test whether different offences may or may not be charged in an indictment, seems not always to be whether the judgments or punishments consequent on conviction differ or not, (see per Ld. Ellenborough, in R. *v.* Johnson, 3 M. & S. 539), but whether the nature and quality of the offences charged is the same or different; in other words, as it seems, whether one is a felony and the other a mere misdemeanor (*ib*). The modern practice is that several misdemeanors may be joined in an indictment, though the judgments on each differ; and the only case in this country which distinctly applied a more rigid practice; Updegraph *v.* Com., 6 S. & R. 5; was afterwards overruled. Counts for an assaulting with intent to ravish, and for a common assault; Harman *v.* Com., 12 S. & R. 476; Buck *v.* State, 2 Har. & J. 426; State *v.* Coleman, 5 Port. 52; State *v.* Montague, 2 M'Cord 257; State *v.* Gaffney, Rice 431; counts for assaulting a constable and for assaulting prosecutor, stated to be a common person (per Parke J., in R. *v.* Finucane and another, 5 C. & P. 551); for conspiracy and false pretences; for selling lottery tickets and conspiracy to sell the same; Com. *v.* Gillespie, 7 S. & R. 469; Com. *v.* Sylvester, 6 P. L. J. 283; for producing abortion, and for conspiracy to produce the same; Com. *v.* Demain, 6 P. L. J. 29; for false pretences and forgery at common law; R. *v.* Collier, 5 C. & P. 160; for entering closed land by night with another person, armed for the purpose of killing game (a misdemeanor, which by 9 G. IV. c. 64, s. 9, can only be tried at the assizes), and on s. 2 for assaulting a gamekeeper authorized to apprehend, and for assaulting a gamekeeper in the execution of his duty; and for a common assault, R. *v.* Finucane, 5 C. & P. 551, may be properly joined.

In the United States, notwithstanding the recognition of the same line of distinction in respect to challenges and arraignment, which obtains in England, the English doctrine has been so far extended as to admit of the joinder of felonies and misdemeanors in all cases where the misdemeanor is a constituent part of the felony. Thus an assault with intent to ravish requires the same kind of defence as rape itself; a trial for the consummated act involving a trial for the attempt; and as no real inconvenience results to the prisoner, the artificial difficulties arising from the difference in challenges has not been allowed to operate so far as to prevent a joinder of the offences; Harman *v.* Com., 12 S. & R. 69; Burk *v.* State, 2 Har. & J. 426; State *v.* Coleman, 5 Port. 52; State *v.* Montague, 2 M'Cord 257; State *v.* Gaffney, Rice 431; State *v.* Boise, 1 M'Mullen 190. But a greater latitude has been allowed; and the cases go to show that where the misdemeanor instead of being a constituent part of the felony, is merely a corollary to it, as in the case of larceny and the receiving of stolen goods, the two offences may be coupled; Wh. C. L. 108.

Though on the face of an indictment every count should import to charge a different offence; 3 T. R. 106; the words "*the said*" as applied to a prosecutrix in a second or subsequent count, merely asserting her to be the same person as was mentioned in the prior count, without re-asserting her particular character or age there stated; *e. g.* that she was a female child aged between ten and twelve; Reg. *v.* Martin, 9 C. & P. 213; whether founded on the same or different facts; yet in practice the use made of the legal right to join several charges of *felony*, is commonly no other than the charging the same offence in different counts of the same indictment in different ways, to meet the several aspects which it is apprehended the case may assume in evidence, or in which it may be regarded in point of law by the court; *e. g.* where it is doubted whether the goods stolen or the house in which a larceny was committed belong to or is occupied by A. or B., one count may state the goods, &c., as A's, and a second as B's; R. *v.* Eggington, 2 B. & P. 50. So the same act, *e. g.* burglary, may be laid in different counts to have been done with intent to steal and to murder; R. *v.* Thompson, 2 East P. C. 515; Josslyn *v.* Com., 6 Met. 236. Even where six distinct houses in the same row were burned down, it was held that each house might be the subject of a distinct count in a joint indictment; R. *v.* Trueman, 8 C. & P. 727; and in Massachusetts there is no hesitancy in including in the same indictment counts for the several subdivisions into which the chief common law felonies are there divided; Com. *v.* Hope, 22 Pick. 1. But in felony, if charges requiring an essentially different state of fact to support them, though *referring* to the same transaction, be joined, as a count for robbing with a count for assaulting with intent to rob, the court will, in general, compel the prosecutor to make an election; R. *v.* Gough, 1 M. &

Rob. 71; though here such rigour is not exercised, and the power of election as to which of the two stages of the defence the defendant is guilty of, is reserved to the jury.

In cases of misdemeanor the books in both countries agree that while different counts may be introduced applicable to the same facts as in case of felony, no objection can be made in any way even to the joinder of counts applicable to different *facts*, so that the legal character of the substantive offences charged be the same; per Ld. Ellenborough, in R. *v.* Jones, 2 Campl. 13. So conspiracy, and charges of other misdemeanors, may be joined; R. *v.* Johnson, 3 M. & S. 539; Kane *v.* People, 8 Wend. 203; State *v.* Rooby, 3 Harringt. 561; State *v.* Haney, 2 Dev. & Bat. 390; U. S. *v.* Dickinson, 2 M'Lean 325. Thus it is the constant practice to receive evidence of several assaults or libels on the several counts of the same indictment; and, on the other hand, an indictment for an assault by one or more *on several* is valid, though an award of a joint fine would be bad and the parties assaulted could not join in an action, where each person injured is to recover separate damages. See *dictum* of Ld. Mansfield in R. *v.* Benfield and Saunders, 2 Burr. R. 980, 984; 2 Hawk. c. 25, s. 89, denying R. *v.* Clendon, 2 Strange 870; Ld. Raym. 1572.

CHAPTER III.

COMMENCEMENTS AND CONCLUSIONS IN THE FEDERAL AND STATE COURTS.

I. FEDERAL COURTS.(*a*)

Commencement in District of Massachusetts, where the offence was committed on board of an American vessel within the jurisdiction of a foreign state.

United States of America.

District(*b*) of Massachusetts, to wit, (*stating the court*).

The jurors of the United States of America, within and for the district aforesaid, upon their oath present that A. B., late of Boston, in said district, mariner, on, &c., (*stating date*), * in and on board of the barque Eliza, then lying within the jurisdiction of a foreign state or

(*a*) The criminal pleading of the United States' courts, like the civil pleading, is governed, under the direction of the Act of 1788, by the practice of the states in which the particular courts are situated. This is illustrated by the forms of commencements and conclusions given in the text.

(*b*) The district must be set forth according to its jurisdiction, as settled by act of congress. Thus where an indictment in the Circuit Court for the Eastern District of Pennsylvania, commenced "in the Circuit Court of the United States, &c., in and for the District of Pennsylvania," Judge Washington held that it should appear by the record that the jury were sworn to inquire for the district over which the court had jurisdiction, and as by the Act of 20th April, 1818, Pennsylvania was divided into two districts, and as the court in which the indictment was found, had only jurisdiction over one of these districts, the judgment would have to be arrested; U. S. *v.* Wood, 2 Wheel. C. C. 325.

sovereign, to wit, at one of the islands called the Navigator's Island, in the south Pacific, the said barque then and there being a ship or vessel of the United States, belonging(c) to certain citizens of the United States, whose names are to this inquest unknown, &c.

Same where the offence was committed on an American ship within the jurisdiction of the United States.

*Same as above down to mark *, and then proceed:* on the waters of Long Island Sound, the same being an arm of the sea, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, in and on board of the steamer M., the same then and there being an American ship or vessel, &c.

Same where the offence was committed on the high seas on board of an American vessel.

*Same as above down to mark *, and then proceed:* upon the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, on board of a certain vessel, to wit, a schooner called the William Wirt, then and there belonging to a citizen or citizens of the United States to the said inquest unknown, of which said vessel a certain J. S. S. was then and there master, &c.

Same where offence was committed on high seas on board a vessel whose name was unknown, belonging to an American citizen whose name is given.

*Same as above down to *, and then proceed:* upon the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, on board of a certain vessel, to wit, a vessel the name whereof is to the jurors unknown, then and there belonging to a citizen of the United States, to wit, one J. P. V., late of the district aforesaid, &c.

Same where offence was committed by a person who belonged to a vessel owned by American citizens, whose names are known, the vessel being at the time lying in the jurisdiction of a foreign state.

*Same as above down to *, and then proceed:* within the admiralty and maritime jurisdiction of the United States, on board of a certain vessel, to wit, a sloop called the C. W., then and there belonging to S. P. W., J. C. B. and N. F., citizens of the United States, while lying in a place, to wit, Great Harbour in Long Island one of the Bahama Islands within the jurisdiction of a certain foreign sovereign, to wit, the king of the United Kingdom of Great Britain and Ireland, a certain J. P. M., late of the district aforesaid, mariner, then

(c) In several of the precedents the words "in whole or in part" are here introduced.

and there being a person belonging to the company of the said vessel, did, &c.

Same where offence was committed in Navy Yard.

*Same as above down to *, and then proceed:* at and within the navy yard adjoining the in the county of in the district of aforesaid, the site of which said navy yard had been, before the said day of in the year last aforesaid, ceded to the said United States, and was on the said last mentioned day then and there under the sole and exclusive jurisdiction of the said United States, &c.

Same where offence was committed on ground occupied for an armory or arsenal.

*Same as above down to *, and then proceed:* at the said town of Springfield, on land belonging to the said United States, to wit, on land occupied for an armory or arsenal, and for purposes connected therewith, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of the said United States, &c.

Commencement in Southern District of New York.

Southern district of New York, ss. The jurors of the United States of America, with and for the district aforesaid, on their oath present that A. B., late of the City and County of New York in the district aforesaid, heretofore, did, &c., (*stating the date, and proceeding as in foregoing forms*).

Commencement in Eastern District of Pennsylvania.

In the Circuit (or District) Court of the United States in and for the Eastern District of Pennsylvania, of Sessions, in the year of our Lord, &c.

Eastern District of Pennsylvania, ss. The grand inquest of the United States of America, inquiring for the Eastern District of Pennsylvania, on their oaths and affirmations respectively, do present that A. W. H., late of the district aforesaid, mariner, on the (*stating date, and proceeding as in foregoing counts*).

Commencement in District of Virginia.

In the Circuit (*or District*) Court of the United States in and for the Virginia District, of, &c., (*as in last form*).

The grand inquest of the United States of America, for the Virginia District, upon their oath do present that A. B., late of the State of New York and City of New York, attorney at law, on, &c., (*stating the date, and proceeding as in foregoing counts*).

Conclusion in District of Massachusetts.

Against the peace and dignity of the said United States, and contrary to the form of the statute of the United States in such case made and provided.(*d*)

Conclusion in Southern District of New York.

Against the peace of the said United States of America and their dignity, and against the form of the statute of the said United States in such case made and provided.

Conclusion in Eastern District of Pennsylvania.

Contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States.

Conclusion in District of Virginia.

Against the constitution, peace, and dignity of the said United States, and against the form of the act of the congress of the said United States in such case made and provided.(*e*)

[*Where the offence was committed within the admiralty and maritime jurisdiction of the United States, jurisdiction over the offender attaches to the particular district to which he was brought, or in which he was apprehended. In order to show jurisdiction, it is necessary for the grand jury to find an additional count in all such cases, as follows:*]

Final count where the offender was first apprehended in the particular district.

And the jurors aforesaid on their oath aforesaid, (*or in Pennsylvania* oaths and affirmations aforesaid), do further present, that the

(*d*) Indictments in the United States adapt themselves in their conclusion, as well as their other formal parts, to the practice of the courts of the states within whose territorial limits they are found, always retaining the *contra formam statuti* as well as the *contra pacem*, there being no common law offences against the United States.

(*e*) The form in the text is taken from Burr's case.

district of in the circuit is the district and circuit in which the said was first apprehended for the said offence.(*f*)

Final count where the offender was first brought into the particular district.

And the jurors aforesaid, on their oath aforesaid (*or in Pennsylvania* on their oaths and affirmations aforesaid), do further present, that the district of in the circuit is the district and circuit into which the said was first apprehended for the said offence.

II. STATE COURTS.

Maine. Commencement.

State of Maine, Kennebec, to wit:

At the court, &c., begun, &c. (*stating style of court*), the jurors for the State of Maine upon their oath do present that, &c.

Conclusion at common law.

Against the peace of the said state.(*g*)

New Hampshire. Commencement.

State of New Hampshire, ss.

At the court of common pleas holden at within and for the county of aforesaid, on the Tuesday of in the year of our Lord one thousand eight hundred and forty , the jurors of the State of New Hampshire, upon their oath, present, &c.

Conclusion for a common law offence.

Against the peace and dignity of the state.(*h*)

For a statutory offence.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.(*i*)

(*f*) See under the heads of piracy, &c., the several methods used of stating the jurisdiction in the respective circuits. The one in the text is that used in New York, and in connexion with that following it, appears to me to be the most formal. In some of the forms in the last named circuit the concluding averment is, "was first brought and apprehended."

(*g*) Browne's case, 1 Greenl. 177; State *v.* Soule, 20 Maine R. 19; Bufman's case, 8 Greenl. 113.

(*h*) The conclusion "against the peace and dignity of our said state," sufficiently complies with the constitutional provision that the conclusion shall be "against the peace and dignity of the state;" State *v.* Kean, 10 N. Hamp. 347.

(*i*) *Information.*

State of New Hampshire, ss.

At the court of common pleas holden at on the Tuesday of in the year of our Lord one thousand eight hundred and forty . Be it remembered,

Vermont. Commencement.

State of Vermont. Windsor County, ss.

The grand jurors within and for the body of the County of Windsor aforesaid, now here in court duly empanneled and sworn, upon their oath present, &c.(*j*)

Conclusion for common law offence.

Against the peace and dignity of the state.(*k*)

Conclusion for statutory offence.

Contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the state.

that Lyman B. Walker, Esquire, Attorney-General for the state aforesaid, being here in court, gives the court to understand and be informed, that, &c. (*stating offence*), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said state. Whereupon the said attorney-general prays advice of the court in the premises, and that due process of law may issue against the said in this behalf, to answer to the said state in the premises, and to do therein what to law and justice may appertain.

(*j*) This, as I am informed by Mr. Washburn, the learned reporter of the decisions of the Supreme Court, is the usual form; but in a recent case, of which he has kindly furnished me with the sheets, an indictment was sustained, beginning, "State of Vermont, Chittenden County, ss. The grand jurors for the people of the State of Vermont upon their oath present that, &c."

"To the indictment itself," said Williams C. J., in an opinion which throws great light on this branch of pleading, "the first objection urged is, that it commences,—'The grand jurors for the people of the State of Vermont.' This is not the usual form of the commencement of indictments in this state; but nevertheless, it may be questioned, whether it is not more correct than the one commonly used. The grand jurors in this state, as well as in Great Britain, are to inquire for all offences in the county for which they are returned; 2 Hawk. P. C. c. 25, p. 299. They are to present in behalf of and for the sovereign power, which is considered as the prosecutor for all public offences; and hence the style or language of the indictment is not uniform. In England, the form is, 'The grand jurors *for our Lord the King* on their oaths present;' in New York, '*for the people*,' &c.; in Massachusetts, '*for the Commonwealth*.' In some cases this part of the indictment is used only to designate the jury, who present,—as, 'The grand inquest of the United States for the district of Virginia;'—'The grand jurors of the United States in and for the body of the district of New York;'—'The grand jurors within and for the body of the county,' &c.; and this latter is the form usually adopted in this state, and in Connecticut. The better form, I think, is the one used in Georgia, found in 6 Peters 528—'The grand jurors sworn, chosen, and selected for the county of in the name and behalf of the citizens of Georgia.'

"In this state, when we wish to designate the sovereign power, we usually say—The State of Vermont; but I apprehend it is as well to designate it by the term—The People. Proceedings to take the forfeiture of grants and charters were heretofore directed to be prosecuted in the name of *The People of the State;* Slade's St. 189: and moreover, in making a record of a case arising on an indictment by a grand jury, these words might be wholly omitted; and, after the caption, which sets forth that the grand jury were empanneled, &c., it would be sufficient to say that it is presented, 'that A. B.' &c. We cannot, therefore, attach any importance to this objection to the indictment, considering it wholly immaterial whether the indictment commenced by saying, the grand jurors for the county, or for the state, or for the people of the state; and that either mode would be conformable to approved forms;" State *v.* Nixon, 18 Verm. 70; see also State *v.* Hooker, 17 Verm. 659.

(*k*) By the constitution of Vermont, all indictments must conclude, "against the peace and dignity of the state;" sect. 32, part ii. In a common law offence, the conclusion "*contra formam*" is to be rejected as surplusage; State *v.* Phelps, 11 Verm. R. 118.

Massachusetts. Commencement.

Commonwealth of Massachusetts. Suffolk, to wit:

At the Supreme Judicial(*l*) Court of said Commonwealth of Massachusetts, begun and holden at Boston, within and for the County of Suffolk, on the first Monday of in the year of our Lord one thousand eight hundred and forty .

The jurors for the Commonwealth of Massachusetts upon their oath present, &c.

Conclusion for a common law offence.

Against the peace of said commonwealth.

For a statutory offence.

Against the peace of said commonwealth, and the form of the statute in such case made and provided.(*m*)

Connecticut. Commencement.

State of Connecticut, &c. New Haven County, ss.

New Haven, day of 184 .

To the Honourable Superior Court of the State of Connecticut now sitting in within and for the County of on the Tuesday of

The grand jurors within and for said county, on their oaths present and inform, &c.

Conclusion.

Against the peace and contrary to the statute in such case made and provided.(*n*)

(*l*) At Boston: "At the Municipal Court of the City of Boston, begun and holden at said Boston."

(*m*) "Against the peace and the statute" has in Massachusetts been held to be sufficiently formal; Com. *v.* Caldwell, 14 Mass. 330; though "against the law in such case made and provided" has been held to be too general; Com. *v.* Stockbridge, 11 Mass. 279. The object of the conclusion "against the statute" is to notify the defendant that the offence of which he is accused, and the penalty to which he may be subject are statutory, and not as at common law; Com. *v.* Stockbridge, 11 Mass. 279; Com. *v.* Northampton, 2 Mass. 116; Com. *v.* Springfield, 7 Mass. 9; Com. *v.* Cooley, 10 Pick. 37. The phrase "against the peace of the commonwealth" is a proper conclusion for an offence at common law; Com. *v.* Buckingham, 2 Wheel. C. C. 182. The statutory termination, when unnecessary, may be treated as surplusage; Com. *v.* Hoxey, 16 Mass. 385.

(*n*) The statutory conclusion can be rejected as surplusage if necessary, and judgment given at common law; Knowles *v.* State, 3 Day 103; Swift's Digest 684-5; Southworth *v.* State, 9 Conn. 560.

Information by attorney for the state.

State of Connecticut. County of New Haven, ss.

County court, November term, one thousand eight hundred and forty-five.

Dennis Kimberly, attorney to the State of Connecticut, for the County of New Haven, now here in court, information makes that, &c. (*stating the offence*).

Against the peace and contrary to the statute in such case made and provided. Whereupon the attorney prays the advice of this honourable court in the premises.

Information by grand juror.

State of Connecticut. County of New Haven, ss.

To justice of the peace for said county, residing in said town (*or as in last form*), comes a grand juror for said town, and on his oath of office information makes, that at said New Haven on the day of 184 , &c. (*stating the offence*), against the peace, and contrary to the statute in such case made and provided. Wherefore the grand juror aforesaid prays process, and that the said may be arrested and held to answer the complaint, and be dealt with according to law. Dated at New Haven the day and year first aforesaid.

Rhode Island. Commencement.

State of Rhode Island and Providence Plantations. Providence, ss.

At the Supreme Judicial Court of the State of Rhode Island and Providence Plantations, holden at Providence, within and for the County of Providence, on the third Monday of September, in the year of our Lord one thousand eight hundred and forty .

The grand jurors of the State of Rhode Island and Providence Plantations, and in and for the body of the County of Providence, upon their oaths present, that, &c.

Conclusion for common law offence.

Against the peace and dignity of the state.

Conclusion for statutory offence.

Against the form of the statute in such case made and provided, and against the peace and dignity of the state.

New York. Commencement.

City and County of New York, ss.

The jurors of the people of the State of New York, in and for the

body of the City and County of New York, upon their oath present, that, &c.

Conclusion for common law offence.

Against the peace of the people of the State of New York, and their dignity.(*o*)

Conclusion for statutory offence.

Against the form of the statute in such case made and provided,(*p*) and against the peace of the people of New York and their dignity.

New Jersey. Commencement.

In the Court, &c.,(*q*) County, to wit:
The grand inquest for the State of New Jersey, and for the body of the County of upon their present, that, &c.

Conclusion for common law offence.

Against the peace of this state, the government and dignity of the same.

Conclusion for statutory offence.

Contrary to the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.

Pennsylvania. Commencement.

In the Court of for the County of
Session, 184 .
The grand inquest of the Commonwealth of Pennsylvania, inquiring for the upon their oaths and affirmations respectively do present, &c.

(*o*) See Rev. Stat. part 4, c. 2, s. 51.
See People *v.* Enoch, 13 Wend. 159, per Walworth, Chancellor; People *v.* M'Kinnon, 1 Wheeler's C. C. 170. The only case in which the statutory conclusion appears to be omitted in New York is assault and battery, and in fact, as when unnecessary it is merely surplusage, it is better to always include it.
(*p*) Against the form of the *statute* is sufficient, though the offence be prohibited by more than one statute; Kane *v.* People, 9 Wend. 203. By 2 Rev. Stat. p. 728, error in stating the conclusion is not fatal.
(*q*) The court should appear in the margin, so that the indictment may carry jurisdiction, though if it appear in the caption when the case goes up on error, it is enough; State *v.* Zale, 5 Halst. 348.

Conclusion for common law offence.

Against the peace and dignity of the Commonwealth of Pennsylvania.(*r*)

Conclusion for statutory offence.

Contrary to the form of the act of assembly in such case made and provided,(*s*) and against the peace and dignity of the Commonwealth of Pennsylvania.

Delaware. Commencement.

October Term, 1836. Kent County, ss.

The grand inquest for the State of Delaware and the body of Kent County, on their oath and affirmation respectively, do present, &c.

Conclusion for common law offence.

Against the peace and dignity of the state.

Conclusion for statutory offence.

Against the form of the act of the general assembly in such case made and provided,(*t*) against the peace and dignity of the state.(*u*)

Maryland.

Washington County, ss.

The jurors of the State of Maryland for the body of Washington County, on their oath present, &c.

(*r*) By the constitution, all prosecutions have to be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude, "against the peace and dignity of the same;" Art. v. s. 11. The proper conclusion is, "against the peace and dignity of the Commonwealth of Pennsylvania;" Com. *v.* Rogers, 5 S. & R. 463.

(*s*) See Warner *v.* Com., 1 Barr 154; Com. *v.* Searle, 3 Binn. 332; Russel *v* Com., 7 S. & R. 489; White *v.* Com., 6 Binn. 179; Chapman *v.* Com., 5 Wh. 427. Where, however, to a common law offence there is a penalty attached, but the offence continues unchanged, the conclusion "*contra formam*," &c., need not be inserted; and this is even the case in an indictment for murder, though the common law offence is here divided in two partitions; White *v.* Com., 6 Binn. 179.

When the termination "against the act," &c., is irregularly inserted in a common law indictment, the courts will always regard it as surplusage; Pa. v. Bell, Add. 171; Res *v.* Newell, 3 Yeates 407.

(*t*) "Against the form of the *acts*," &c., will not be vicious, though only *one* act prohibits the offence; Townley *v.* State, 3 Harris. 377.

The statutory conclusion can always be rejected as surplusage; State *v.* Craidly, 3 Harrison 108.

(*u*) See State *v.* Whaley, 2 Harris. 538.

Conclusion for common law offence.

Against the peace, dignity and government of the state.

Conclusion for statutory offence.

Contrary to the form of the act of assembly in such cases made and provided,(*v*) and against the peace, dignity and government of the state.

Virginia. Commencement.

Virginia, Lewis county, to wit:
The jurors for the Commonwealth of Virginia in and for the body of the County of Lewis, upon their oath present, &c.

Conclusion for common law offence.

Against the peace and dignity of the commonwealth.

Conclusion for statutory offence.

Contrary to the form of the statute in that case made and provided, and against the peace and dignity of the Commonwealth of Virginia.(*w*)

North Carolina. Commencement.

(*x*) County, to wit: Superior Court of law, Term, 184 .
The jurors for the state upon their oath present that, &c.(*y*)

Conclusion for common law offence.

Against the peace and dignity of the state.(*z*)

(*v*) State *v.* Negro Jesse, 7 Gill & J. 290. Where the punishment is prescribed by one act, and the offence prohibited by another, it is said the conclusion should be "against the *acts*;" State *v.* Cassal, 2 Harr. & Gill 407; though the weight of authority is now the other way; Wh. C. L. 105. It seems, also, that when there is but an "act," the conclusion against the "*acts*" is of doubtful propriety; State *v.* Cassal, 2 Harr. & Gill 407; see *ante*, p. 12.

(*w*) See for this form, Com. *v.* Daniels, 2 Va. Cases 402.
In case of misdemeanor it is said that though the name of the county be left blank in the margin, the deficiency will be made up by the statement of the county in the body of the indictment; Teeft *v.* Com., 8 Leigh 721.

(*x*) The omission of "North Carolina" is no cause for arresting judgment where the name of the county appears in the margin or body of the indictment; State *v.* Lane, 4 Iredell 113.

(*y*) Where the term is stated in these words: "Fall Term, 1822," and in the body of the indictment the offence is charged "on the first day of August in the present year," the time is sufficiently set forth; and it is said there is no necessity for stating any time in the caption of an indictment found in the county or superior courts; State *v.* Haddock, 2 Hawk. 461.

(*z*) State *v.* Evans, 5 Iredell 603.

Conclusion for statutory offence.

Contrary to the statute in such case made and provided,(*a*) and against the peace and dignity of the state.

South Carolina. Commencement.

The State of South Carolina, District, } To wit:

At a Court of General Sessions, begun and holden in and for the district of in the State of South Carolina, at in the district and state aforesaid, on the day of in the year of our Lord one thousand eight hundred and forty- .

The jurors of and for the District of aforesaid, in the State of South Carolina aforesaid, that is to say, &c., upon their oaths present, &c.

Conclusion for common law offence.

Against the peace and dignity of the same state aforesaid.(*b*)

Conclusion for statutory offence.

Against the form of the act of the general assembly of the said state(*c*) in such case made and provided, against the peace and dignity of the same state aforesaid.

Georgia.

Georgia.—Gwinnett County, ss.

The grand jurors sworn, chosen and selected for the County of Gwinnett, in the name and in the behalf of the citizens of Georgia, on their oath present, &c.(*d*)

(*a*) State *v.* Jim, 3 Murph. 3. See as to the propriety of concluding "against the *statutes*" where the act is in violation of more than one statute, State *v.* Pool, 2 Dev. 202. The unnecessary insertion of the qualification "*contra formam*," &c., does not vitiate a common law indictment; Haslip *v.* State, 4 Hay. 273; see *ante*, p. 12.

(*b*) Though the commencement in the margin is "South Carolina," and not "State of South Carolina," a conclusion "against the peace and dignity of the said state" is good; State *v.* Anthony, 1 M'Cord 285. The same ruling was had as to the conclusion "against the peace and dignity of this state," and as to that "against the peace and dignity of the same;" the constitution prescribing the termination, "against the peace and dignity of the same;" State *v.* Yancey, 1 Tr. Con. Rep. 237; State *v.* Washington, 1 Bay 120.

(*c*) Unless the statute is merely declaratory of the common law, without adding to it or altering it, the conclusion should be, in all cases where a statute comes into play, "*contra formam*;" State *v.* Ripley, 2 Brevard 382.

(*d*) Worcester *v.* State, 6 Peters 520.

Conclusion for common law offence.

Contrary to the good order, peace and dignity of the said state.

Conclusion for statutory offence.

Contrary to the laws of the said state, the good order, peace and dignity thereof.

Alabama. Commencement.

The State of Alabama, County. In Circuit Court, at term, 184 .

The grand jurors for the said State of Alabama, empanneled, sworn and charged to inquire for the body of county, upon their oath present, &c.

Conclusion for common law offence.

Against the peace and dignity of the state aforesaid.

Conclusion for statutory offence.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Alabama.(*e*)

Mississippi. Commencement.

The State of Mississippi,(*f*) County, ss.

In the Criminal Court for county, at the term thereof, in the year of our Lord one thousand eight hundred and forty- .

The grand jurors of the State of Mississippi (taken from the body of the good and lawful men of county) elected, empanneled and sworn to inquire in and for the said county of at the term of aforesaid (in the name and by the authority of the State of Mississippi),(*g*) upon their oath present, &c.

Conclusion for common law offence.

Against the peace and dignity of the Commonwealth of Mississippi.(*h*)

(*e*) See State *v.* Williams, 3 Stew. 454; State *v.* Coleman, 5 Port. 32.

(*f*) It is not essential that there should be a formal statement of a finding by authority of the state. It is enough if it appear from the record that the prosecution is in the state's name. Greeson *v.* State, 5 How. Miss. R. 33.

(*g*) The passages in brackets, though usual, can be omitted. Woodsides *v.* State, 2 How. Miss. R. 655.

(*h*) An indictment beginning "State of Mississippi," and concluding "against the peace and dignity of the same" is sufficiently precise; State *v.* Johnson, 1 Walker 392.

Conclusion for statutory offence.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the Commonwealth of Mississippi.

Louisiana. Commencement.

The State of Louisiana, First Judicial District, ss. Parish of Orleans. Criminal Court of the First District.

The grand jurors of the State of Louisiana, duly empanneled and sworn, in and for the parishes of Orleans, Jefferson and Plaquemines, upon their oath present, &c.

Conclusion generally.

Contrary to the form of the statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the same.(*i*)

Michigan. Commencement.

State of Michigan. The Circuit Court for the County of Wayne, of the term of May in the year of our Lord one thousand eight hundred and forty- .

Wayne County, ss.

The grand jurors of people of the State of Michigan, inquiring in and for the body of the County of Wayne aforesaid, upon their oath present, &c.

Conclusion for common law offence.

Against the peace and dignity of the people of the State of Michigan.

Conclusion for statutory offence.

Against the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan.

(*i*) *Information.*

The State of Louisiana, First Judicial District, ss.

Criminal Court of the First District.

Christian Roselius, Attorney-General of the State of Louisiana, who, in the name and by the authority of the said state, prosecutes in this behalf, in proper person comes into the Criminal Court of the first district, at the City of New Orleans, on the day of in the year of our Lord one thousand eight hundred and forty- , and gives the said court here to understand and be informed that, &c.

contrary to the form of the statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the same.

Ohio. Commencement.

In the court of, &c., of term, county of
The grand inquest for the State of Ohio, inquiring for the county of upon their oath present, &c.(*j*)

Conclusion for common law offence.

Against the peace and dignity of the State of Ohio.

Conclusion for statutory offence.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.(*jj*)

Indiana. Commencement.

State of Indiana, County of
In the court, &c. (*setting out the same*), of term, 184 .
The grand jurors, empanneled and sworn, &c., to inquire for the State of Indiana and the body of the county of V., upon their oath do present, &c.

Conclusion for statutory offence.

Contrary to the form of the statute(*k*) in such case made and provided, and against the peace and dignity of the state.(*l*)

(*j*) It is not necessary that it should be averred in the indictment, that the grand jury were empanneled and sworn to inquire within and for the body of the county. "The law," it was said by the Supreme Court in this connexion, "points out the duty of the grand jury; the law requires them to inquire within and for the body of the county, when they are empanneled, and for no other county; for her they are empanneled and sworn; therefore, the law presumes the purpose, and it is not error, any more than it would be to omit to state their number, to omit an averment of the purpose for which they are empanneled, when they can under law be empanneled for no other purpose; Ohio *v.* Hurley, 6 Ohio R. 399.

(*jj*) See Const. art. 3, s. 12, where the same termination is prescribed as is given in the Constitution of Pennsylvania; as to construction of which see *ante*, p. 23.

(*k*) Notwithstanding the general laxity of pleading in this state, of which the next note gives a strong instance, an indictment was quashed which concluded against the form of the *statute*, instead of *statutes*, and the broad ground was taken that when an offence is created by one statute, and the punishment declared by another, the plural termination is essential; State *v.* Moses, 7 Blackf. 244. But see as to correctness of this position, *ante*, p. 12.

(*l*) Where the words "and dignity" were omitted, the court amended the indictment, with the consent of the prosecuting officer, by inserting them; Cain *v.* State, 4 Blackf. 512. "The indictment in this case," said Sullivan J., "as it was returned by the grand jury, did not conclude 'against the peace and dignity of the state.' The *contra dignitatem* was omitted. Before the defendant was arraigned, the prosecuting attorney moved the court to insert the omitted words. The defendant objected, but the court overruled the objection, and permitted the amendment to be made.

"The indictment, as it was returned, was undoubtedly insufficient; but the question is, whether the court was authorized to amend it, so as to make the conclusion of the indictment conform to the requisition of the constitution?

"There is no doubt but that the court, by the consent of the grand jury, may amend indictments in matters of form. They may be amended in any case where an amendment

Conclusion for common law offence.

Against the peace and dignity of the state.

Illinois. Commencement.

State of Illinois, County, ss.
Of the term of the Circuit Court in the year of our Lord one thousand eight hundred and forty- .
The grand jurors chosen, selected and sworn in and for the county of in the name and by the authority of the people of the State of Illinois, upon their oaths present, &c.

Conclusion for common law offence.

Against the peace and dignity of the said people of the State of Illinois.

Conclusion for statutory offence.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said people of the State of Illinois.

Kentucky. Commencement.

State of Kentucky, County, ss.
The grand inquest of the State of Kentucky, inquiring for the county of , on their oath present, &c.

Conclusion for common law offence.

Against the peace and dignity of the State of Kentucky.

was allowable at common law. In this respect, there is no difference between civil and criminal cases. The settled practice, when an indictment is returned into court, is to obtain the consent of the grand jury, that the court may amend it in matters of form, not altering the substance.

"The words with which the constitution requires all indictments to conclude, are words of form. The facts are found by the jury on their oath, but the conclusion is affixed by law. The grand jury have nothing to do with finding that conclusion, nor does the constitution require that it should be found by the grand jury. The amendment made in this case did not hinder, delay, or embarrass the defendant, nor did it deprive him of any just means of defence.

"We think the court did right in permitting the amendment to be made, and that the judgment of the Circuit Court should be affirmed; 1 Chit. C. L. 297–8, and the authorities cited; 1 Saund. R. 249, n. 1."

Conclusion for statutory offence.

Against the statute in such case made and provided, and against the peace and dignity of the State of Kentucky.(*m*)

Tennessee. Commencement.

State of Tennessee. Hardin County, Circuit Court,(*n*) November term, 1829.

The grand jurors of the State of Tennessee, elected, empanneled, sworn and charged to inquire for the body of the County of Hardin aforesaid, upon their oath present, &c.

Conclusion for common law offence.

Against the peace and dignity of the state.(*o*)

Conclusion for statutory offence.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

(*m*) The conclusion "*contra formam*," &c., if improperly introduced, can always be treated as surplusage; Com. *v.* Gregory, 2 Dana 103. Notwithstanding the constitutional provisions that all prosecutions should be carried on in the name and by the authority of the Commonwealth of Kentucky, it is not requisite that indictments should so conclude. This point was discussed by chief justice Boyle, in an elaborate opinion in Allen *v.* Com., 2 Bibb 210. "At the common law," he said, "prior to the Revolution, prosecutions were carried on in the name and by the authority of the king, in his political capacity; but the forms of indictment show that it was unnecessary to be expressed, to be found by his authority. When we threw off the regal government and adopted the republican form, it became necessary to provide that prosecutions should be carried on in the name and by the authority of the commonwealth; but as under the regal, so under our present form of government, it is equally unnecessary that an indictment should expressly aver by what authority it is found and carried on. This indictment was, as all other indictments must be, carried on by the authority of the Commonwealth of Kentucky, and not by the authority of any other power; and that is alone what the constitution requires."

In an indictment for a misdemeanor, however, the prosecutor's name must be endorsed before the bill can go in to the grand jury. Thus, in the last cited case it was said: "In the case of Hutcheson *v.* The Commonwealth, decided Fall Term, 1809 (vol. i. p. 355), it was held that a dismission for want of a prosecutor, on the motion of the defendant, after issue joined upon the plea of not guilty, and part of the jury sworn, was correct. That was a stronger case than the present. In this case the plea of *autrefois convict* had been pleaded, but issue had not been joined upon it when the motion to dismiss was made.

"The argument that in requiring a prosecutor, the object of the law was to enable the defendant to recover his costs, in case of a judgment in his favour, and that by setting down a prosecutor, as permitted by the court below, that object would be obtained, seems not to obviate the objection. The law requires that it should have been done before the indictment was presented to the grand jury; see 1 Litt. L. R. 473–4. In a case of this kind, the law must be strictly pursued, and we cannot adopt other means than those which the law has appointed to attain its object, however much we may suppose them calculated for that purpose."

(*n*) It should appear in what court the indictment is found, so that it shall carry with it jurisdiction; Dean *v.* State, Mart. & Yerg. 127.

The grand jury must appear from the whole record, to come from the county over which the court has jurisdiction; Tipton *v.* State, Peck's R. 8; Cornell *v.* State, Mart. & Yerg. 147.

(*o*) State *v.* Barnes, 5 Yerg. 187. The object of the conclusion "*contra formam*," &c., is to indicate to the court and the defendant that the offence and the penalty are statutory; Crain *v.* State, 2 Yerg. 390.

Missouri. Commencement.

State of Missouri, A. county, ss.
The Circuit Court, term, 184 .
The grand jurors for the State of Missouri for A. county, sworn to inquire,(*p*) upon their oath present, &c.

Conclusion for common law offence.

Against the peace and dignity of the state.

Conclusion for statutory offence.

Contrary to form of the statute in such case made and provided, and against the peace and dignity of the state.(*q*)

Arkansas. Commencement.

State of Arkansas, County, ss.
Court, &c., of term, 184 .
The grand jurors for the State of Arkansas, sworn and charged to inquire for the county of upon their oath present, &c.

Conclusion for common law offence.

Against the peace and dignity of the State of Arkansas.(*r*)

Conclusion for statutory offence.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Arkansas.

(*p*) "Sworn to inquire" is surplusage, though it is the practice to introduce it.
(*q*) The indictment is usually signed "C. D., circuit attorney," though this, it seems, is unnecessary; Thomas *v.* State, 6 Miss. 457.
(*r*) The constitutional provision, that the conclusion shall be "against the peace and dignity of the State of Arkansas," will not be deviated from by the insertion of the words "the people of" before the state; Anderson *v.* State, 5 Pike 445.

BOOK THE SECOND.

CHAPTER I.

ACCESSARIES.(a)

Against accessary before the fact together with the principal.

(*After charging the principal with the offence, and immediately before the conclusion of the indictment, charge the accessary thus*): And the jurors aforesaid, upon their oath aforesaid, do further pre-

(a) (*Who are accessaries;—Time of trial and venire*). An accessary is he who is not the chief actor in an offence, nor present at its performance, but is in some way concerned therein, either *before* or *after* the fact committed; 4 Bla. Com. 35; Burr's case, 4 Cranch 502; Com. *v.* Andrews, 3 Mass. 126; Com. *v.* Briggs, 5 Pick. 429; Com. *v.* Woodward, Thach. C. C. 63; State *v.* Groff, 1 Murph. 270; Com. *v.* Williamson, 2 Va. Cases 211.

An accessary *before* the fact is he, who, being absent at the time of the commission of a felony, "*procures, counsels or commands*" the principal felon to commit it; 1 Hale 613; as if several plan a theft which one is to execute, or if a person incites a servant to embezzle the goods of his master. *Command* includes all those who incite, procure, set on or stir up any other to do the fact; Foster 126; East's P. C. 641; 2 Hawk. c. 33, s. 65; State *v.* Hanna, 1 Hay. 4; Wh. C. L. 34; People *v.* Norton, 8 Cow. 137.

An accessary *after* the fact is one who, knowing a felony to have been committed, receives, harbours, relieves, comforts or assists the principal or accessary before the fact, with a view to his escape; 1 Hale 618. Employing another to harbour felons seems sufficient to constitute this offence; 4 Bla. C. 37; 2 Hawk. c. 29, s. 1; 3 P. Wms. 475; but the assisting must be to the felons personally; Reg. *v.* Chapple and others, 9 C. & P. 355.

As in treasons, so in *misdemeanors*, there are no accessaries, but in felonies only; 1 Hale 238, 613; Foster 341; Wh. C. L. 33. "In the highest offences (*crimen laesae majestatis*), and in the lowest (*riots, routs, forcible entries, and vi et armis*), there be no accessaries; but in felonies there be, both before and after;" see Co. Lit. 57, a. b. What makes a man accessary before the fact in felony makes him principal in misdemeanor; Reg. *v.* Clayton and Mooney, C. & K. 128. The rule is proved, says Serjeant Talfourd, by the exception in misdemeanors punishable under act against malicious injuries to person. In this country the same rule has been settled by repeated adjudications; Whitaker *v.* English, 1 Bay 15; Chanit *v.* Parker, 1 Rep. Con. Ct. 333; State *v.* Goode, 1 Hawks 463; Curlin *v.* State, 4 Yerg. 143; Com. *v.* M'Atee, 8 Dana 28; Com. *v.* Major, 6 Dana 293; Com. *v.* Burns, 4 J. J. Marsh. 182; Com. *v.* Gillespie, 7 S. & R. 469; U. S. *v.* Morrow, 4 W. C. C. 733; Com. *v.* Macomber, 3 Mass. 254; U. S. *v.* Mills, 7 Peters 38; State *v.* Westfield, 1 Bail. 132; State *v.* Barden, 1 Dev. 518. Nor were there in England any accessaries in larceny under or to the value of 12*d.*, until the 7 and 8 G. IV. c. 29, abolished the distinction between grand and petty

sent, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, before the said (*felony and larceny*) was committed in form aforesaid, to wit, on the first day of August, in the year aforesaid, at

larceny, and rendered the law of grand larceny applicable to all cases of theft, however trifling in value.

At common law a party guilty of receiving stolen goods did not come within the definition of an accessary after the fact; but his offence was made punishable as that of an accessary after the fact and otherwise by statutes existing in every state of the Union and which will be noticed under the proper head. No accessaries before or after the fact could at common law, without their consent be brought to trial, unless with the principal or after his guilt has been legally ascertained by his conviction on having taken his trial singly; or, after his outlawry on a capital crime, which is equivalent to attainder; 4 Bla. C. 40, 132; and even the entry of a plea does not waive the prisoner's right to call for the record of the principal's conviction; Fost. 360; U. S. *v.* Berry, 4 Cranch 502. Even the death of the principal before conviction does not relieve the prosecutors from the pressure of the rule; Com. *v.* Phillips, 16 Mass. 423. In North Carolina the principle has been somewhat expanded, it having been there held that the accessary is not liable to be tried while the principal is amenable to the laws of the state, and is still unconvicted; State *v.* Goode, 1 Hawks 463; State *v.* Groff, 1 Murph. 270; see Harris *v.* State, 3 Blackf. 386. But now in England by 7 G. IV. c. 64, s. 11, and in many of the United States by statutes of similar import, in order that all accessaries may be convicted and punished in cases where the principal felon is not attainted, it is enacted that if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessary, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, be (admitted to benefit of clergy, or) pardoned, or otherwise delivered *before* attainder: and every such accessary shall suffer the same punishment, if in anywise connected, as he or she should have suffered if the principal had been attainted; Dickinson's Q. S. 6th ed. 293. *See as to Massachusetts statute, post*, p. 85, n. *g*.

(*Principals in first and second degrees*). All parties who are present at the fact of committing a *felony*, and concur therein, are principals, whether they assist by manual exertion (which constitutes them principals in the *first* degree), or only by command, co-operation or encouragement, though they were anciently deemed only accessaries, viz. down to the reign of Hen. VII.; see Plowden 100; Wh. C. L. 28.

A constructive presence suffices to make a man a principal (in the *second* degree) as an aider and abettor; for he need not be actually present; if an eye or ear witness of the transaction, he is, in construction of law, "*present*, aiding and *abetting*," (*i. e.* encouraging or setting on). This term includes seconds present at a fatal duel; see Reg. *v.* Cuddy, C. & K. 210; if he act in concert with the principals, and if with the intention of giving them assistance, he be near enough at the time of the felony committed, to afford it, should the occasion arise, *e. g.* by watching outside a house to prevent surprise, while his companions are committing the felony, or to receive goods which they are stealing in it, or remaining at convenient distance in order to favour their escape if necessary; Fost. 350; 1 Hale 439; see R. *v.* Borthwick, 1 Dougl. 207; R. *v.* Gogerly, R. & R. 343; R. *v.* Owen, 1 Mood. C. C. 96; R. *v.* Stewart, R. & R. 363; Plowden 96. If, however, he is constructively present, with the intent not of assisting but of detecting the felony, he has not the felonious intent necessary to convict him as a principal felon, though his motive in so acting was to get a reward; R. *v.* Dannelly and another, 2 Marsh. 571; S. C., R. & R. 310. Where the parties are principals in the second degree as well as in fact they are in the first, they may be charged either way in one count; Reg. *v.* Crisham, C. & M. 187, (Maule J. and Rolfe B.); or both ways in different counts. Thus an indictment in its first count charged that Folkes ravished E., and Ludds at the time of committing the said felony and rape in form aforesaid, to wit, on, &c., with F. and A. at, &c., feloniously was present aiding, abetting and assisting Folkes the felony and rape to do and commit against the peace, &c.; and in other counts Ludds was charged as principal and Folkes as aider; in others an "evil disposed person unknown" was laid as principal, and Folkes and Ludds as aiders; and Ludds was acquitted, Folkes convicted generally, it appearing that the latter, with three other men had committed at same place and time, one after the other successively, rapes on E., the others aiding, &c., in turn. It was said that distinct offences liable to distinct punishments were charged, and that there was therefore a misjoinder; as 9 G. IV. c. 31, contained no specific provision against aiders and abettors in rape. Held by the judges, on case reserved, that the conviction was good on the first count charging him as principal; and that on such an indictment several rapes on the same woman by

the parish aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said J. S. the said (*felony and larceny*) in manner and form aforesaid to do and commit.(*b*) (*Conclude as ante, book* 1, *chap.* 3).

Indictment against an accessary before the fact, the principal being convicted.

Middlesex, to wit: The jurors for our lady the queen upon their oaths present, that heretofore, to wit, at the general sessions of the delivery of the gaol of, &c. &c. (*so continuing the caption of the indictment against the principal*), it was presented upon the oaths of, &c., that one J. S., late of, &c. (*continuing the indictment to the end, reciting it, however, in the past, and not in the present tense*), upon which said indictment the said J. S., at the session of the gaol delivery aforesaid, was duly convicted of the (*felony and larceny*) aforesaid, as by the record thereof more fully and at large appears.(*c*)* And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, before the said (*felony and larceny*) was committed in form aforesaid, to wit, on the first day of May in the year aforesaid, at the parish aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, counsel, hire and command the said J. S. the said (*felony and larceny*) in manner and form aforesaid to do and commit; against the peace, &c., (*as in ordinary cases*).

prisoner and other men, each assisting the other in turn, might be proved without putting the crown to elect which count to proceed; Folke's case, 1 Mood. C. C. 354.

An indictment against G. and W. charged in the first count W. as principal and G. as an aider, in the second it charged G. as principal and W. as aider, (viz. as principal in second degree). Coleridge J. refused a motion to quash the indictment for misjoinder; R. *v.* Gray and Wise, 7 C. & P. 164; see R. *v.* Parry and others, 7 C. & P. 836; Dickinson's Q. S. 6th ed. 293.

(*b*) Mr. Archbold, in his note to this form, says: "The act of accessary before the fact is described in the several statutes creating new felonies, or punishing with death the principal and accessaries in felonies at common law, in different terms. In prudence, perhaps, it will be better to pursue the words of the statute upon which the indictment is framed, in describing the offence of the accessary; but if the statute do not mention accessaries, or in the case of a felony at common law, the words in the above form, 'incite, move, procure,' &c., will be sufficiently indicative of the offence. And even where the statute does expressly describe the offence of accessary in terms, it is not absolutely necessary to describe it in the same terms in the indictment; a description in equivalent terms will be sufficient; thus, where the words in the statute were 'command, hire or counsel,' and in the indictment, 'excite, move and procure,' the indictment was holden good; because the words were of the same legal import; R. *v.* Grevil, 1 And. 195. A man may be indicted as accessary to one of several principals or to all, and if he be indicted as accessary to all, he may be convicted on such indictment as accessary to one or some of them; Lord Sanchar's case, 9 Co. 119; Fost. 361; 1 Hale 624. An indictment charging that a certain evil disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil disposed person to commit the said felony, is bad against A. B.; Reg. *v.* Caspar, 2 Mood. C. C. 101; 9 C. & P. 289;" Accessaries, Arch. C. P. 811.

(*c*) In setting out the indictment against the principal, it is not sufficient to allege that "at the sessions of gaol delivery, &c., it was presented," &c., without saying by whom, and on oath, &c.; Reg. *v.* Butterfield, 2 M. & Rob. 522. As to the venue, see Arch. C. P. 815.

Indictment against accessary after the fact with the principal.

(*After stating the offence of the principal, and immediately before the conclusion of the indictment, charge the accessary after the fact thus*): And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the said J. S. to have done and committed the said (*felony and larceny*) in form aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. S. did feloniously receive, harbour and maintain.(*d*) (*Conclude as ante, book* 1, *chap.* 3).

Indictment against an accessary after the fact, the principal being convicted.

(*Proceed as in the precedent, ante, p.* 34, *to the asterisk; and then thus*): And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., late of the parish aforesaid, in the county aforesaid, labourer, well knowing the said J. S. to have done and committed the (*felony and larceny*) aforesaid, after the same was committed as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. S. did feloniously receive, harbour, and maintain, against the peace, &c. (*as in ordinary cases*).(*e*)

Against accessary before the fact generally in Massachusetts.

(*Charge the offence against the principal in the usual form, and proceed*): And the jurors aforesaid upon their oath do further present, that A. B., of in the County of yeoman, before the said felony and murder (*or burglary, &c.*) was committed, in manner and form aforesaid, to wit, on at was accessary before the fact, and feloniously and maliciously (*in murder say, "and of his malice aforethought," instead of maliciously*), did hire and procure the said C. D. (*the principal*) the felony and murder aforesaid, in manner and form aforesaid, to do and commit; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.(*f*)

(*d*) Arch. C. P. 817.

(*e*) Arch. C. P. 820.

(*f*) The Rev. Stat. c. 133. s. 1 and 2, provide: "Every person, who shall be aiding in the commission of any offence which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, or who shall be accessary thereto before the fact, by counseling, hiring, or otherwise procuring such felony to be committed, shall be punished in the same manner, which is or which shall be prescribed for the punishment of the principal felony.

"Every person, who shall counsel, hire, or otherwise procure any offence to be committed which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, may be indicted and convicted as an accessary before the fact, either with the principal felon, or after the conviction of the principal felon, or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice, and in the last mentioned case may be punished in the same manner as being convicted of being an accessary before the fact."

The form in the text is based on the above statute, and is in conformity with those given by Mr. Davis under it.

Indictment against an accessary before the fact, in murder, at common law.

(*Frame the indictment against the principal in the usual form, alleging the nature of the murder, and then proceed as follows*): And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. of in the county of labourer, before the said felony and murder was committed, in form aforesaid, to wit, on the day of in the year of our Lord one thousand eight hundred and with force and arms, at in the county aforesaid, was accessary thereto before the fact, and did feloniously and maliciously incite, move, procure, aid, counsel, hire and command the said C. D. to do and commit the felony and murder aforesaid, in manner and form aforesaid.(*g*) (*Conclude as in precedents for murder, postea*).

Accessaries before the fact in Massachusetts.

(*After alleging the murder against the principal, in the usual form, upon the first section of the statute of Massachusetts*, 1804, *c.* 123, § 1, *the indictment proceeds*): And the jurors aforesaid, upon their oath aforesaid, do further present, that J. J. Knapp, of &c., and George Crowninshield, of &c., before the said felony and murder was committed, in manner and form aforesaid, to wit, on at were accessary thereto before the fact, and *feloniously*, *wilfully and of their malice aforethought*, did counsel, hire and procure the said J. J. Knapp (*the principal*) the felony and murder aforesaid, in manner and form aforesaid, to do and commit; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.(*h*)

Against an accessary for harbouring a principal felon in murder.

(*Frame the indictment, against the principal felon, according to the facts in the case, and in the usual form; then go on*): And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., late of in the county of labourer, well knowing the said C. D. to have done, committed and perpetrated the felony and murder in manner and form aforesaid, afterwards, to wit, on the day of in the year of our Lord , with force and arms, at aforesaid, in the county aforesaid, was accessary thereto, and him the said C. D. did then and there feloniously receive, harbour, comfort, conceal and maintain, &c.(*i*) (*Conclude as above*).

(*g*) Cr. C. P. 124; 2 Chit. C. L. 5; *ib.* 121.

(*h*) This was the indictment, as we are informed by Mr. Davis, used against the accessaries before the fact, in Com. *v.* Knapp, 9 Pick. 496, as principal, "in the horrid and most diabolical murder of Joseph White; upon which J. J. Knapp was tried, convicted and executed. The words used in the English precedents are 'feloniously and maliciously counsel him,' &c., not using the allegation in the following precedent, 'feloniously, wilfully and of their malice aforethought.' This indictment was drawn by the attorney-general of Massachusetts;" Davis' Precedents 41.

As there has been no change made by the Revised Statute in the language of the law under which the above form was drawn, it may be presumed to be still good.

(*i*) 2 Stark. C. P. 456.

Against an accessary to a burglary, after the fact.

(*Draw the indictment against the principal according to the precedents in burglary* (*see "Burglary," post*), *and then proceed*):" And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. of in the county of labourer, afterwards, to wit, on at well knowing the said C. D. to have done and committed the felony and burglary aforesaid, in manner and form aforesaid, him the said C. D. did then and there knowingly harbour, conceal, maintain and assist.(*j*) (*Conclude as in book* 1, *chap.* 3).

Against principal and accessaries before the fact, in burglary.

(*Draw the indictment against the principal according to the precedents in burglary*, (*see "Burglary," post*), *and then proceed*): And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., of in the county of labourer, before the committing of the felony and burglary aforesaid, in manner aforesaid, to wit, on the day of in the year of our Lord one thousand eight hundred and at aforesaid, in the county aforesaid, was accessary thereto before the fact, and did, feloniously and maliciously incite, move, counsel, hire and procure, aid, abet and command the said C. D. to do and commit the said felony and burglary, in manner and form aforesaid.(*k*) (*Conclude as in book* 1, *chap.* 3).

Accessary before the fact to suicide. First count against suicide as principal in the first degree, and against party aiding him as principal in the second degree.

The jurors, &c., upon their oaths present, that C. D. of labourer, on the day of now last past, at aforesaid, in the county of aforesaid, in and upon himself did make an assault; and that he the said C. D., with a rope, about the neck of himself, the said C. D., then and there feloniously, wilfully and of his malice aforethought, did put, fasten and bind; and that he the said C. D., with the said rope, about the neck of him the said C. D., then as aforesaid put, fastened and bound, himself the said C. D. then and there feloniously, wilfully and of his malice aforethought, did choke and strangle; of which said choking and strangling the said C. D. then and there instantly died.

And so the inquest aforesaid, on their oath aforesaid, do say, that the said C. D. in manner and form aforesaid, himself, the said C. D., feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided. And that one E. F., late of said labourer, before the said self-murder, by the aforesaid C. D. in manner and form aforesaid done and committed, that is to say, on the day and year aforesaid, him the aforesaid

(*j*) Cro. C. P. 125. (*k*) 3 Ch. C. L. 1101; Cro. C. P. 124.

C. D., at aforesaid, in the County of aforesaid, to do and commit the felony and murder of himself aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily and of his malice aforethought, did stir up, move, abet, counsel and procure, against the peace of the said commonwealth, and contrary to the form of the statute in such case made and provided.

Second count against defendant for murdering suicide.

And the jurors aforesaid, on their oath aforesaid, do further present, that the said E. F., on the day and year aforesaid, at aforesaid, in the county aforesaid, in and upon the said C. D. did make an assault; and that he, the said E. F., a rope about the neck of the said C. D., then and there feloniously and of his malice aforethought, did put, fasten and bind; and that he, the said E. F., with the said rope about the neck of him the said C. D., then as aforesaid put, fastened and bound, him the said C. D., then and there feloniously, wilfully and of his malice aforethought, did choke and strangle; of which choking and strangling he the said C. D. then and there instantly died And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. F., in manner and form aforesaid, him the said C. D. feloniously, wilfully and of his malice aforethought, did kill and murder; against the peace of the said commonwealth, and contrary to the form of the statute in such case made and provided.(*l*)

(*l*) This is in general construction the same with the indictment in Com. *v.* Bowen, 15 Mass. 357. The deceased, a convict in the Northampton prison, being under sentence of death, the defendant, who was in an adjoining apartment, advised him the day before the intended execution to make away with himself, and thereby to elude the penalties of the law. The advice was taken, and the experiment being successful, the defendant was indicted in the first count, as a principal in the second degree in the homicide, and in the second count, as its sole cause. The jury returned a verdict of not guilty, but in the charge of the chief justice no doubt is expressed but that both the counts were proper. The law was declared to be, that if the persuasions of the defendant were the cause of the death of the deceased, the former was as much responsible for it as if he had himself struck the blow.

The inclination in England is to declare the law in the same way, and so it was expressed in Wh. C. L. 29, though of late the doctrine has been qualified by the position that at common law there can be no accessaries to suicide. Thus in R. *v.* Leddington, 9 C. & P. 79, where the indictment charged that Ann Burton murdered herself by poisoning herself with arsenic, and that the prisoner did feloniously incite and procure the said Ann Burton the said felony and murder to do and commit, Alderson B., said to the jury: "You have no authority to inquire into this charge; this is a case of suicide, and the prisoner is charged with inciting it; that is a case that by law we cannot try. The prisoner must be acquitted." In the case of R. *v.* Russell, 1 M. C. C. 356, it was held by the fifteen judges that an accessary before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried, and that he is not now triable for a substantive felony under the stat. 7 Geo. IV. c. 64, s. 9, as that statute was to be considered as extending to those persons only who before the statute were liable either with or after the principal, and not to make those liable who before could never have been tried. And it was also held, that if a woman takes poison with intent to procure a miscarriage and dies of it, she is guilty of self-murder, whether she was quick with child or not, and that the person who furnished her with the poison for that purpose will, if absent when she took it, be an accessary before the fact only, and as such not punishable. Where, however, the surviving party was actually aiding in the suicide, he becomes a principal therein, and as such is clearly indictable for murder; R. *v.* Dyson, R. & R. 523; R. *v.* Allison, 8 C. & P. 523; R. *v.* Russell, 1 Mood. C. C. 356; Starkie C. P. 420; and case in text.

Against a defendant in murder who is an accessary before the fact in one county to a murder committed in another.(*m*)

That Robert Carliel, late, &c., and James Irweng, late, &c., as, &c., at, &c., not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, with force and arms, at aforesaid, in the county aforesaid, in and upon one John Turner, in the peace of God and our said lord the king, then and there being, feloniously and of their malice aforethought, did make an assault, and that the aforesaid Robert Carliel, with a certain gun, called a pistol, of the value of five shillings, then and there charged with gunpowder and one leaden bullet, which gun the said Robert Carliel in his right hand then and there had and held in and upon the aforesaid John Turner, then and there feloniously, voluntarily and of his malice aforethought, did shoot off and discharge, and the aforesaid Robert Carliel, with the leaden bullet aforesaid, from the gun aforesaid then and there sent out, the aforesaid John Turner, in and upon the left part of the breast of him the said John Turner, then and there feloniously struck, giving to the said John Turner then and there, with a leaden bullet as aforesaid, near the left pap of him the said John Turner, one mortal wound of the breadth of half an inch and depth of five inches, of which mortal wound the aforesaid John Turner at London aforesaid, in the parish and ward aforesaid, instantly died; and that James Irweng feloniously, wilfully and of his malice aforethought, then and there was present, aiding, assisting, abetting, comforting and maintaining the aforesaid Robert Carliel to do and commit the felony and murder aforesaid, in form aforesaid; and so the aforesaid Robert Carliel and James Irweng, him the aforesaid John Turner, at London aforesaid, in the parish and ward aforesaid, in manner and form aforesaid, feloniously, voluntarily and of their aforethought malice, killed and murdered; against the peace of our lord the now king, his crown and dignity; and that one Robert Creighton, late of the parish of St. Margaret, in Westminster, in the County of Middlesex, Esq., not having the fear of God before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid, by the aforesaid Robert Carliel and James Irweng, in manner and form aforesaid done and committed, that is to say, on the tenth day of May, in the tenth year of the reign of our lord James, by the grace of God, &c., the aforesaid Robert Carliel at the aforesaid parish of St. Margaret, in Westminster, in the County of Middlesex aforesaid,(*n*) to do and commit the felony and

(*m*) This, we are informed by Mr. Starkie, was the indictment used against Lord Sanchar, upon which he was convicted and executed. A full account of the proceedings upon that occasion appears in 9 Co. 117. It is observable, that though the indictment is founded upon the stat. 2 and 3 E. 6, c. 24, it does not conclude against the form of the statute, nor does this appear to be necessary, for though, before the statute, an accessary in one county to a murder in another, could not have been indicted in either, that was for want of the authority in the jurors to inquire, and the statute merely remedies the defect without making any alteration either in the nature of the offence or in the measure of punishment, which remained as at common law. It was deemed necessary, says Mr. Starkie, expressly to allege the perpetration of the murder in the true county.

(*n*) By stat. 4 and 5 Ph. & M. c. 4, all persons that shall maliciously command, hire, or counsel any person to commit petit treason, wilful murder, &c., every such offender

murder aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily and of his aforethought malice, did stir up, move, abet, counsel and procure, against the peace of our said lord the king that now is, his crown and dignity.

[*For other forms of indictments against accessaries in homicide, see post, chap.* "*Murder*"].

Larceny. Principal and accessary before the fact.

That A. B. of in the county of labourer, on the day of in the year of our Lord one thousand eight hundred and at , one silver cup, of the value of ten dollars, of the goods and chattels of one C. D., then and there in the possession of the said C. D. being found, feloniously did steal, take and carry away, against, &c.

And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F. late of in the county of labourer, before the committing of the felony and larceny aforesaid, to wit, on the day of in the year last aforesaid, at aforesaid, in the county aforesaid, did knowingly and feloniously incite, move, procure, aid, abet, counsel, hire and command the said A. B. to do and commit the said felony and larceny, in manner and form aforesaid, against, &c.(*o*).

Against accessary for receiving stolen goods.

(*State the offence against the principal felon, as above, and then proceed as follows*):

And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. of in the county of labourer, afterwards, to wit, on the day of now last past, at B. aforesaid, in the county aforesaid, the goods and chattels aforesaid, to wit, one pair of shoes, of the value of two dollars (*here state all the articles found upon the accessary, their value, &c.*) so as aforesaid feloniously stolen, taken and carried away, by the said A. B., in manner aforesaid, feloniously did receive and have, and did then and there feloniously aid in concealing the same; he the said C. D. then and there well knowing the same goods and chattels to have been feloniously stolen, taken and carried away as aforesaid, against, &c.(*p*)

being attainted or who shall stand mute, &c., or challenge peremptorily above twenty, &c., shall be excluded from the benefit of clergy. Though it is proper to introduce the words of the statute into the indictment, yet an indictment has been holden sufficient which wholly drops the words of the statute; Starkie C. P. 421.

(*o*) 2 Stark. C. P.; Cro. C. C. 124; Davis' Prec. 36.

(*p*) 2 Stark. C. P. 457; this form is given by Mr. Davis, as good under the Massachusetts statute; Precedents 38. When the principal has been convicted in one county, and the stolen goods received in another, the form will be the same as in this precedent; the conviction of the principal being alleged conformably to the record in the county where it was had.

Against accessary for receiving the principal felon.

(*State the offence against the principal felon, as in the next preceding precedent, and then proceed as follows*):

And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D. of in the county of yeoman, well knowing the said A. B. to have done and committed the felony and larceny aforesaid, in manner and form aforesaid, afterwards, to wit, on the day of in the year of our Lord one thousand eight hundred and at B. aforesaid, in the county aforesaid, him the said A. B. did then and there knowingly and feloniously receive, harbour, conceal and maintain, in the larceny and felony aforesaid, against, &c.(*q*)

[*The only variation between indictments against accessaries to arson, mayhem, robbery and rape, and the form given in the text, is that after the word felony, the phrase, "and arson," "and mayhem," "and robbery," "and rape," must be inserted as the case may require. For accessaries after the fact, to larceny, see "Receiving Stolen Goods"*].

(*q*) Davis' Precedents 367; 2 Stark. C. P. 456; Cro. C. C. 124.

BOOK THE THIRD.

OFFENCES AGAINST THE PERSON.

CHAPTER I.

HOMICIDE.

That A. B., late of the parish of C., in the county of P., labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil,(*a*) on, &c., with force and arms, (*b*) at the parish aforesaid, in the county aforesaid,(*c*) in and upon one E. F.,(*d*) in the peace of God and of the said commonwealth then and there being,(*e*) feloniously, wilfully and of his malice aforethought,(*f*) did make an assault; and that the said A. B., with a certain knife(*g*) of the value of sixpence,(*h*) which he the said A. B. in his right hand had and held,(*i*) him,(*j*) the said E. F., in and upon the left side of the breast of him the said E. F.,(*k*) then and there(*l*) feloniously, wilfully and of his malice aforethought,(*m*) did strike(*n*) and thrust, giving to the said E. F., then and there, with the knife aforesaid,(*o*) in and upon the said left side of the breast of him(*p*) the said E. F., one mortal wound of the breadth of three inches, and of the depth of six inches;(*q*) of which said mortal wound the said E. F., from the said third day of August, in the year aforesaid, until the fifteenth day of the same month of August, in the year aforesaid, at the parish aforesaid, did languish, and languishing did live;(*r*) on which said fifteenth day of August, in the year aforesaid, the said E. F., at the parish aforesaid, in the county aforesaid, died;(*s*) and so the jurors aforesaid, upon their oath aforesaid, do say that the said A. B., him the said E. F., in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder.(*t*) (*Conclude as in book* 1, *chap.* 3).(*u*)

(*a*) These words are wholly unnecessary. If included they are rejected as surplusage; if excluded the want of them is not the subject of exception.

(*b*) "Force and arms." The use of these words, as has been before shown, is unneces-

sary; see *ante*, p. 9; and in one instance the omission of them in an indictment for murder has been expressly sanctioned; Terr. *v.* M'Farlan, 1 Mart. 16.

(*c*) Where the indictment charged that the defendant, late of B. county, "at the county aforesaid," &c., it was held that this was sufficient to point out the place where the offence was committed; State *v.* Lamon, 3 Hawks 175; see *ante*, p. 8.

(*d*) In what way the name of the party injured must be set forth, has been already discussed, *ante*, p. 6, *et seq.*

(*e*) These words do not need proof, and may be omitted without prejudice; Arch. C. P. 10th ed. 407.

(*f*) These words have always been held necessary; Wh. C. L. 271; and if the qualification of "malice aforethought" be omitted, the offence drops to manslaughter. In Arkansas, however, it would seem a conviction of murder can rest on an indictment where malice aforethought is not charged; Anderson *v.* State, 5 Pike 445.

(*g*) The common law rule in pleading the instrument of death is that where the instrument laid and the instrument proved are of the same nature and character, there is no variance; where they are of opposite nature and character, the contrary. Thus evidence of a dagger will support the averment of a knife, but evidence of a knife will not support the averment of a pistol. A very happy illustration of this distinction is found in Com. *v.* Haines, 6 Pa. L. J. 232. The defendant was charged with having erected a stuffed *Paddy* with intent to libel the *Catholic* Irish; and he endeavoured to defend himself by proof that the device was a stuffed *Shelah*, and the object was to annoy the *Protestant* Irish. The instructions of the court were invoked as to whether there was a variance; and Gibson J. said that if there was a mere averment of a Paddy, and evidence of a Shelah, the object and character of the figures being similar, there was no variance; but that if on the contrary they were devices of an antagonistic character, the indictment could not be supported. Where the method of operation is the same though the instrument is different, no variance exists: where the former is not the case, the rule is otherwise. The same reasoning applies to indictments for homicide. Where the species of death would be different, as if the indictment allege a stabbing or shooting, and the evidence prove a poisoning or starving, the variance is fatal; R. *v.* Briggs, 1 Mood. C. C. 318; and the same if the indictment state a poisoning, and the evidence prove a starving. Thus where an indictment stated that the defendant assaulted the deceased, and struck and beat him upon the head, and thereby gave him divers mortal blows and bruises, of which he died, and it appeared in evidence that the death was by the deceased falling on the ground, in consequence of a blow on the head received from the defendant; it was holden that the cause of the death was not properly stated; R. *v.* Thompson, 1 Mood. C. C. 139. But if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, staff, bill or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material; R. *v.* Mackally, 9 Co. 67 a; Gilb. Ev. 231; R. *v.* Briggs, 1 Mood. C. C. 318. So if the indictment allege a death by one kind of poison, proof of a death by another kind of poison will support the indictment; *ib.*, and see 2 Hale 185, 115; 2 Hawk. c. 23, s. 84. An indictment having charged that the prisoner, with both her hands about the neck of the deceased, the neck and throat of the deceased did squeeze and press, and by such squeezing, &c., did suffocate and strangle the deceased; and the evidence being that the prisoner suffocated the deceased by placing one hand on his mouth and the other on the back of his head; Patteson J. held that it was sufficient if the death was caused by suffocation, and that the evidence supported the indictment; R. *v.* Culkin, 5 C. & P. 121. And in another case the offence being charged to have been committed with a certain sharp instrument, and the evidence was that the wound was partly torn and partly cut, and was done with an instrument not sharp, Parke B. held the indictment proved, and said the degree of sharpness was immaterial; R. *v.* Grounsell, 7 C. & P. 788. And where an indictment for the murder of a bastard child stated that the defendant forced and thrust moss and dirt into its throat, mouth and nose, and that by forcing and thrusting the moss and dirt into the throat, mouth and nose of the child, the child was choked, &c., and it appeared that the child was not immediately suffocated by the moss and dirt, but that the moss and dirt caused an injury and inflammation in the throat, which closed the passage to the lungs and stomach, of which the child died; it was declared that the evidence supported the indictment, and that it was sufficient to state the proximate cause of the death, without stating the intermediate process resulting from that proximate cause; R. *v.* Tye, R. & R. 345. Where the prisoner was indicted for cutting the throat of the deceased, and a surgeon proved that what was technically called the throat was not cut, as the wound did not extend so far round the neck, Patteson J. held that the indictment must be understood to mean what is commonly called the throat; R. *v.* Edwards, 6 C. & P. 401. Where the indictment alleged that the defendant suffocated the deceased by placing her hand on the mouth of the deceased, and the jury found that the death was caused by suffocation, but could not say

how it was occasioned, Denman C. J., held the indictment proved; R. *v.* Waters, 7 C. & P. 250. But under an indictment for shooting with a pistol loaded with gunpowder and a leaden bullet, it appeared that there was no bullet in the room where the act was done, and no bullet in the wound; and it was proved that the wound might have been occasioned by the wadding of the pistol. Bolland B., Park and Parke Js., held the indictment not proved. See R. *v.* Hughes, 5 C. & P. 126. The same principle was applied where an indictment charged that the defendant struck the deceased with a brick, and it appeared that he knocked the deceased down with his fist, and that the deceased fell upon a brick which caused his death; R. *v.* Kelly, 1 Mood. C. C. 113. In New York a far more liberal rule has been announced, it having been substantially held that the use of a pistol might be proved under an indictment charging the weapon to have been a knife; People *v.* Colt, 3 Hill 432.

(*h*) The allegation of value is now immaterial, and need not be proved. In England, where deodands are still recognised, it may be necessary to introduce it; though the same object does not exist in this country. In the late edition of Hale's Pleas of the Crown, by Messrs. Stokes and Ingersoll, i. 424, will be found an interesting and curious exposition of the law of deodands, and of how far it may be made to press on this point.

(*i*) Though the hand in which the instrument was held is set out in the old forms, it is clearly not necessary to prove it; Arch. C. P. 10th ed. 407.

(*j*) The "him" which is here inserted is not usually introduced; and in several cases counts have been sustained without it, where the express exception was taken; Com. *v.* White, 6 Binn. 183. See Wh. C. L. 270–71, and *postea*. Perhaps its insertion, however, leads to greater clearness.

(*k*) It must be averred in what part of the body the deceased was wounded; and therefore, if it be said that the wound was on the arm, hand or side, without saying whether the right or the left, it is bad; 2 Hale 185. If, however, the wound be stated to be on the left side, and proved to be on the right, or alleged to be on one part of the body, and proved to be on another, the variance is immaterial; 2 Hale 186.

(*l*) The time need not be formally repeated, "then and there" carries the averment back to the original date; Stout *v.* Com., 11 S. & R. 177. See *ante*, p. 10. Even if the "then and there" be omitted, it would seem that the court will still give judgment on the indictment if the grammatical construction be such as to apply the time at the outset to the subsequent allegations; State *v.* Cherry, 3 Murph. 7. But where two distinct periods have been averred, the statement "then and there" is not enough; one particular time should be averred; Storrs *v.* State, 3 Miss. 45.

(*m*) The repetition of this phrase in this place has been held to be unnecessary in North Carolina; State *v.* Owen, 1 Murph. 452, though it is much safer to introduce it; Resp *v.* Honeyman, 2 Dall. 228.

(*n*) Wherever death is caused by physical violence, it is essential to the indictment that it should allege that the defendant struck the deceased; see 5 Co. 122 a; 2 Hale 184; 2 Hawk. c. 23, s. 82; and it must also be proved, though in Virginia it has been ruled that where the instrument was a dagger, "stab, stick and thrust," would be held equivalent to strike; Gibson *v.* Com., 2 Va. Cases 111. It is not necessary, however, to prove that he struck him with the particular instrument mentioned in the indictment; and therefore, although the indictment allege that the defendant did strike and thrust, proof of a striking which produced contused wounds only would maintain the indictment; Arch. C. P. 10th ed. 486.

(*o*) The indictment must distinctly state that the blow was struck by the instrument alleged. An indictment, however, charging "that A. B. with a certain stick, &c., in and upon the head and face of C. D., then and there did strike and beat, giving to the said C. D. then and there, with the stick aforesaid, in and upon the head and face of the said C. D., several mortal wounds, of which said several mortal wounds the said C. D. instantly died," is good; for there is in the first clause a direct allegation of a stroke, and the participle *giving*, and the words *then and there*, connect the allegation with the mortal wound in the second clause; Gibson *v.* Com., 2 Va. Cases 111. Where the allegation was, "that the prisoner in and upon M. F., &c., feloniously, &c., did make an assault with a certain gun, called a rifle gun, &c., then and there charged with gunpowder and two leaden bullets, which said gun he, &c., had and held, at and against the said M. F., then, &c., feloniously, &c., did shoot off and discharge, and that the said M. F, with the leaden bullets aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at and against the said M. F., as aforesaid, did, &c., feloniously, &c., strike, penetrate and wound the said M. F., in and upon the left side of the said M. F., &c., giving to her the said M. F., &c., with the leaden bullets aforesaid, by means of shooting off and discharging the said gun, so loaded, to, at and against the said M. F., and by such stricken, &c., the said M. F., as aforesaid, one mortal wound in and upon the left side of the said M. F.," &c.; on a motion to arrest the judgment, on the ground that there was no sufficient

averment that the gun was shot off, or that the contents were discharged, it was said that the inference seemed to be one of absolute certainty, that the contents of the gun were shot off and discharged, for there was nothing else to which the words "did shoot off and discharge" with a gun charged with gunpowder and leaden bullets, could be applied; State *v.* Freeman, 1 Spears 57; Wh. C. L. 270–71.

(*p*) The insertion of the pronoun "him" at this place, though not usual, tends to help the grammatical construction.

(*q*) Whatever may once have been thought, it has now been decided by the English judges, that it is not necessary to state in an indictment for murder, the length, breadth or depth of the wound; R. *v.* Mosley, 1 Mood. C. C. 97.

(*r*) The allegation of languishing, though proper in the cases where there actually is an intermission between the blow and the death, may be rejected as surplusage in all others; Pennsylvania *v.* Bell, Add. 171, 175.

(*s*) The dates here stated in the indictment need not be proved as laid, though an indictment upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective; because, when the death does not ensue within a year and a day after the wound is inflicted, the law presumes that it proceeded from some other cause; State *v.* Onell, 1 Dev. 139. All that is necessary to be proved, in order to support this part of the indictment is, that the deceased died of the wound or wounds given him by the defendant, within a year and day after he received them; as otherwise the case is not made out, 1 Hawk. c. 23, s. 90. Where it appeared that the man's death was caused by improper applications to the wound, and not by the wound itself, the defendant is not responsible; though if a man be wounded, and the wound turn to a gangrene or fever for want of proper applications, or from neglect, and the man die of the gangrene or fever; or if it become fatal from the refusal of the party to undergo a surgical operation, Reg. *v.* Holland, 2 M. & Rob. 351; this is homicide, and murder or not, according to the circumstances under which the wound was given; 1 Hale 421. An indictment against two defendants, which states the death to be the result of two different injuries inflicted by each of the defendants separately, on different days, is bad; Reg *v.* Devett, 8 C. & P. 639.

(*t*) In a very late English case, the second count of the indictment charged J. O. B. that he, "on the 27th of May, feloniously, and of his malice aforethought, struck the deceased with a stick, of which said mortal wound the deceased died on the 29th day of May; that T. R., D. D., &c., on the day and year first aforesaid, at the parish aforesaid, feloniously and of their malice aforethought, were present aiding and abetting the said J. O. B., the felony last aforesaid to do and commit;" and concluding "the jurors, &c., say that the said J. O. B., T. R., D. D., &c., him the deceased in manner and form last aforesaid, feloniously, and of their malice aforethought, did kill and murder." The third count charged T. R. that he, "on the 27th day of May, a certain stone feloniously, and of his malice aforethought, cast and threw, and which said stone, so cast and thrown, struck deceased, of which mortal blow the deceased died on the 29th of May, and that J. O B., D. D., &c., were present, aiding and abetting," &c., as in the first count. It was objected—1st, that the indictment was inconsistent, in charging the principals in the second degree with committing the felony at the time of the stroke, whereas it was no felony till the time of the death; and, 2d, that the general verdict of guilty, left it uncertain which was the cause of death, the stick or the stone, and that, therefore, no judgment could be entered on either. It was held—1st, that the form of the indictment was good; and, 2d, that the alleged generality was immaterial, the mode of death being substantially the same; Reg. *v.* O'Brian, 1 Den. C. C. 9. If several be charged as principals, one as principal perpetrator, and the others as present, aiding and abetting, it is not material which of them be charged as principal in the first degree, as having given the mortal blow, for the mortal injury done by any one of those present, is, in legal consideration, the injury of each and every one of them; Fost. 551; 1 East P. C. 350; State *v.* Fley & Rochelle, 2 Brev. 338; State *v.* Mair, 1 Coxe 453; see *ante*, p. 33. If the actual perpetrator of a murder should escape by flight, or die, those present, abetting the commission of the crime, may be indicted as principals; and though the indictment should state that the mortal injury was committed by him who is absent, or no more, yet if it be subsequently alleged that those who are indicted were present at the perpetration of the crime, and did kill and murder the deceased, by the mortal injury so done by the actual perpetrator, it will be sufficient; State *v.* Fley & Rochelle, 2 Brev. 338.

(*u*) In New York, though a common law indictment for murder will bring the case within the statutory felony, yet there can be no conviction under it unless the offence comes up to the grade assigned by the statute to a felonious and intentional homicide; People *v.* Enoch, 18 Wend. 159; see *ante*, p. 12.

In Pennsylvania, Com. *v.* White, 6 Binn. 183, and in North Carolina, 3 Iredell 117,

the statutory conclusion is unnecessary, and on an indictment concluding as at common law, the statutory punishment may be inflicted. In the latter case the question was discussed with great fulness by chief justice Ruffin. "The act of 1777," he said, "in requiring pleas of the state to be commenced in the district wherein the offence was committed, but followed the principle of the common law, that the cognizance of crime is local. It seems to the court, that the subsequent act of 1831, was intended for the sole purpose of modifying that provision in particular cases, by conferring a jurisdiction to try indictments for murder or manslaughter, where the whole offence was not perpetrated or was not fully constituted within one county or within this state. It provides, Rev. Stat. c. 35, s. 14, 15, first, that 'in all cases of felonious homicide, where the assault shall have been committed in one county of this state and the person assaulted shall die in any other county thereof, the offender shall and may be indicted and punished for the crime in the county where the assault was made;' and in the next place, that 'in all cases of felonious homicide, where the assault shall have been committed in this state, and the person assaulted shall die without the limits thereof, the offender shall and may be indicted and punished for the crime in the county where the assault was made, in the same manner to all intents and purposes as if the person assaulted had died within the limits of this state.' There is no offence newly created, nor raised to a higher offence, nor an additional punishment annexed, in any of which cases, it is admitted, the indictment ought to conclude *contra formam statuti*. In respect to a case, which occurs wholly in this state, the act is like that of 2 and 3 Ed. VI. c. 24, except that the English statute directs the trial to be in the county where the person died. It enacts that 'where any person shall be feloniously stricken in one county and die of the same stroke in another county, an indictment thereof, found by jurors of the county where the death shall happen, shall be as good and effectual in law as if the stroke had been given in the same county where the party shall die.'

"Mr. East says, this statute created no new felony, but merely removed the difficulty which existed in the trial; 1 East C. L. 365. Indeed it is obvious that it provides only a mode of trial for a known existing offence, 'where any person shall be feloniously stricken,' and die thereof, without defining or enacting what shall be such felonious striking, or what the punishment, but leaving that to the law as it stood. The same observations apply to another statute connected with this subject, that of 28 Hen. VIII. c. 15, which provides for the case of both the stroke and death taking place at sea. The words are, 'that all murders, &c. committed in and upon the sea, &c., shall be inquired, tried, determined and judged, in such shires as shall be limited by the king's commission, as if such offence had been committed upon the land.' So, likewise, of stat. 2 G. II. c. 21, which embraces the case of the stroke in England, and the death without it, or *vice versa*, of which the language is 'that an indictment thereof, found by the jurors, &c., shall be good and effectual, &c.' In prosecutions authorized by those acts, the indictments, as it seems, have always concluded at common law; Arch. C. P. 22, 57, 58; Dougherty C. C. 295; Cro. C. C. 278, 281; 3 Chit. C. L. 783. It is true, offenders are thereby punished, who could not be punished before. But the reason why they were not punished before, was, solely, that no court had authority to try them. It was not because the crime did not exist, for the crime, murder, is the killing of any person in the peace of the state, with malice aforethought, and that is constituted alike by killing with the evil disposition, be the places of assault and death where they may. Language of precisely the same character is found in our act. It does not say that killing a person with malice, when the stroke is in one county, and the death in another county or in another state, shall be deemed murder, or that on conviction the person shall be deemed a felon, and suffer death without the benefit of clergy. It does not profess to define 'felonious homicide,' or to constitute that crime by any particular acts, but merely says, that, in certain cases of felonious homicide, the offender may be indicted, and, of course, tried and punished in the country where the stroke was given; meaning, though it does not, like stat. 2 and 3 Ed. VI. expressly say so, 'in the same manner as if the death had happened in the same county where the stroke was given.' As the act of 28 Hen. VIII. c. 15, says, 'all murders committed on the sea shall be tried in a shire,' by commission of oyer and terminer; so our act says, in 'all cases of felonious homicide, &c., where, &c., the offender may be indicted, &c.' Besides, the character of our enactment may be further deduced from the circumstance that it is found in the Revised Statutes, in the 35th chapter on 'Criminal Proceedings,' and not in the preceding chapter on 'Crimes and Punishments.'

"It was, however, argued at the bar, that it was an essential part of the definition of murder, that the person slain should be in the peace of the state; and that, where the death occurs in another state, that requisite is deficient in the crime at common law, and therefore, it cannot be an offence against this state, unless made so by the statute. And upon that ground a distinction was taken between the English statutes and ours, inasmuch, as it was said, the statutes both of Ed. VI. and of Hen. VIII. provide for cases of killing,

Murder. By shooting with a pistol.(v)

That A. B. of, &c., yeoman, on with force and arms, at in the county aforesaid, in and upon the body of one C. D., in the peace of said commonwealth then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said A. B., a certain pistol, of the value of two dollars, then and there charged with gunpowder and one leaden bullet, which said pistol, he the said A. B. in his right hand then and there had and held, then and there feloniously, wilfully and of his malice aforethought, did discharge and shoot off, to, against and upon the said C. D.; and that the said A. B. with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said A. B. discharged and shot off as aforesaid, then and there feloniously, wilfully and of his malice aforethought, did strike, penetrate and wound him the said C. D. in and upon the right side of the belly of him the said C. D., giving to him the said C. D. then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said A. B., in and upon the right side of the belly of him the said C. D., one mortal wound of the depth of four inches, and of the breadth of half an inch; of which said mortal wound, he the said C. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said C. D., in the manner and by the means

in which the whole of the transaction occurred either in England, or within the jurisdiction of England, as exercised by her admiralty court. But we think the reasoning is not sound. That part of the definition of murder expressed in the terms, "on the king's peace,' refers not to the place of the assault and death, but to the state and condition of the person slain, as being or not being entitled to the protection of the English laws; for example, whether he be a subject or an alien enemy, or traitor in arms, or, in more ancient times, an infidel, or guilty of a *præmunire*. Then, it is also a mistake to say, that the acts are confined to cases in which every part of the transaction was within the jurisdiction of England, either as being within some of her territories, or on board of her ships. The act of Geo. II. before mentioned, provides for the case of one stricken in England and dying on the sea, or 'at any place out of England,' and we do not find that this has received a different construction from that of the previous statutes. We find an adjudication, however, upon another statute, which shows that the question does not depend on the ground supposed, but that the indictment is to conclude at common law, although *no part* of the transaction was within the British dominions or jurisdiction. By the stat. 33 Hen. VIII. c. 33, it is enacted, 'that if any person, being examined before the king's council upon any murder, do confess such offence, &c., then in such case a commission of oyer and terminer shall be made to such persons and into such shires and places as shall be appointed by the king, for the speedy trial, conviction or delivery of such offenders, which commissioners shall have power and authority to inquire, hear and determine such murders within the shires and places limited by their commission, by such good and lawful men as shall be returned before them, in whatever other shire or place within the king's dominion, or *without*, such offence of murder, so examined, was done or committed.' In Rex v. Sawyer, R. & R. C. C. 294, a British subject was indicted for the murder of another British subject, 'at Lisbon in the kingdom of Portugal, in parts beyond sea without England,' and the indictment was at common law. The case was argued before the twelve judges, and they held that, being for a common law felony, committed abroad, but made triable in England under the 33 Hen. VIII., the indictment was right. That judgment is directly in point, and is decisive of this case against the prisoner.

"It must therefore be certified to the Superior Court, that there is no error in the judgment given by that court, in order that further proceedings may be had thereon according to law."

(v) 3 Chit. C. L. 170; Davis' Precedents 170.

aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder. (*Conclude as in book* 1, *chap.* 3).

Murder. By cutting the throat.(*w*)

That A. B., of &c., on at in the county aforesaid, with force and arms, in and upon one C. D. feloniously, wilfully and of his malice aforethought, did make an assault; and that the said A. B., with a certain knife, made of iron and steel, which he the said A. B. in his right hand then and there had and held, the throat of him the said C. D. feloniously, wilfully and of his malice aforethought, did strike and cut; and that the said A. B., with the knife aforesaid, by the striking and cutting aforesaid, did then and there give to him the said C. D., in and upon the said throat of him the said C. D., one mortal wound, of the length of three inches, and of the depth of two inches; of which said mortal wound the said C. D., from the said day of to the day of aforesaid, at aforesaid, in the county aforesaid, did suffer and languish, and languishing did live; on which said day of aforesaid, in the year aforesaid, at aforesaid, in the county aforesaid, he the said C. D., of the said mortal wound, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. him the said C. D., in manner and form aforesaid, then and there feloniously, wilfully and of his malice aforethought, did kill and murder. (*Conclude as in chap.* 3).

Murder. Against principal in the first and principal in the second degree, for shooting a negro slave with a pistol.(*x*)

That T. P. K., late of the said County of Monroe, labourer, and D. C., late of said County of Monroe, labourer, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the fifth day of October, in the year of our Lord eighteen hundred and thirty-five, with force and arms, at the said County of Monroe, in and upon one P. a negro man slave, belonging to one G. P., in the peace of God and of the said State of Alabama, then and there being, feloniously, wilfully and of their malice aforethought, did make an assault; and that the said T. P. K., a certain pistol of the value of ten dollars, then and there loaded and charged with gunpowder and twenty leaden bullets, commonly called buckshot, which pistol he, the said T. P. K., in his right hand, then and there had and held, to, against and upon the said P., then and there feloniously, wilfully and of his malice aforethought, did shoot and discharge; and that the said T. P. K., with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder, shot and sent forth, as aforesaid, the aforesaid P., in and upon the buttocks of him the said P., a little above the rectum of him the said P., then and there, feloniously, wilfully and of his malice

(*w*) 3 Ch. C. L. 757; Davis' Precedents 173.
(*x*) This form was sustained in State v. Coleman, 5 Port. 32.

aforethought, did strike, penetrate and wound, giving to the said P. then and there, with the leaden bullets aforesaid, commonly called buckshot, as aforesaid, so as aforesaid shot, discharged and sent forth out of the pistol aforesaid, by the said T. P. K., in and upon the said buttocks of him, the said P., a little above the rectum of him, the said P., one mortal wound of the depth of six inches, and of the breadth of half an inch, of which said mortal wound the said P., from the said fifth day of October, in the year of our Lord eighteen hundred and thirty-five, until the thirteenth of the same month of October, in the year last aforesaid, in the county aforesaid, did languish, and languishing did live; on which said thirteenth day of October, in the year last aforesaid, the same P., at the county aforesaid, of the mortal wound aforesaid, died; and that the aforesaid D. C., then and there, feloniously, wilfully and of his malice aforethought, was present, aiding, helping, abetting and comforting, assisting and maintaining the said T. P. K., the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said T. P. K. and the said D. C., the said P. then and there, in manner and form aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Alabama.

Against principal in the first and principal in the second degree. Hanging.(*xx*)

That John Joyce, late of Philadelphia County, yeoman, and Peter Mathias, late of the same county, yeoman, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the eighteenth day of December, in the year of our Lord one thousand eight hundred and seven, with force and arms, in the county aforesaid, in and upon one Sarah Cross, in the peace of God and the commonwealth, then and there being feloniously, wilfully and of their malice aforethought, did make an assault; and that he the said John Joyce, a certain rope of the value of five cents, on and about the neck of her the said Sarah Cross, then and there feloniously, wilfully and of his malice aforethought did fix, tie and fasten, and that the said John Joyce with the rope aforesaid, so as aforesaid fastened on and about the neck of her the said Sarah Cross, her the said Sarah Cross then and there feloniously, wilfully and of his malice aforethought, did choke, suffocate and strangle, of which said choking, suffocating and strangling, she the said Sarah Cross then and there instantly died, and that the said Peter Mathias, at the time of committing the felony and murder aforesaid by the said John Joyce in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, was present, aiding, helping and abetting, assisting, comforting and maintaining the said John Joyce, the felony and

(*xx*) Drawn by Mr. J. B. M'Kean, and sustained by the Supreme Court.

murder aforesaid in manner and form aforesaid, to do, commit and perpetrate. And so the inquest aforesaid, upon their oaths and affirmations aforesaid, do say, that the said John Joyce and Peter Mathias, her the said Sarah Cross, then and there in manner and form aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, contrary to the form of the act of assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Second count. Against same. Beating and hanging.

And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present that the said John Joyce and Peter Mathias, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the said eighteenth day of December, in the year aforesaid, with force and arms in the county aforesaid, in and upon the said Sarah Cross, in the peace of God and the commonwealth then and there being, feloniously, wilfully and of their malice aforethought, did make an assault, and that he the said John Joyce with a certain large stick of no value, which he the said John Joyce in his right hand, then and there had and held, her the said Sarah Cross then and there feloniously, wilfully and of his malice aforethought, divers times did strike and beat, giving to her the said Sarah Cross then and there by striking and beating of her the said Sarah Cross as aforesaid, with the stick aforesaid, in and upon the back part of the head of her the said Sarah Cross, one mortal bruise, and that the said John Joyce also a certain rope of the value of five cents, on and about the neck of her the said Sarah Cross, then and there feloniously and wilfully, and of his malice aforethought, did fix, tie and fasten, and that the said John Joyce with the rope last aforesaid, so as last aforesaid, fixed, tied and fastened on and about the neck of her the said Sarah Cross, then and there did violently squeeze, press and bind her the said Sarah Cross; of which said striking and beating of her the said Sarah Cross in and upon the back part of the head of her the said Sarah Cross with the stick aforesaid, and also of the squeezing, pressing and binding of the neck of her the said Sarah Cross with the rope as last aforesaid, she the said Sarah Cross then and there instantly died; and that the said Peter Mathias, at the time of committing the felony and murder last aforesaid, by the said John Joyce in manner and form last aforesaid, feloniously, wilfully and of his malice aforethought, was present aiding, helping, abetting and assisting, comforting and maintaining the said John Joyce, the felony and murder last aforesaid in manner and form last aforesaid to do, commit and perpetrate.

And so the inquest aforesaid upon their oaths and affirmations aforesaid, do further say, that the said John Joyce and Peter Mathias, her the said Sarah Cross then and there in manner and form last aforesaid, feloniously and wilfully and of their malice aforethought did kill and murder, contrary to the form of the act of assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

Murder. Striking with a poker.(y)

That C. D., of said B., labourer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., feloniously, wilfully and of his malice aforethought, did make an assault; and that he the said C. D. then and there with a certain iron poker, which he the said C. D. in both his hands then and there had and held, the said E. F., in and upon the back part of the head of him the said E. F., then and there feloniously, wilfully and of his malice aforethought, did strike, giving unto him the said E. F. then and there, with the said iron poker, by the stroke aforesaid, in manner aforesaid, in and upon the back part of the head of him the said E. F., one mortal wound, of the length of three inches, and of the depth of one inch; of which said mortal wound, he the said E. F., on the said day of at B. aforesaid, in the county aforesaid, did languish, and languishing did live; on which same day of aforesaid, at B. aforesaid, in the county aforesaid, he the said E. F., of the said mortal wound, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder. (*Conclude as in book* 1, *chapter* 3).

Murder. By riding over with a horse.(z)

That C. D., of said B., labourer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., feloniously, wilfully and of his malice aforethought, did make an assault; and that the said C. D. then and there riding upon a horse, the said horse in and upon the said E. F. then there feloniously, wilfully and of his malice aforethought, did ride and force, and him the said E. F., with the horse aforesaid, then and there, by such riding and forcing as aforesaid, did throw to the ground; by means whereof the said horse, with his hinder feet, him the said E. F., so thrown to and upon the ground as aforesaid, in and upon the back part of the head of him the said E. F., did then and there strike and kick, thereby then and there giving to him the said E. F., in and upon the back part of the head of him the said E. F., one mortal fracture and contusion, of the breadth of two inches, and of the depth of one inch; of which said mortal fracture and contusion, the said E. F. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder. (*Conclude as in book* 1, *chapter* 3).

Murder. By drowning.

That C. D., of said B., labourer, on the day of now last past, with force and arms, at B. aforesaid, in the county afore-

(y) 3 Chit. C. L. 761; Davis' Precedents 175.
(z) 3 Chit. C. L. 765; 2 Stark. C. P. 380; Davis' Precedents 177.

said, in and upon one E. F., feloniously, wilfully and of his malice aforethought, did make an assault; and that the said C. D. then and there feloniously, wilfully and of his malice aforethought, did take the said E. F. into both the hands of him the said C. D., and did then and there feloniously, wilfully and of his malice aforethought, cast, throw and push the said E. F. into a certain pond there situate, wherein there was a great quantity of water; by means of which said casting, throwing and pushing of the said E. F. into the pond aforesaid, by the said C. D., in form aforesaid, he the said E. F., in the pond aforesaid, with the water aforesaid, was then and there choked, suffocated and drowned; of which said choking, suffocation and drowning, he the said E. F. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, him the said E. F. feloniously, wilfully and of his malice aforethought, did kill and murder.(*a*) (*Conclude as in book* 1, *chapter* 3).

Murder. By strangling.(*b*)

That E. W. K., late, &c., not having the fear, &c., but being moved, &c., on, &c., in and upon one J. D., in the peace, &c., feloniously, wilfully and of his malice aforethought, did make an assault, and that the said E. W. K. a certain rope about the neck of the said J. D. then and there feloniously and wilfully, and of his malice aforethought, did fix, tie and fasten, and that the said E. W. K. with the rope aforesaid, (*him*) the said J. D. then and there feloniously and wilfully, and of his malice aforethought, did drag, pull, choke, strangle and dislocate the neck; of which said dragging, pulling, choking, strangling and dislocation of the neck, he the said J. D. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. W. K. in, &c., the said J. D. in manner and form aforesaid, feloniously and wilfully, and of his malice aforethought, did kill and murder, against the peace, &c.

Second count. By strangling and stabbing with unknown persons.

And the jurors aforesaid, upon their oath aforesaid, do further pre-

(*a*) 3 Chit. C. L. 768; Davis' Precedents 181.

(*b*) This indictment, with a little qualification in the first count, is the same with that sanctioned by the Supreme Court of North Carolina in State *v.* Haney, 2 Dev. 432. "It is lastly urged," said the court, that upon a critical construction of the indictment, it does not more appear, that Kimbrough dragged, pulled and choked Davis, than that Davis dragged, pulled and choked Kimbrough. However this may be upon the first count, I think no such objection as this appears on the second. In that count it is charged that Kimbrough made an assault upon Davis, and that Kimbrough placed a rope around Davis' neck, and that the said Kimbrough, by means of said rope, the said John Davis did choke and strangle; and the said Kimbrough, with a dagger, which he then in his hand held, the said John Davis, in and upon the belly of the said John Davis, did thrust and penetrate, giving to him the said John Davis, with the said dagger, in and upon the belly of him the said John Davis, a mortal wound, of which the said John Davis died on the next day; with a conclusion, that he the said Kimbrough, the said John Davis did kill and murder. Human ingennity cannot make out of this, that it stands indifferent, whether Kimbrough or Davis was the actor in all and every act necessary to constitute murder, or which was the agent and which the sufferer, not only in the close of the drama, but in each and every act which led to the catastrophe."

The difficulty raised as to the first count is obviated by the insertion of "him" in the seventh line.

sent, that the said E. W. K. with divers other persons, &c., afterwards, to wit, &c., not having the fear, &c., in and upon the said J. D. in the peace, &c., feloniously, wilfully and of their malice aforethought, did make an assault, and that the said E. W. K. a certain rope about the neck of the said J. D. then and there feloniously, wilfully and of their malice aforethought, did fix, tie and fasten; and that the said E. W. K. by means of said rope, him the said J. D. then and there feloniously, wilfully and of his malice aforethought, did drag, pull, choke and strangle; and that the said E. W. K. with a certain drawn dagger, being part of a walking-cane, &c., which he the said E. W. K. in his right hand then and there had and held, him the said J. D. in and upon the forepart of the belly and divers other parts of the body of the said J. D. then and there feloniously, wilfully and of his malice aforethought, did strike, thrust and penetrate, giving to the said J. D. then and there, with the dagger aforesaid, in and upon the aforesaid forepart of the belly and divers other parts of the body of the said J. D., several mortal wounds of the breadth of one inch, and of the depth of six inches; as well of which pulling, dragging, choking and strangling, as also of the striking, thrusting and penetrating, &c., he the said J. D. from, &c., until, &c., did languish, &c., on which, &c., the said J. D. in, &c., of the pulling, dragging, choking and strangling, as well as of the mortal wounds inflicted as aforesaid, died; and that divers other persons, &c. And so the jurors, &c., do further say, that the said E. W. K. and divers other persons, the said J. D. then and there in manner and form last aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, against the peace, &c.

Murder. By poisoning with arsenic.(c)

That Robert Sandys, late of the parish of Stockport in the county of Chester, labourer, and Ann Sandys, otherwise called Ann Devannah, late of the same place, not having the fear of God before their eyes, but being moved and seduced by the instigations of the devil, wickedly contriving and intending one Elizabeth Sandys with poison, wilfully, feloniously and of their malice aforethought to kill and murder, on the twenty-third day of September, in the fourth year of the reign of our sovereign lady Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully and of their malice aforethought, a large quantity of a certain deadly poison called white arsenic, did give and administer unto the said Elizabeth Sandys with intent that she should take and swallow down the same into her body (they then and there well knowing the said white arsenic to be a deadly poison), and the said white arsenic so given and administered unto her by the said Robert Sandys and Ann Sandys, otherwise called Ann Devannah as aforesaid, the said Elizabeth Sandys did then and there take and swallow down into her body;

(c) R. *v.* Sandys, 1 C. & M. 345. A verdict of guilty was supported on this form, it being held that the allegation "and of the said mortal sickness died," was good without stating that the deceased died of the poisoning. See another form on p. 57.

by reason and by means of which said taking and swallowing down the said white arsenic into her body as aforesaid, the said Elizabeth Sandys became and was mortally sick and distempered in her body, of which said mortal sickness and distemper the said Elizabeth Sandys from the said twenty-third day of September, in the year last aforesaid, until the twenty-fifth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid, did languish and languishing did live, on which said twenty-fifth day of September, in the year aforesaid, at the parish aforesaid, in the county aforesaid, the said Elizabeth Sandys of the said mortal sickness died; and so the jurors aforesaid upon their oath aforesaid, do say that the said Robert Sandys and Ann Sandys, otherwise called Ann Devannah, the said Elizabeth Sandys in manner and form aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

Murder. By burning a house where the deceased was at the time.(*d*)

That S. C. late, &c., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of April, one thousand eight hundred and thirty, with force and arms, &c., at the township aforesaid, in the county aforesaid, and within the jurisdiction of this court, did wilfully and maliciously burn a certain dwelling house of one R. S., there situate, and that one J. H., of the township and county aforesaid, within the jurisdiction aforesaid, in the said dwelling house then and there being, before, at and during the said burning, and was then and there, by reason and means of the said burning so committed and done by the said S. C., in manner aforesaid, mortally burned and killed; and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said S. C., him the said J. H., in manner and form aforesaid, feloniously and wilfully, and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.

Second count. Averring a preconceived intention to kill.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said S. C., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought contriving and intending one J. H., there being in a certain dwelling house of one R. S., situate in the township and county aforesaid, feloniously, wilfully and of his malice aforethought, to burn, kill and murder, on the same day and year aforesaid, with force of arms, at the township aforesaid, in the county and within the jurisdiction aforesaid, did wilfully and maliciously set fire to and burn the said dwelling house, the said J. H. then and there, before, at and during the said burning, being in the said dwelling house, he the said S. C., then and there well knowing the said J. H. to be in the said dwelling house, and that he the said S. C., in so setting fire to and burning the said dwelling house as afore-

(*d*) State v. Cooper, 1 Green 362; see *postea*, book vi.—"Plea of autrefois acquit," for the subsequent action of the court on this indictment.

said, then and there feloniously, wilfully and of his malice aforethought, did mortally burn the body of the said J. H.; by means of which said mortally burning of the body of the said J. H., as aforesaid, he, the said J. H., on the day and year aforesaid, at the township aforesaid, in the county and within the jurisdiction aforesaid, did die; and so the jurors aforesaid, upon their oaths aforesaid, do say that the said S. C., the said J. H., in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the form, &c.

Murder. By starving.(*e*)

Middlesex, to wit: The jurors for our lady the queen, upon their oaths present, that J. S., late of the parish of B., in the county of M., carpenter, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and of his malice aforethought, contriving and intending one J. N., then being an apprentice to him the said J. S., feloniously to starve, kill and murder, on the third day of August, in the ninth year of the reign of our sovereign lady Victoria, and on divers days and times between that day and the twenty-eighth day of the same month, in the same year, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., his apprentice as aforesaid, in the peace of God and of our said lady the queen, then and there being, feloniously, wilfully and of his malice aforethought, did make divers assaults; and that the said J. S., on the said third day of August, in the year last aforesaid, at the parish aforesaid, in the county aforesaid, him the said J. N., in a certain room in the dwelling house of him the said J. S. there situate, feloniously, wilfully and of his malice aforethought, did secretly confine and imprison, and that the said J. S., from the said third day of August, in the year last aforesaid, until the twenty-eighth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid, feloniously, wilfully and of his malice aforethought, did neglect, omit and refuse to give and administer, and to permit and suffer to be given and administered to him the said J. N., sufficient meat and drink necessary for the sustenance, support and maintenance of the body of him the said J. N.; by means of which said confinement and imprisonment, and also of such neglecting and refusing to give and administer, and to permit and suffer to be given and administered to the said J. N., such meat and drink as were sufficient and necessary for the sustenance, support and maintenance of the body of him the said J. N., he the said J. N., from the said third day of August, in the year last aforesaid, until the twenty-eighth day of the same month, in the same year, at the parish aforesaid, in the county aforesaid, did languish, &c. &c.

(*e*) Arch. C. P. 405. If the indictment be for refusing to supply the apprentice with necessaries, it must state that the apprentice was of tender years unable to provide for himself; Reg. *v.* Friend, R. & R. 20; Reg. *v.* Marriott, 8 C. & P. 425. Where the indictment charges an imprisoning, that sufficiently shows the duty to supply food; but if it do not, then it must allege a duty in the defendant to supply the deceased with food; Reg. *v.* Edwards, 8 C. & P. 611; see as to evidence, Arch. C. P. 406, *et seq.* It is necessary, also, to prove that J. N. was the apprentice of J. S., or at least acted as such; Arch. C. P. 513.

Murder. First count, by choking, against two—one as principal in the first degree, and the other in the second degree.(*f*)

That J. W., late of the county aforesaid, yeoman, and H. N., late of the county aforesaid, widow, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the tenth day of April, in the year one thousand eight hundred and twenty-five, at the county aforesaid, and within the jurisdiction of this court, with force and arms, in and upon one G. H. W., in the peace of God and of the commonwealth, then and there being, feloniously, wilfully and of their malice aforethought, did make an assault, and that he the said J. W., a certain muslin handkerchief of the value of twelve cents, about the neck of him the said G. H. W., then and there feloniously, wilfully and of his malice aforethought, did fix, tie and fasten, and that the said J. W., with the muslin handkerchief aforesaid, him the said G. H. W., then and there feloniously, wilfully and of his malice aforethought, did choke, suffocate and strangle; of which said choking, suffocating and strangling, he the said G. H. W., then and there instantly died. And that she the said H. N., at the time of the committing of the felony and murder aforesaid, in manner and form aforesaid, feloniously, wilfully and of her malice aforethought, was present aiding, abetting and counseling the said J. W., the felony and murder aforesaid to do and commit; and so the inquest aforesaid, upon their oaths and affirmation aforesaid, do say, that the said J. W. and the said H. N., the said G. H. W., in manner and form aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, contrary to the form of the acts of the general assembly in such case made and provided, and against, &c.

Second count, by choking and beating. Against two—one as principal in first degree, the other in second degree.

And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said J. W., and the said H. N., not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the said tenth day of April, in the year one thousand eight hundred and twenty-five, at the county aforesaid, and within the jurisdiction of this court, with force and arms, in and upon the said G. H. W., in the peace of God and of the commonwealth then and there being, feloniously, wilfully and of their malice aforethought, did make an assault, and that he the said J. W., a certain muslin handkerchief of the value of twelve cents, about the neck of him the said G. H. W., then and there feloniously, wilfully and of his malice aforethought, did fix, tie and fasten, and that the said J. W. with the muslin handkerchief aforesaid, the neck of him the said G. H. W., then and there feloniously, wilfully and of his malice aforethought, did violently squeeze and press, and that the said J. W., with a certain large stick of the value of one cent, which he the said J. W., then and there in his right hand had and held, him the said G. H. W., in and upon the right side of the

(*f*) See p. 52, for another form.

head of him the said G. H. W., then and there feloniously, wilfully and of his malice aforethought, did strike and beat, then and there giving to the said G. H. W., by then and there so striking and beating him the said G. H. W. with the stick aforesaid in and upon the right side of the head of the said G. H. W., one mortal bruise of the length of two inches, and of the breadth of one inch; of which said violent squeezing and pressing of the neck of him the said G. H. W., as well as of the said striking and beating of him the said G. H. W., in and upon the right side of the head of him the said G. H. W., with the stick aforesaid, he the said G. H. W., then and there instantly died; and that she the said H. N., at the time of the committing of the felony and murder last aforesaid, in manner and form aforesaid, feloniously, wilfully and of her malice aforethought was present aiding, abetting and counseling the said J. W. the felony and murder last aforesaid, to do and commit; and so the inquest aforesaid, upon their oaths and affirmations aforesaid, do say, that the said J. W. and the said H. N., the said G. H. W., in manner and form last aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, contrary to the form of the act of the general assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Murder by poisoning. First count with arsenic, in chicken soup.(g)

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the body of the County of Bucks, upon their oaths and solemn affirmations respectively, do present that Lucretia Chapman, late of the county aforesaid, widow, otherwise called Lucretia Espos y Mina, late of the county aforesaid, widow, and Lino Amalia Espos y Mina, late of the county aforesaid, yeoman, otherwise called Celestine Armentarius, late of the county aforesaid, yeoman, otherwise called Amalia Gregoria Zarrier, late of the county aforesaid, yeoman, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, and of their malice aforethought contriving and intending a certain William Chapman to deprive of his life, and him the said William Chapman, feloniously to kill and murder, on the twentieth day of June, in the year of our Lord one thousand eight hundred and thirty-one, and on divers other days and times between the said twentieth day of June, in the year last aforesaid, and the twenty-third day of June, in the same year, with force and arms at the county aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, feloniously and of their malice aforethought, mix and mingle certain deadly poison, called arsenic, in certain chicken soup, which had been, at divers days and times, during the time aforesaid, prepared for the use of the said William Chapman, to be drunk by him the said William Chapman, (they the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, and the said Lino Amalia Espos y Mina, otherwise called

(g) Com. v. Mina, Court of O. & T. of Bucks County, 1831. The defendant Mina was convicted and executed. See p. 53, for another form.

Celestine Armentarius, otherwise called Amalia Gregoria Zarrier, then and there well knowing that the said chicken soup with which they, the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, and the said Lino Amalia Espos y Mina, otherwise called Celestine Armentarius, otherwise called Amalia Gregoria Zarrier, did so mix and mingle the said deadly poisons as aforesaid, was then and there prepared for the use of the said William Chapman, with intent to be then and there administered to him for his drinking the same), and the said chicken soup with which the said deadly poison was so mixed as aforesaid, afterwards, to wit, on the said twentieth day of June, in the year last aforesaid, and on the said other days and times last mentioned, at the county and within the jurisdiction aforesaid, was delivered to the said William Chapman, to be then and there drunk by him, the said William Chapman, and he the said William Chapman (not knowing the said poison to have been mixed with the said chicken soup, did, afterwards, to wit, on the said twentieth day of June, in the year of our Lord one thousand eight hundred and thirty-one, and on the said other days and times above mentioned, there drink and swallow down into his body several quantities of the said deadly poison so mixed as aforesaid with the said chicken soup, and the said William Chapman of the poison aforesaid and by the operation thereof then and there became sick and greatly distempered in his body, of which said sickness and distemper of body, occasioned by the said drinking, taking and swallowing down into the body of the said William Chapman of the deadly poisons aforesaid, so mixed and mingled in the said chicken soup as aforesaid, he the said William Chapman from the said several days and times on which he has so taken, drunk and swallowed down the same as aforesaid, until the said twenty-third day of June, in the year last aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, did languish, and languishing did live, on which said twenty-third day of June, in the year last aforesaid, at the county and within the jurisdiction aforesaid, he, the said William Chapman, of the poison aforesaid, so taken, drunk and swallowed down as aforesaid, and of the said sickness and distemper occasioned thereby, did die. And so the inquest aforesaid, upon their oaths and solemn affirmations aforesaid do say, that the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, and the said Lino Amalia Espos y Mina, otherwise called Celestine Armentarius, otherwise called Amalia Gregoria Zarrier, him, the said William Chapman then and there in the manner and by the means aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, contrary to the form of the act of the general assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Second count. Against one defendant as principal in the first, and the other as principal in the second degree.

And the inquest aforesaid, inquiring as aforesaid, upon their oaths and solemn affirmations aforesaid, do further present, that the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil and of her malice aforethought, wick-

edly contriving and intending the said William Chapman to deprive of his life, and the said William Chapman feloniously to kill and murder on the twentieth day of June, in the year of our Lord one thousand eight hundred and thirty-one, and on divers other days and times between the said twentieth day of June, in the year last aforesaid, and the twenty-third day of June in the same year, with force and arms at the county aforesaid, and within the jurisdiction of this court, did, feloniously, wilfully and of her malice aforethought, mix and mingle certain deadly poison, called arsenic, in certain chicken soup, which had been at divers days and times, during the time aforesaid, prepared for the use of the said William Chapman, to be drunk by him, the said William Chapman (she, the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, then and there well knowing that the said chicken soup with which she, the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, did so mix and mingle the said deadly poison as aforesaid, was then and there prepared for the use of the said William Chapman, with intent to be then and there administered to him for his drinking the same), and the said chicken soup with which the said deadly poison was so mixed as aforesaid, afterwards, to wit, on the said twentieth day of June, in the year of our Lord one thousand eight hundred and thirty-one, and on the said other days and times last mentioned, at the county and within the jurisdiction aforesaid, was delivered to the said William Chapman, to be then and there drunk by him, the said William Chapman, and he the said William Chapman (not knowing the said poison to have been mixed with the said chicken soup), did afterwards, to wit, on the said twentieth day of June, in the year last aforesaid, and on the said divers other days and times above mentioned, there drink and swallow down into his body several quantities of the said deadly poison so mixed as aforesaid with the said chicken soup, and the said William Chapman of the poison aforesaid, and by the operation thereof, then and there became sick and greatly distempered in his body, of which said sickness and distemper of body, occasioned by the said drinking, taking and swallowing down into the body of the said William Chapman of the deadly poison aforesaid, so mixed and mingled in the said chicken soup as aforesaid, he, the said William Chapman, from the said several days and times, on which he had so taken, drunk and swallowed down the said deadly poison as aforesaid, until the said twenty-third day of June, in the year last aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, did languish, and languishing did live, on which said twenty-third day of June, in the year last aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, he the said William Chapman, of the poison aforesaid so taken, drunk and swallowed down as aforesaid, and of the said sickness and distemper occasioned thereby, did die. And that the said Lino Amalia Espos y Mina, otherwise called Celestine Armentarius, otherwise called Amalia Gregoria Zarrier, then and there feloniously, wilfully and of his malice aforethought, was present, aiding and abetting the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, the felony and murder aforesaid, in manner and form last aforesaid, to do and

commit. And so the inquest aforesaid, upon their oaths and solemn affirmations aforesaid do say, that the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, and the said Lino Amalia Espos y Mina, otherwise called Celestine Armentarius, otherwise called Amalia Gregoria Zarrier, him the said William Chapman, then and there, in the manner and form last aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, contrary to the form of the act of assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Third count. Against one as principal and the other as accessary before the fact.

And the inquest aforesaid, inquiring as aforesaid, upon their oaths and solemn affirmations aforesaid, do further present, that the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought, contriving and intending a certain William Chapman to deprive of his life, and the said William Chapman, feloniously, wilfully and of her malice aforethought, to kill and murder with poison, on the twentieth day of June, in the year of our Lord one thousand eight hundred and thirty-one, and on divers other days and times, between the said twentieth day of June, in the year last aforesaid, and the twenty-third day of June in the same year, with force and arms, at the county aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, feloniously and of her malice aforethought, mix and mingle certain deadly poison, called arsenic, in certain chicken soup, which had been at divers days and times, during the time aforesaid, prepared for the use of the said William Chapman, to be drunk by him, the said William Chapman (she, the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, then and there, well knowing that the said chicken soup with which she, the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, did so mix and mingle the said deadly poison as aforesaid, was then and there prepared for the use of the said William Chapman, with intent to be then and there administered to the said William Chapman for his drinking the same), and that the said William Chapman afterwards, to wit, on the twentieth day of June, in the year last aforesaid, and on the said other days and times last mentioned, at the county aforesaid, and within the jurisdiction aforesaid, did take, drink and swallow down into his body several quantities of the said chicken soup, with which the said arsenic was so mixed and mingled by the said Lucretia Chapman, otherwise called Lucretia Espos y Mina as aforesaid (he the said William Chapman, at the time he so took, drank and swallowed down into his body the said chicken soup, not knowing there was any arsenic or any other poisonous or hurtful ingredient mixed or mingled with the said chicken soup), by means whereof he, the said William Chapman, then and there became sick and greatly distempered in his body, and the said William Chapman, of the poison aforesaid so by him taken, drunk and swallowed as aforesaid, and of the sickness occasioned thereby, from the said several days and times on which he, the said William Chapman, had so taken, drunk and

swallowed down the same deadly poison as aforesaid, until the said twenty-third day of June, in the year last aforesaid, at the county and within the jurisdiction aforesaid, did languish, and languishing did live, on which said twenty-third day of June, in the year last aforesaid, at the county and within the jurisdiction aforesaid, he the said William Chapman, of the poison aforesaid, so by him taken, drunk and swallowed down, and of the sickness and distemper occasioned thereby, did die.

And that the aforesaid Lino Amalia Espos y Mina, otherwise called Celestine Armentarius, otherwise called Amalia Gregoria Zarrier, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, before the said felony and murder committed, to wit, on the said twentieth day of June, in the year of our Lord one thousand eight hundred and thirty-one, at the county aforesaid, and within the jurisdiction of this court, with force and arms, feloniously, wilfully and of his malice aforethought, did incite, instigate, stir up, counsel, direct, advise, command, aid, abet, move and procure her, the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, the felony and murder aforesaid, in manner and form aforesaid, to do and commit.

And so the inquest aforesaid, upon their oaths and solemn affirmations aforesaid, do say, that the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, him the said William Chapman, then and there, in manner and form last aforesaid, feloniously, wilfully and of her malice aforethought, did kill and murder, and that he, the said Lino Amalia Espos y Mina, otherwise called Celestine Armentarius, otherwise called Amalia Gregoria Zarrier, feloniously, wilfully and of his malice aforethought, in manner and form aforesaid, at the county aforesaid, and within the jurisdiction of this court, her the said Lucretia Chapman, otherwise called Lucretia Espos y Mina, did aid, abet, counsel, direct, advise and instigate the felony and murder aforesaid, in manner and form aforesaid, to commit and perpetrate, contrary to the form of the act of assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

By placing poison so as to be mistaken for medicine.(*h*)

That C. D., of said B., labourer, feloniously, and of his malice aforethought, devising and intending one E. F. to poison, kill and murder, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain quantity of arsenic, to wit, two drachms of arsenic, being a deadly poison, feloniously, wilfully and of his malice aforethought, did put, infuse, mix and mingle in and together, with water, he the said C. D. then and there well knowing the said arsenic to be a deadly poison; and that the said C. D. the said arsenic, so as aforesaid put, infused in and mixed and mingled in and together with water, into a certain glass phial, did put and pour; and the said glass phial, with the said arsenic put,

(*h*) Cro. C. A. 297-9; 2 Stark. C. P. 369; Chit. C. L. 774; Davis' Prec. 183.

infused in and mixed and mingled in and together with water as aforesaid contained therein, then and there, to wit, on the day of in the year aforesaid, with force and arms, at B. aforesaid, feloniously, wilfully and of his malice aforethought, in the lodging room of the said E. F. did put and place, in the place and stead of a certain salutary medicine then lately before prescribed and made up for the said E. F., and to be taken by him the said E. F., he the said C. D. then and there feloniously, wilfully and of his malice aforethought, intending that the said E. F. should drink and swallow down into his body the said arsenic, put, infused, mixed and mingled in and together with water as aforesaid, contained in the said glass phial, by mistaking the same as and for the said salutary medicine, so prescribed and made up for the said E. F., and to be by him the said E. F. taken as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. F., not knowing the said arsenic, put, infused in and mixed together with water as aforesaid, contained in the said glass phial, so put and placed by the said C. D., in the lodging room of the said E. F., in the place and stead of the said salutary medicine, then lately before prescribed and made up for the said E. F., to be taken by him the said E. F., in manner aforesaid, to be a deadly poison, but believing the same to be the true and real medicine, then lately before prescribed and made up for, and to be taken by him the said E. F., afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said arsenic, so as aforesaid put, infused in and mixed together with water, by the said C. D., as aforesaid, contained in the said glass phial, so put and placed by the said C. D., in the lodging room of him the said E. F. in the place and stead of the said medicine, then lately before prescribed and made up for the said E. F., he the said E. F. did take, drink and swallow down into his body; by means of which said taking, drinking and swallowing down into the body of him the said E. F. of the said arsenic, so as aforesaid put, infused in and mixed together with water by the said C. D. as aforesaid, he the said E. F. then and there became sick and distempered in his body; of which sickness and distemper of body, occasioned by the said taking, drinking and swallowing down into the body of him the said E. F., and of the said arsenic, so as aforesaid put, infused in and mixed together with water by the said C. D. as aforesaid, he the said E. F. on the said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did poison, kill and murder. (*Conclude as in book* 1, *chapter* 3).

Murder of a child by poison.(*i*)

That C. M., &c., contriving and intending to kill and murder one G.

(*i*) R. v. Michael, 9 C. & P. 356; 2 Mood. C. C. 120. The prisoner purchased a bottle of laudanum, and directed the person who had charge of the child to give it a teaspoonful

M., &c., on the thirty-first day of March, in the third year of the reign of her present majesty, upon the said G. M., feloniously, &c., did make an assault, and that the said C. M., a large quantity, to wit, half an ounce weight, of a certain deadly poison called laudanum, feloniously, &c., did give and administer unto the said G. M. with intent that he should take and swallow the same down into his body (she the said C. M. then and there well knowing the said laudanum to be a deadly poison), and the said G. M. the said laudanum so given and administered unto him by the said C. M. as aforesaid, did take and swallow down into his body; by reason and by means of which said taking and swallowing down the said laudanum into his body, as aforesaid, the said G. M. became and was mortally sick and distempered in his body, of which said mortal sickness and distemper the said G. M. from, &c., till, &c., did languish, &c., and died; (*and concluding in the usual form, as in cases of murder*).

By mixing white arsenic with wine, and sending it to deceased, &c.(*j*)

That A. B., late of &c., of his malice aforethought, contriving and intending one C. D., with poison, feloniously to kill and murder, on with force and arms, at a large quantity of white arsenic, being a deadly poison, with a certain quantity of wine, feloniously, wilfully and of his malice aforethought, did mix and mingle; he the said A. B. then and there well knowing the said white arsenic to be a deadly poison; and that the said A. B. afterwards, to wit, on the day of at aforesaid, the poison aforesaid, so as aforesaid mixed and mingled with the wine aforesaid, feloniously, wilfully and of his malice aforethought, did send to her the said C. D. to take, drink and swallow down; and that the said C. D., not knowing the poison aforesaid in the wine aforesaid to have been mixed and mingled as aforesaid, afterwards, to wit, on at aforesaid, the said poison, so as aforesaid mixed and mingled, by the persuasion and procurement of the said A. B., did take, drink and swallow down; and thereupon the said C. D., by the poison aforesaid, so mixed and mingled as aforesaid by the said A. B., and so taken, drank and swallowed down as aforesaid, became then and there sick and distempered in her body, and the said C. D. of the poison aforesaid, and of the sickness and distemper occasioned thereby, from the said day of until the day of at aforesaid, in the county aforesaid, did languish, and languishing, did live; on which said day of she the said C. D., at aforesaid, in the county aforesaid, of the poison aforesaid, and of the sickness and distemper thereby occasioned as aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. her the said C. D., in manner and form, and by the means aforesaid, then and there feloniously, wilfully and of his malice aforethought, did kill and murder. (*Conclude as in book* 1, *chapter* 3).

every night. That person did not do so, but another child got hold of the poison, and gave it to the deceased, who died of it. A conviction was sustained by the judges.

(*j*) 3 Chit. C. L. 776; Davis' Prec. 185.

Murder by poisoning. First count, mixing white arsenic in chocolate.(*k*)

That J. E., late of Lycoming County aforesaid, labourer, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, and of his malice aforethought, wickedly contriving and intending a certain C. E. with poison, wilfully, feloniously and of his malice aforethought, to kill and murder, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and thirty-five, and on divers other days and times between the said fourteenth day of October, in the year last aforesaid, and the seventeenth day of October, in the year last aforesaid, with force and arms, at Lycoming County aforesaid, did, knowingly, wilfully and feloniously, and of his malice aforethought, put, mix and mingle certain deadly poison, to wit, white arsenic, in certain chocolate which had been at divers days and times during the time aforesaid, prepared for the use of the said C. E., to be drunk by her the said C. E.; he the said J. E., then and there well knowing that the said chocolate with which he the said J. E. did so mix and mingle the deadly poison as aforesaid, was then and there prepared for the use of the said C. E., with intent to be then and there administered to her for her drinking the same; and the said chocolate with which the said poison was so mixed as aforesaid, afterwards, to wit, on the said fourteenth day of October, in the year last aforesaid, and on the said other days and times, at Lycoming County aforesaid, was delivered to the said C. E., to be then and there drunk by her; and the said C. E., not knowing the said poison to have been mixed with the said chocolate, did afterwards, to wit, on the said fourteenth day of October, in the year last aforesaid, and on the said divers other days and times there, drink and swallow down into her body, several quantities of the said poison so mixed as aforesaid with the said chocolate; and the said C. E., of the poison aforesaid, and by the operation thereof, on the said fourteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, became sick and greatly distempered in her body; of which said sickness and distemper of body, occasioned by the drinking, taking and swallowing down into the body of the said C. E. of the poison aforesaid, so mixed and mingled in the said chocolate as aforesaid, she the said C. E., from the said several days and times on which she had so drunk and swallowed down the same as aforesaid, until the sixteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, did languish and languishing did live; on which said sixteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, she, the said C. E. of the poison aforesaid, so taken, drunk and swallowed down as aforesaid, and of the said sickness and distemper thereby occasioned, did die.

And so the inquest aforesaid, upon their oaths and affirmations respectively as aforesaid, do say, that the said J. E., her the said C. E., in the manner and by the means aforesaid, then and there feloniously, wilfully and of his malice aforethought, did kill and murder,

(*k*) Com. v. Earle, 1 Whart. 525. Under this indictment the prisoner was executed.

contrary to the form of the act of general assembly of this commonwealth in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Second count. Mixing arsenic in tea.

And the jurors aforesaid, upon their oaths and affirmations respectively as aforesaid, do further present that the said J. E., on the said fourteenth day of October, in the year of our Lord one thousand eight hundred and thirty-five as aforesaid, and on divers other days and times between the said fourteenth day of October, in the year last aforesaid, and the sixteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, with force and arms did, knowingly, wilfully, feloniously and of his malice aforethought, place, mix and mingle certain deadly poison, to wit, white arsenic, in certain tea which had been at divers days and times during the time aforesaid, prepared for the use of the said C. E., to be drunk by her the said C. E.; he the said J. E., then and there well knowing that the said tea with which the said poison was mixed as aforesaid, was then and there prepared for the use of the said C. E., with intent to be then and there administered to her for her drinking the same. And the said tea with which the said poison was so mixed as aforesaid, afterwards, to wit, on the said fourteenth day of October, in the year last aforesiad, and on the said other days and times, at Lycoming County aforesaid, was delivered to the said C. E. to be then and there drunk by her; and the said C. E., not knowing the said poison to have been mixed with the said tea, did afterwards, to wit, on the said fourteenth day of October, in the year last aforesaid, and on the said divers other days and times, there did drink and swallow down into her body, several quantities of the said poison so mixed as aforesaid with the said tea; and the said C. E., of the poison aforesaid, and by the operation thereof, on the said fourteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, became sick and greatly distempered in her body; of which said sickness and distemper, occasioned by the drinking, taking and swallowing down into the body of the said C. E. of the poison aforesaid, so mixed and mingled in the said tea as aforesaid, she the said C. E., from the said several days and times on which she had so drunk and swallowed down the same as aforesaid, until the said sixteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, did languish and languishing did live; on which said sixteenth day of October, in the year last aforesaid, at Lycoming County aforesaid, she, the said C. E., of the poison aforesaid, so taken, drunk and swallowed down as aforesaid, and of the sickness and distemper thereby occasioned, did die.

And so the inquest aforesaid, upon their oaths and affirmations respectively as aforesaid, do say, that the said J. E., her, the said C. E., in the manner and by the means last aforesaid, then and there feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the form of the act of general assembly of this commonwealth in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Murder by giving to the deceased poison, and thereby aiding her in suicide.(*l*)

That B. A., on the twenty-eighth of February, at St. Leonard, Shoreditch, upon E. C., "feloniously, wilfully and of his malice aforethought, did make an assault, and feloniously, wilfully and of his malice aforethought, did give and administer to her two ounces weight of a deadly poison called laudanum, with intent that she should take and swallow the same down into her body, (he knowing the same to be a deadly poison); and that the said E. C., the said laudanum so administered, did take and swallow down into her body, and by reason thereof became mortally sick and distempered in her body, and of such mortal sickness and distemper then and there died." (*Conclude as usual, &c.*).

(*l*) R. *v.* Alison, 8 C. & P. 418. As has already been observed, (see *ante*, p. 38), a party who is present aiding in the commission of suicide, becomes a principal in the offence, and may be indicted for the murder of the deceased, though the courts in England and in Massachusetts differ as to whether there can be accessaries before the fact to suicide at common law. Patteson J., in summing up in the present case, after stating the indictment, said:—"This case undoubtedly presents some extraordinary features. There is an old case which occurred as far back as the reign of James I., which was very similar to the present. In that case a husband and wife, being in extreme poverty and great distress of mind, were conversing together on their unfortunate condition, when the husband said 'I am weary of life and will destroy myself,' upon which the wife replied, 'if you do I will too.' The man then went out, and having bought some poison he mixed it with some drink, and they both partook of it. The draught was fatal to the husband, but the wife, in her agony from the effect of the poison, seized a flask of salad oil and drank it off, which caused a sickness of the stomach, and the consequence was that she voided the poison, and her life was saved. She was afterwards tried for the murder of her husband in this very court and acquitted, but solely on the ground that being the wife of the deceased, she was under his control: and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the judge who tried the case, pronounced her not guilty. There is also another case which occurred not very long since, which still more nearly resembles the present; (R. *v.* Dyson, R. & R. 528, set out in Rose. C. D. 616). It was the case of a man and woman who lived together, but were not married. They were in great poverty, and having formed a determination to destroy themselves, they went to the theatre, and afterwards proceeded together to Westminster bridge where they got into a boat, but the water being shallow they entered another, where they had conversed together for some time, when on a sudden, according to the statement of the man, he saw the woman struggling, and plunged in for the purpose of rescuing her; but he failed in his attempt. The woman was drowned, and he was tried for her murder and convicted. The case was, however, subsequently referred to the judges, who were of opinion that the conviction was good in point of law; but as there was some doubt whether the woman might not have fallen into the water by accident, and whether the prisoner might not, as he had stated, have endeavoured to save her life, he had the benefit of the doubt, and was recommended for a pardon. After these two cases I should not be discharging my duty if I did not tell you that supposing the parties in this case mutually agreed to commit suicide, and one only accomplished that object, the survivor will be guilty of murder in point of law. It may be said that they were both under the influence of what is called 'temporary insanity,' and a practice has of late years been pursued by coroner's juries, of finding verdicts to that effect in cases which do not at all justify such a conclusion. As a lawyer I am bound to say that such verdicts are wholly unwarranted by the law of this country. His lordship, in conclusion told the jury that, in his opinion, there was not any evidence to show that the prisoner was not in his perfect senses, and if they were of the same opinion, he would be legally responsible for the death of the deceased." Verdict—guilty.

By forcing a sick person into the streets.(*m*)

That A. B., of &c., intending one C. D. feloniously, wilfully and of his malice aforethought, to kill and murder, on at with force and arms, at an unseasonable hour in the night, to wit, about the hour of eleven in the night of the same day, in and upon the said C. D., he the said C. D. then and there being in extreme sickness and weakness of body, occasioned by a fever, and then and there confined to his bed in the dwelling house of him the said A. B. there situate, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said A. B. him the said C. D. from and out of the said bed, and also out of the said dwelling house, into the public and open street there, did then and there feloniously, wilfully and of his malice aforethought, remove, force and drive, and there abandon and leave; he the said A. B. then and there well knowing the said C. D. to be then in extreme sickness and weakness of body, occasioned by the fever aforesaid; by means whereof, he the said C. D., through the cold and the inclemency of the weather, and for want of due care and other necessaries requisite for a person in such sickness and weakness as aforesaid, then and there died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said C. D., in manner and form aforesaid, feloniously, wilfully and of his malice aforethought did kill and murder.

Murder of an infant by suffocation.(*n*)

That on the twenty-sixth day of June, &c., M. H. &c., (*setting forth addition, birth of child, &c., and proceeding*): on the said child "did make an assault; and that the said M. H., her the said new-born child, with both her hands in a certain piece of flannel of no value, then and there feloniously, wilfully and of her malice aforethought, did wrap up and fold, by means of which said wrapping up and folding the said new-born female bastard child in the piece of flannel aforesaid, she the said new-born female child was then and there suffocated and smothered; of which said suffocation and smothering she the said new-born female child, then and there instantly died; and so the jurors aforesaid," &c.

Murder by stamping, beating and kicking.

That T. V. Jr., late of the said county, yeoman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the eleventh day of October, in the year of our Lord one thousand eight hundred and fifteen, at the said County of Chester, in and upon one N. R., in the peace of God and the commonwealth, then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said T.

(*m*) 3 Chit. C. L. 771; Davis' Prec. 189.

(*n*) R. v. Huggins, 3 C. & P. 414. Three exceptions were taken to this inquisition: 1st, that the time was imperfectly stated; 2d, that there was no imputation to the prisoner of any act sufficient to cause death; and 3d, that there was a variance in the name of one of the grand jury. Vaughan B. quashed the inquisition on the latter ground, holding that the indictment was itself good.

V. Jr., then and there with both his hands, the said N. R., in and upon the head, neck and breast of him the said N. R., feloniously, wilfully and of his malice aforethought did strike and beat; and that the said T. V. Jr., then and there, with both his hands and feet, the said N. R. so and upon the ground, feloniously, wilfully and of his malice aforethought did knock, cast and throw; and the said N. R., to on the ground lying and being, he the said T. V. Jr., with both his hands, knees and feet, in and upon the head, neck, breast, stomach, back and sides of him the said N. R., did then and there feloniously, wilfully and of his malice aforethought, strike, beat, press and kick; and that the said T. V. Jr., then and there the said N. R., by and upon the neck and throat of him the said N. R., with both the hands of him the said T. V. Jr., did feloniously, wilfully and of his malice aforethought grasp and seize, thereby choking and strangling the said N. R., and by the said striking, beating, casting, throwing, pressing and kicking, giving to the said N. R. several mortal bruises; of which said several mortal bruises, choking and strangling, the said N. R. then and there instantly died.

And so the inquest aforesaid, on their oaths and affirmations aforesaid, do say that the said T. V. Jr., the day and year aforesaid, at Chester County aforesaid, in manner and form aforesaid, the said N. R., feloniously, wilfully and of his malice aforethought did kill and murder, contrary to the form of the act of general assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Murder by beating with fists and kicking on the ground, no mortal wound being discovered.(o)

That W. W., late of, &c., on, &c., at, &c., with force and arms, at aforesaid, &c., in and upon one E. D., in the peace of God and the said commonwealth, then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said W. W. then and there feloniously, wilfully and of his malice aforethought did strike, beat and kick the said E. D. with his hands and feet in and upon the head, breast, back, belly, sides and other parts of the body of him the said E. D., and did then and there feloniously, wilfully and of his malice aforethought, cast and throw the said E. D. down unto and upon the ground with great force and violence there, giving unto the said E. D. then and there, as well by the beating, striking and kicking of him the said E. D. in manner and form aforesaid, as by the casting and throwing of him the said E. D. down as aforesaid, several mortal strokes, wounds and bruises in and upon the head, breast, back, belly, sides and other parts of the body of him the said E. D., of which said mortal strokes, wounds and bruises he the said E. D. from, &c., until, &c., at, &c., did languish, and languishing did live; on which said day of , in the year aforesaid, the said E. D. at, &c., of the several mortal strokes, wounds and bruises aforesaid, died. And so the jurors aforesaid, upon their

(o) Stark. C. P. 419.

oath aforesaid, do say, that the said W. W. him the said E. D. in the manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary, &c.

For stabbing, casting into the sea and drowning the deceased on the high sea, &c.(*p*)

The jurors, &c., upon their oath present, that A. B., (*and others, naming them*), being citizens of the United States, on upon the high sea, out of the jurisdiction of any particular state, in and on board a certain schooner, the name of which is to the jurors aforesaid unknown, in and upon one C. D., a mariner in and on board said vessel, piratically and feloniously did make an assault, and that he the said A. B., with a certain steel dagger, which he the said A. B. in his hand then and there had and held, the said C. D., in and upon the breast of him the said C. D., upon the high sea, and on board the schooner aforesaid, and out of the jurisdiction of any particular state, piratically and feloniously did strike and thrust, giving to the said C. D. in and upon the breast of him the said C. D., upon the high sea aforesaid, in and on board the said schooner, and out of the jurisdiction of any particular state, piratically and feloniously, in and upon the breast of him the said C. D. several grievous, dangerous and mortal wounds; and did then and there, in and on board the schooner aforesaid, upon the high sea, and out of the jurisdiction of any particular state, piratically and feloniously, him the said C. D. cast and throw from out of the said schooner into the sea, and plunge, sink and drown him in the sea aforesaid; of which said mortal wounds, casting, throwing, plunging, sinking and drowning, the said C. D., in and upon the high sea aforesaid, out of the jurisdiction of any particular state, then and there instantly died. And the jurors aforesaid, upon their oath aforesaid, do say, that by reason of the casting and throwing the said C. D. in the sea as aforesaid, they cannot describe the said mortal wounds. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B. (*and others*), him the said C. D., then and there, upon the high sea aforesaid, out of the jurisdiction of any particular state, in manner and form aforesaid, piratically and feloniously did kill and murder; against the peace of the said United States, and contrary to the form of the statute thereof in such case made and provided.

Knocking to the ground, and beating, kicking and wounding.(*q*)

That R. M., late of the parish of Wakefield in the County of York, labourer, and B. M., late of the same place, labourer, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the thirtieth day of September, in the fifth year of the reign of our sovereign lord George the fourth, by the grace of God, of the United Kingdom of Great Britain

(*p*) Davis' Prec. 228. This was the form in U. S. *v.* Holmes, 5 Wheat. 412.

(*q*) R. *v.* Mosley, 1 Mood. C. C. 98. This form was sustained by the twelve judges, it being held that it is not necessary to set forth the length, depth, or breadth of the wound.

and Ireland, king, defender of the faith, with force and arms at the parish aforesaid, in the county aforesaid, in and upon one J. D., in the peace of God and our said lord the king, then and there being, feloniously, wilfully and of their malice aforethought, did make an assault, and that they the said R. M. and B. M., then and there feloniously, wilfully and of their malice aforethought, did with great force and violence, pull, push, cast and throw the said J. D., down unto and upon the ground there, and that the said R. M. and B. M., with both the hands and feet of them the said R. M. and B. M., then and there, and whilst the said J. D. was so lying, and being upon the ground, him the said J. D., in and upon the head, stomach, breast, belly, back and sides of him the said J. D., then and there feloniously, wilfully and of their malice aforethought, divers times with great force and violence, did strike, beat and kick, and that the said R. M. and B. M., with both the hands, feet and knees of them the said R. M. and B. M., and each of them then and there, and whilst the said J. D. was so lying and being upon the ground as aforesaid, him the said J. D., in and upon the belly, head, stomach and sides of him the said J. D., then and there feloniously, wilfully and of their malice aforethought, did with great force and violence strike, push, press and squeeze, giving to the said J. D., then and there, as well by the pulling, pushing, casting and throwing of him the said J. D. down unto and upon the ground as aforesaid, and by the striking, beating and kicking of him the said J. D., whilst he was so lying and being upon the ground as aforesaid, in and upon the head, stomach, breast, belly, back and sides of him the said J. D. as aforesaid, as also by the striking, pushing, pressing and squeezing of him the said J. D. whilst he the said J. D. was so lying and being upon the ground as aforesaid, in and upon the belly, breast, stomach and sides of him the said J. D., with the hands, knees and feet of them the said R. M. and B. M., in manner aforesaid, several mortal bruises, lacerations and wounds, in and upon the belly, breast, stomach and sides of him the said J. D., of which said several mortal bruises, lacerations and wounds the said J. D., from the said thirtieth day of September, in the fifth year of the reign aforesaid, until the tenth day of October, in the same year, in the parish aforesaid, in the county aforesaid, did languish and languishing did live; on which tenth day of October, in the year aforesaid, the said J. D., at the parish aforesaid, in the county aforesaid, of the said several mortal bruises, lacerations and wounds died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said R. M. and B. M., him the said J. D. in manner and form and by the means aforesaid, feloniously, wilfully and of their malice aforethought, did kill and murder, against the peace of our said lord the king, his crown and dignity.

Murder by striking with stones.(*r*)

That J. D., late of, &c., labourer, J. P., late of, &c., labourer, and

(*r*) R. *v.* Dale, 9 Moore 19. An arrest of judgment was asked, first, because the number of stones was uncertain, and secondly, because it was not stated in which hand of the several defendants they were held. The twelve judges, however, held the indictment good, and the prisoner was executed. See note *s*, next page.

C. T., late of, &c., labourer, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the sixteenth July, 4 Geo. IV., with force and arms, at, &c., in and upon one W. W., in the peace, &c. then and there being, feloniously, wilfully and of their malice aforethought, did make an assault, and that the said J. D., J. P. and C. T., with certain stones of no value, which they the said J. D., J. P. and C. T. in their right hands then and there had and held, in and upon the back part of the head of him the said W. W. then and there feloniously, wilfully and of their malice aforethought, did cast and throw, and that the said J. D., J. P. and C. T., with the stones aforesaid, so as aforesaid cast and thrown, the aforesaid W. W., in and upon the back part of the head of him the said W. W., then and there feloniously, wilfully and of their malice aforethought, did strike, penetrate and wound, then and there giving to the said W. W., by the casting and throwing of the stones aforesaid, in and upon the back part of the head of him the said W. W. one mortal wound, bruise, fracture and contusion, of the breadth of one inch, and of the depth of half an inch, of which said mortal wound, bruise, fracture and contusion he the said W. W. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. D., J. P. and C. T. him the said W. W. in the manner and by the means aforesaid, feloniously, wilfully and of their malice aforethought did kill and murder, against the peace, &c.(*s*)

Murder by casting a stone.(*t*)

That A. B. late of the said yeoman, on the day of in the year of our Lord one thousand, &c., with force and arms, at aforesaid, in the county aforesaid, in and upon one M., in the peace of God and of the said commonwealth then and

(*s*) On the verdict of guilty being recorded, Mr. D. F. Jones moved in arrest of judgment, that the indictment was defective in form on the following grounds: First, that after the words "certain stones" there should have been a videlicet mentioning the number of stones. Secondly, that it was not expressed in what hand they were held by each of the defendants. And lastly, that the mode of causing the death was not properly stated.

Judgment was accordingly respited, and the above points reserved for the consideration of the twelve judges, and were now argued for the prisoner, Dale, by Mr. D. F. Jones, who cited as to the first, The King *v.* Beech, 1 Leach C. C. 3d ed. 159; Hale's P. C. vol. ii. p. 182, 185. Secondly, Hale's P. C. vol. ii. p. 185; Cuppledick's case, 44 Eliz. K. B.; Ld. Sanchar's case, 9 Rep. 119.

[Ld. Chief Justice Abbott. It is very possible that ten stones may produce one mortal wound].

[Mr. Justice Bayley. If a man give two blows they may only produce one wound; and it cannot be for a moment supposed that it would be necessary to allege the number of shots in a gun, and they receive an impetus from the gun as stones thrown by the hand].

Thirdly, a case before Mr. Justice Chambre, at the Spring Assizes at York, 1806.

[Mr. Justice Holroyd. The verbs cast and throw may be used either in an active or neuter sense, as to throw at backgammon, or with dice, or to cast or throw with a net into the sea; and the latter part of this indictment shows that they had been used in the latter sense].

Mr. J. Park was to have argued on the part of the crown; but the judges were unanimously of opinion that the conviction was right.

The convict was afterwards executed.

(*t*) Stark. C. P. 424.

there being, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said A. B., a certain stone of no value, which he the said A. B. in his right hand then and there had and held, in and upon the right side of the head, near the right temple of her the said M., then and there feloniously, wilfully and of his malice aforethought did cast and throw; and that the said A. B., with the stone aforesaid, so as aforesaid cast and thrown, the aforesaid M., in and upon the right side of the head, near the right temple of her the said M., then and there feloniously, wilfully and of his malice aforethought did strike, penetrate and wound; giving to the said M., by the casting and throwing of the stone aforesaid, in and upon the right side of the head, near the right temple of her the said M., one mortal wound of the length of one inch, and of the depth of one inch, of which said mortal wound she the said M., from the said day of in the year aforesaid, until the day of in the same year, at aforesaid, at the county aforesaid, did languish, and languishing did live; on which said day of in the year aforesaid, the said M., at aforesaid, in the county aforesaid, of the said mortal wound, died. And so the jurors aforesaid, upon their oath (*or oaths and affirmations*) aforesaid, do say, that the said A. B. her the said M., in the manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary, &c.

Murder by striking with a stone.(*u*)

That E. W., not having the fear of God before his eyes, &c., on the twenty-third day of July, one thousand eight hundred and twelve, with force and arms, at, &c., in and upon one S. S., in the peace of God, &c., then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said E. W. (*with*) a certain stone of no value, which he the said E. W. in his right hand then and there had and held, in and upon the right side of the head, near the right temple of him the said S. S., then and there feloniously, wilfully and of his malice aforethought did cast and throw; and that he the said E. W., with the stone aforesaid so as aforesaid cast and thrown, the aforesaid S. S., in and upon the right side of the head, near the right temple of him the said S. S., then and there feloniously, wilfully and of his malice aforethought, did strike, penetrate and wound, giving to the said S. S., by the casting and throwing of the stone aforesaid, in and upon the right side of the head, &c., one mortal wound, of the length of two inches and of the depth of one inch, of which said mortal wound the said S. S. then and there instantly died; and so the jurors aforesaid, upon their oaths, &c. say, that the said E. W., him the said S. S., in manner and form aforesaid, felo-

(*u*) White *v.* Com., 6 Binn. 179. The first objection to this count arising from the interpolation of the word "with" in the sixth line, was treated by the court as arising from a clerical error, and as not so far affecting the sense of the averment as to vitiate it. It is not necessary, it was said also, to distinguish between the two degrees in an indictment for homicide. So far as the indictment was concerned, the judgment of the court below on a verdict of murder in the first degree was sustained.

niously, wilfully and of his malice aforethought, did kill and murder, against the peace and dignity of the Commonwealth of Pennsylvania.

Striking with stones.(*v*)

That J. D., late of, &c., labourer, J. P., late of, &c., labourer, and C. T., late of, &c., labourer, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the sixteenth July, 4 Geo. IV., with force and arms, at W. aforesaid, in the county aforesaid, in and upon one W. W., in the peace, &c., then and there being, feloniously did make an assault, and that the said J. D., J. P. and C. T., (with) certain stones of no value, which they the said J. D., J. P. and C. T. in their right hands then and there had and held, in and upon the back part of the head of him the said W. W. then and there feloniously, wilfully and of their malice aforethought did cast and throw, and that the said J. D., J. P. and C. T., with the stones aforesaid so as aforesaid cast and thrown, the aforesaid W. W., in and upon the back part of the head of him the said W. W., then and there feloniously, wilfully and of their malice aforethought, did strike, penetrate and wound, feloniously, wilfully and of their malice aforethought, then and there giving to the said W. W., by the casting and throwing of the stones aforesaid in and upon the back part of the head of him the said W. W., one mortal wound, bruise, fracture and contusion, of the breadth of one inch and of the depth of half an inch; of which said mortal wound, bruise, fracture and contusion, he the said W. W. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. D., J. P. and C. T., him the said W. W. in the manner and by the means aforesaid, feloniously, wilfully and of their malice aforethought did kill and murder, against the peace, &c.

By striking with an axe on the neck.(*w*)

That J. M., late of said county, labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and thirty-two, with force and arms, at, to wit, in the County of Jackson aforesaid, in and upon one S. W., in the peace of God and the state, then and there being, felo-

(*v*) On this indictment the defendant was tried and convicted. Jones moved in arrest of judgment: First, that after the words "certain stones," there should have been a videlicet mentioning the number. Secondly, that it was not expressed in what hand the stones were held by each. Thirdly, the mode of causing the death was not properly stated. Judgment was respited, and the above points reserved for the consideration of the judges.

In Hilary Term, 1824, this case was argued in the Exchequer Chamber before eleven of the judges, by D. F. Jones for the prisoners; J. Parke (who appeared for the crown), was not heard. The judges were unanimously of opinion that the conviction was right. The judges held that the cause of the death was sufficiently stated, it being clear the "stones" were what was cast and thrown at the deceased, and the word "with" might be rejected, or the words "cast and throw" might be considered as used as neuter verbs; R. *v.* Dale, 1 Mood. C. C. 5.—The word "with," put in brackets in the text, should be left out.

(*w*) This form was sustained in Mitchell *v.* State, 8 Yerg. 515.

niously, wilfully, unlawfully and of his malice aforethought, did make an assault, and the said J. M., with a certain axe made of iron and steel, of the value of one dollar, which he the said J. M., in both his hands then and there held, the said S. W., in and upon the right side of the neck of him the said S. W., between the head and shoulder of him the said S. W., then and there unlawfully and of his malice aforethought, did strike, thrust and penetrate, giving to the said S. W., then and there, with the axe aforesaid, in and upon the right side of the neck of him the said S. W., between the head and shoulder of him the said S. W., one mortal wound of the length of ten inches, and of the depth of four inches, of which said mortal wound, the said S. W., in the County of Jackson aforesaid, on the day aforesaid, and the year aforesaid, did instantly die; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. M., the said S. W., in manner and form aforesaid, unlawfully and of his malice aforethought, did kill and murder.

By striking with a knife on the hip, the death occurring in another state.(*x*)

That W. D., late of the said County of Stokes, labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and forty-two, with force and arms in the county aforesaid, in and upon one A. H., in the peace of God and the state, then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said W. D., with a certain knife of the value of sixpence, which he the said W. D. in his right hand then and there had and held, the said A. H., in and upon the right hip and the left side of the back near the back-bone of him the said A. H., then and there feloniously, wilfully and of his malice aforethought, did strike and thrust, giving to the said A. H., then and there with the knife aforesaid, in and upon the said right hip and the left side of the back near the back-bone of the said A. H., several mortal wounds, each of the breadth of three inches and of the depth of six inches, of which said several mortal wounds the said A. H., from the said thirteenth day of August, in the year aforesaid, until the twenty-ninth day of the same month of August, in the year aforesaid, as well as in the county aforesaid, as in the County of Patrick, in the State of Virginia, did languish and languishing did live, on which said twenty-ninth day of August, in the year aforesaid, the said A. H., in the said County of Patrick, in the State of Virginia, of the said several mortal wounds died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said W. D., the said A. H., in manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the peace and dignity of the state.

(*x*) In this form, which was sustained in North Carolina, State *v.* Dunkley, 3 Iredell 117, the statutory conclusion was omitted; and the same feature was sustained in Com. *v.* White, 6 Binn. 183; see *ante*, p. 12, 45.

Against a slave for murder with an axe.(y)

That A., a negro slave the property of J. H., late of the County of Wayne, and State of North Carolina, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, on the fourth day of November, in the year of our Lord one thousand eight hundred and seventeen, with force and arms, in the County of Wayne, and state aforesaid, in and upon A. S., in the peace of God and the state, then and there being, did then and there feloniously, wilfully and of his malice aforethought, make an assault, and that the said A. with a certain axe of the value of tenpence, current money of the state aforesaid, which axe the said A. in both his hands then and there had and held, in and upon the said A. S., on the right side of the head, near the right temple of said A. S., feloniously, wilfully and of his malice aforethought, did then and there strike and

(y) This count was sustained in State *v.* Cherry, 3 Murph. 7. Taylor, Chief Justice, delivered the opinion of the court:

"An indictment ought to contain a description of the offence which the prisoner is called upon to answer, expressed with plainness, brevity and perspicuity, and accompanied with those essential circumstances which concur to ascertain the fact and its nature. In the statement of these and of their specification, great strictness has always been required in favour of life, to a degree, indeed, that in the opinion of Sir Matthew Hale, it had become the disease and reproach of the law. I cannot think it possible that any man can read this indictment, without receiving from it the impression that the assault, the holding of the axe in both hands, and giving the mortal blow, were all parts of one and the same transaction, and that the last mentioned act followed immediately. The assault is stated to have been on the fourth of November, and that 'then and there' are not repeated as to the blow itself. If a person were asked, upon reading the indictment, when and where the blow was given, he would assuredly answer, in the County of Wayne, and on the fourth day of November.

"The circumstances of place and time are, however, particularly required by the common law to be annexed to the very fact of striking, not by intendment or construction, but by express words; in order that the offence may appear to the court to have been done within their jurisdiction, and that the death should appear to have taken place within a year and a day, computing from the time the blow was given; and another reason as to the time, was, that the forfeiture of the land related to the day of giving the blow. That this was so, appears from Cotton's case, Cro. Eliz. 739, which is expressly in point, and from which there has been do departure in any modern decisions that I can find. By this case, and the series of decisions to the same effect, to be found in Hale and Hawkins, I should feel myself conclusively bound, without being at liberty to scrutinize the reasons of them, were it not for our act of 1811, c. 6, which provides that it shall be sufficient to all intents and purposes, that the indictment shall contain the charge against the criminal, expressed in a plain, intelligible and explicit manner, and that no bill of indictment shall be quashed or judgment arrested for or by reason of any informalities or refinements, when there appears to the court sufficient in the face of the indictment, to induce them to proceed to judgment. If this act of assembly is not always to sleep in the statute book, it never can be called into operation more fitly than in the present case, for undoubtedly, the charge is set forth in a plain, intelligible and explicit manner. The propriety of resorting to this act in the present case, is more evident when it is seen in the books that the exception now taken has been yielded to only 'in favour of life,' and that it would not prevail in an indictment for a misdemeanor. This proves, if proof were necessary, that an indictment may be intelligible and explicit, and contain sufficient to induce the court to proceed to judgment without the time and place being repeated as to the blow, if they had already been connected with the assault.

"I wish not to be understood as expressing an opinion that the act cures any radical defects in an indictment, or that the time and place, when and where the fact was committed, are not an essential part of it; but I think they do appear by a rational and obvious construction of this indictment, and as it is only by a subtle and refined course of argumentation that the objection can be made perceptible to the mind, it is of that character which the act intended to cure.—Let the reasons in arrest of judgment be overruled." —In the text the wanting "then and there" is introduced.

beat, giving to the said A. S., by the striking and beating aforesaid, with the axe aforesaid, in and upon the right side of the head, near the right temple of him the said A. S., one mortal wound of the depth of two inches and breadth of ten inches; of which said mortal wound the said A. S. then and there instantly died, &c. &c. And, &c., that negro slaves B. and C., the reputed property of A. S., were then and there each of them present, and did then and there feloniously, wickedly and with malice aforethought, aid and abet the said A. in feloniously assaulting and striking the said A. S. as aforesaid, &c. And, &c., that the negro slaves A., B. and C., feloniously, wilfully and of their malice aforethought, him the said A. S. did kill and murder, against the peace and dignity of the state.

Murder by stabbing with a knife.(z)

That A. B., late of the said county, yeoman, on the day of in the year of our Lord, &c., with force and arms, at aforesaid, in the county aforesaid, in and upon one J. M., in the peace of God and of the said state then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and that he the said A. B., with a certain knife of the value of sixpence, which he the said A. B., in his right hand then and there had and held, the said J. M., in and upon the left side of the belly, between the short ribs of him the said J. M., then and there feloniously, wilfully and of his malice aforethought, did strike and thrust, giving to the said J. M., then and there, with the knife aforesaid, in and upon the aforesaid left side of the belly, between the short ribs of him the said J. M., one mortal wound of the breadth of three inches and of the depth of six inches, of which said mortal wound the said J. M., from the said day of in the year aforesaid, until the day of in the same year, at aforesaid, in the county aforesaid, did languish and languishing did live; on which said day of in the year aforesaid, the said J. M., at aforesaid, in the county aforesaid, of the said mortal wound died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said J. M., in the manner and by the means aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary, &c.

Murder. Against J. T. for shooting the deceased, and against A. S. for aiding and abetting.(b)

That J. T., late, &c., and A. S., late, &c., on the day of in the year, &c., with force and arms, at aforesaid, in the county aforesaid, in and upon one S. G., in the peace of God, and of our said lord the king, then and there being, feloniously, wilfully and

(z) Stark. C. P. 424. See form for "Cutting Throat," *ante*, p. 48.

(b) Stark. C. P. 423; R. *v.* Taylor and Shaw, Leach 398. A. S. was found guilty and J. T. acquitted; and a majority of the judges were of opinion that the conviction of A. S. was good, but the prisoner afterwards received a free pardon. See Stark. C. P. 88, 89. See for other form for "Shooting," p. 47.

of their malice aforethought, did make an assault; and that the said J. T., a certain gun called a carbine, of the value of ten pounds, then and there charged with gunpowder and a leaden bullet, which said gun he the said J. T., in both his hands then and there had and held, at and against the said S. G., then and there feloniously, wilfully and of his malice aforethought, did shoot off and discharge; and that the said J. T., with the leaden bullet aforesaid, by means of shooting off and discharging the said gun so loaded, to, at and against the said S. G. as aforesaid, did then and there feloniously, wilfully and of his malice aforethought, strike, penetrate and wound the said S. G., in and upon the right side of the head of him the said S. G., near his right temple, giving to him the said S. G., then and there, with the leaden bullet aforesaid, by means of shooting off and discharging the said gun so loaded, to, at and against the said S. G., and by such striking, penetrating and wounding the said S. G., as aforesaid, one mortal wound in and through the head of him the said S. G., of which said mortal wound the said S. G. did then and there instantly die; and that the said A. S., then and there feloniously, wilfully and of his malice aforethought, was present aiding, helping, abetting, comforting, assisting and maintaining the said J. T. in the felony and murder aforesaid, in manner and form aforesaid, to do and commit, &c. &c. (*Concluding as usual in indctments for murder*).

Murder of a bastard child.(*c*)

That A. B., late of, &c., spinster, on, &c., being big with a male (*the sex is material*) child, on the same day and year, at, &c., by the providence of God, did bring forth the said child alive,(*d*) of the body of her the said M., alone(*e*) and in secret; which said male child, so being born alive, by the laws of this realm, was a bastard; and that the said A. B. afterwards, to wit, on, &c., as soon as the said male bastard child was born, with force and arms, at, &c., in and upon the said child, feloniously, wilfully and of her malice aforethought, did make an assault; and that she the said M., with both her hands about the neck of him the said child, then and there fixed, him the said child, then and there feloniously, wilfully and of her malice aforethought, did choke and strangle, of which said choking and strangling, the said child then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said male bastard child, in form aforesaid, feloniously, wilfully and of her malice aforethought, did kill and murder, against the peace, &c.

(*c*) Stark. C. P. 425.

(*d*) If upon view of the child, it be testified by one witness, by apparent probabilities, that the child was not come to its *debitum partus tempus*, as if it have no hair or nails, or other circumstances; this (says Lord Hale) I have always taken to be a proof by one witness, that the child was born dead, so as to leave it nevertheless to the jury, as upon a common law evidence, whether she were guilty of the death or not; Starkie's C. P. 426.

(*e*) These words do not appear to be necessary; *ib.*

Throwing a bastard child in a privy.(*f*)

That C. D., late of said B., singlewoman, on the day of now last past, being pregnant with a female child, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said female child, alone and in secret from her body did bring forth alive, which said female child, so born alive, was, by the laws of this commonwealth, a bastard; and that the said C. D., afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said female bastard child, feloniously, wilfully and of her malice aforethought, did make an assault; and that the said C. D., with both her hands, the said female bastard child, into a certain privy there situate, wherein was a great quantity of human excrements and other filth, then and there feloniously, wilfully and of her malice aforethought, did cast and throw; by reason of which said casting and throwing of the said female bastard child into the said privy, by her the said C. D., in manner as aforesaid, the said female bastard child, in the said privy, with the excrements and filth aforesaid, was then and there choked and suffocated; of which said choking and suffocation the said female bastard child then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. the said female bastard child, in manner and form aforesaid, feloniously, wilfully and of her malice aforethought, did kill and murder. (*Give statutory conclusion as in book* 1, *chapter* 3).

Smothering a bastard child in a linen cloth.(*g*)

That C. D., of said B., singlewoman, on the day of now last past, at B. aforesaid, in the county aforesaid, being pregnant with a certain female child, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said female child alone and secretly from her body did bring forth alive, which said female child, so born alive, was, by the laws of this commonwealth, a bastard; and that the said C. D. afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said female bastard child, feloniously, wilfully and of her malice aforethought did make an assault; and that the said C. D., with both her hands, the said female bastard child, in a certain linen cloth, feloniously, wilfully and of her malice aforethought, did put, place, fold and wrap up; by means of which said putting, placing, folding and wrapping up of the said female bastard child, in the said linen cloth, by her the said C. D. as aforesaid, the said female bastard child was then and there choked, suffocated and smothered; of which said choking, suffocation and smothering, the said female bastard child then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. the said female bastard child, in manner and form aforesaid, feloniously, wilfully and of her malice aforethought, did kill and murder. (*Give statutory conclusion as in book* 1, *chap.* 3).

(*f*) 3 Chit. C. L. 767. This form, and that which follows it, are introduced by Mr. Davis, as conforming to the Massachusetts statute.

(*g*) See Davis' Prec. 178.

Murder, in Pennsylvania, of a bastard child by strangling.(*h*)

That U. S. of the county aforesaid, spinster, on the twenty-second day of September, A. D. one thousand eight hundred and seven, being big with a female child, the same day and year, in the county aforesaid, by the providence of God did bring forth the said child alive of the body of her the said U., alone and in secret, which said female child, so being born alive, by the laws of this commonwealth was a bastard; and that the said U. not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, afterwards, to wit, on the 22d day of September, A. D. one thousand eight hundred and seven, as soon as the said female child was born, with force and arms, at the county aforesaid, in and upon the said child, in the peace of God and this commonwealth then and there being, feloniously, wilfully and of her malice aforethought, did make an assault, and that she the said U., with both her hands about the neck of her the said child, then and there feloniously, wilfully and of her malice aforethought, did choke and strangle; of which said choking and strangling, the said child then and there instantly died. And so the inquest, &c., do say, that the said U. S., her the said female bastard child, in manner and form aforesaid, feloniously, wilfully and of her malice aforethought, did kill and murder, contrary to the form of the act, &c., and against the peace and dignity, &c.

Manslaughter by neglect. First count, that the deceased was the apprentice of the prisoner, and died from neglect in prisoner to supply him with food, &c.(*i*)

That on the third day of February, one thousand eight hundred and forty-two, at, &c., one R. K. (the deceased) was then and there an apprentice to one J. C. (the prisoner), and as such apprentice was then under the care and control of the said J. C.; and that it then and there became and was the duty of the said J. C., during the time aforesaid, to permit and suffer the said R. K. to take and have such proper exercise as was necessary and needful for the bodily health of the said R. K., so being such apprentice as aforesaid; and it then and there became and was the duty of the said J. C. to find, provide and supply the said R. K., being such apprentice as aforesaid, with proper and necessary nourishment, medicine, medical care and attention; and, &c.; (*concluding by averring in the usual form that* the deceased being weak in body, the prisoner struck and beat him, and forced, obliged and compelled him to work for an unseasonable time, and would not allow him to take proper exercise and recreation, and neglected to supply him with proper nourishment and medicine, medical care and attention, by means whereof he died), &c.

Second count—charging killing by overwork and beating.

(The second count stated that the prisoner, in and upon the deceased, so being such apprentice as aforesaid, and under the care and

(*h*) This indictment was sustained after a conviction in Pennsylvania, in 1807.
(*i*) R. *v.* Crumpton, 1 C. & M. 597

control of him the said J. C. as aforesaid, and so being sick and weak in body as aforesaid, in the peace of God and our said lady the queen, feloniously did make an assault; and that the deceased being so weak in body as aforesaid, the prisoner forced him to work for certain unreasonable and improper times, and beat him, by means whereof he died).

Manslaughter. Against a woman for exposing her infant child so as to produce death.(*j*)

That the said A. W., &c., on, &c., and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon a certain female child then and there born of the body of the said A. W., whose name is to the jurors aforesaid unknown, feloniously, wilfully and of her malice aforethought did make an assault. And the jurors aforesaid, upon their oath aforesaid, do further present, that it was the duty of the said A. W. then and there to provide proper and sufficient clothes, covering and protection for the body of the said last mentioned female child, the said last mentioned female child being then and there unable to provide for and take care of herself; and that the said A. W., then and there, contrary to her duty in that behalf, feloniously, wilfully and of her malice aforethought, with both her hands did put and place the said last mentioned female child in a certain common and public highway and open place there, and then and there did feloniously, wilfully and of her malice aforethought desert and leave the said last mentioned female child there exposed to the inclemency of the weather, without sufficient clothes, covering, shelter and protection for the body of the said last mentioned female child. By means of which said several premises in this count mentioned, the said last mentioned female child became and was mortally sick, weak and disordered in her body; of which said mortal sickness, weakness and disorder aforesaid, the said last mentioned female child, on and from the said thirteenth day of April, in the year aforesaid, until the fourteenth day of the same month, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, and then and there, to wit, on the said fourteenth day of April, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did die. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. W., the said last mentioned female child, in manner and form last aforesaid, feloniously, wilfully and of her malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

(*j*) R. *v.* Walters, 1 C. & M. 95. The principle determined in this case was, that if a person do any act towards another who is helpless, which must necessarily lead to the death of that other, the crime amounts to murder; but if the circumstances are such that the person would not have been aware that the result would be death, that would reduce the crime to manslaughter, provided that the death was occasioned by an unlawful act, but not such an act as showed a malicious mind. It was said, that if the defendant had left her child, a young infant, at a gentleman's door, a place where it was likely to be found and taken care of, and the child died, it would be manslaughter only; but if the child were left in a remote place, where it was not likely to be found, *e. g.* on a barren heath, and the death of the child ensued, it would be murder. The defendant was convicted of manslaughter.

Second count. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. W. afterwards, to wit, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, being big with a certain female child, the same female child alone and secretly from her body did then and there bring forth alive. And the jurors aforesaid, upon their oath aforesaid, do further present, that it then and there became and was the duty of the said A. W., as the mother of the said child (to fasten, tie and secure the navel-string of the body of the same child, and to provide and procure such clothing, covering and shelter for the body of the same child, as were then and there necessary and sufficient to protect and defend the same child from the cold and inclemency of the weather, and also to procure for and give, and administer to the same child such milk and food as was then and there necessary and sufficient for the support and maintenance of said child). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. W., not regarding her duty in that behalf, but being moved and seduced by the instigations of the devil, on the day and year first aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the same child not named, in the peace of God and our said lady the queen then and there being, feloniously, wilfully and of her malice aforethought, did make an assault; and that the said A. W., the same child into both her hands, feloniously, wilfully and of her malice aforethought, did then and there take, and that the said A. W., the same child, feloniously, wilfully and of her malice aforethought, with both her hands, did then and there put and place, in a certain road there situate, and the same child in the said road, then and there, feloniously, wilfully and of her malice aforethought, did expose, leave and abandon, naked and without any clothing, covering or shelter whatever to protect the body of the same child from the cold and inclemency of the weather. † And that the said A. W. did then and there feloniously, wilfully and of her malice aforethought, wholly neglect, omit and refuse to tie, fasten or in any way secure the navel-string of the body of the same child, and that the said A. W. did then and there feloniously, wilfully and of her malice aforethought, wholly neglect, omit and refuse to provide and procure any clothing, covering or shelter whatsoever for the same child; and that the said A. W. did then and there feloniously, wilfully and of her malice aforethought, wholly neglect, omit and refuse to procure for or to give or administer to the same child, milk or other food whatsoever, by means of which said last mentioned exposure, leaving and abandonment of the same child, and also by the omitting and refusing to tie, fasten and secure the navel-string of the body of the same child as aforesaid, and to provide and procure clothing, covering and shelter for the body of the same child as last aforesaid, and to procure for and give and administer to the same child milk and food as last aforesaid, † the same child from the time of its birth aforesaid, on the day and year first aforesaid, until the fourteenth day of the same month, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live; on which said fourteenth day of April, in the year aforesaid, the same child, at the parish aforesaid,

in the county aforesaid, of such leaving, abandonment and exposure, and of such wilful omission, neglect and refusal as in this count mentioned, did then and there die. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. W. the same child in manner and form last aforesaid, feloniously, wilfully and of her malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

Third count. (*Exactly similar to the fourth, but instead of the part between* ( ), *inserting the following*): To protect and defend the same child from the cold and inclemency of the weather, and to provide and procure such clothing, covering and shelter for the body of the said child as was then and there necessary and sufficient to protect and defend the same child from the cold and inclemency of the weather. * (*And instead of the allegation between* ††, *inserting the following*): And that the said A. W. did then and there, feloniously, wilfully and of her malice aforethought, wholly neglect, omit and refuse to protect and defend the same child from the cold and inclemency of the weather, or to provide or procure any clothing, covering or shelter whatsoever for the same child, ** by means of which said last mentioned exposure, leaving and abandonment of the same child, and also neglecting, omitting and refusing to protect and defend the same child from the cold and inclemency of the weather, and to provide and procure clothing and shelter for the body of the same child, as in this count mentioned. ***

Sixth count. (*Exactly similar to the fifth count, except that in stating the duty of the prisoner, the following words were added at the* *): And also to procure for, and give and administer to the same child such milk and food as was then and there necessary and sufficient for the support and maintenance of the same child. (*And in stating the cause of the death, the following allegation was inserted at the* **): And that the said A. W. did then and there feloniously, wilfully and of her malice aforethought, wholly neglect, omit and refuse to procure for, give or administer to the same child any milk or other food whatsoever. (*And at the* *** *the following was inserted*): And to procure for, and to give and administer to the same child, milk and food as last aforesaid.

Manslaughter by striking with stone.(*k*)

That T., on, &c., at, &c., (*commencing as usual*), at G., in the county of M. aforesaid, in and upon one J. L., in the peace of said commonwealth, then and there being, feloniously and wilfully did make an assault, and that he the said T., a certain stone, which he the said T. in his right hand then and there had and held, in and upon the left side of the head of him the said L., then and there feloniously and wilfully did cast and throw, and that the said T., with the stone aforesaid, so as aforesaid cast and thrown, the aforesaid J. L., in and upon the left side of the head of him the said

(*k*) Under this form it was held, that it was sufficiently averred that T. gave L. a mortal wound on the 25th of September, at G.; Turns *v.* Com., 6 Met. 225.

J. L., then and there feloniously and wilfully did strike, penetrate and wound, giving to the said J. L., by the casting and throwing of the stone aforesaid, in and upon the left side of the head of him the said J. L., one mortal wound of the length of one inch, and of the breadth of half an inch, of which said mortal wound, he the said J. L., from the said twenty-fifth day of September, in the year aforesaid, to the twenty-sixth day of the same September, at G. aforesaid, in the county aforesaid, did languish and languishing did live; on which twenty-sixth day of the same September, at G. aforesaid, the said J. L., of the mortal wound aforesaid, died; and so the said jurors aforesaid, upon their oath aforesaid, do say that the said T., him the said J. L., in manner and form aforesaid, feloniously and wilfully did kill and slay, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

Manslaughter. By giving to the deceased large quantities of spirituous liquors, of which he died.(*l*)

That J. R., J. P. and A. K., &c., on the fifth of November, at, &c., did give, administer and deliver to one M. A., divers large and excessive quantities of spirituous liquors mixed with water, and also divers large and excessive quantities of wine and porter, to wit, one pint of brandy mixed with water, one pint of rum mixed with water, one pint of gin mixed with water, two quarts of wine called port wine, and one quart of porter, and then and there unlawfully and feloniously did induce, procure and persuade the said M. A., to take, drink and swallow down into his body the said quantities of spirituous liquors mixed with water, and of wine and porter, the said quantities, &c., being then and there, when taken, drunk and swallowed by the said M. A., likely to cause and procure his death, and which they the said J. R., J. P. and A. K., then and there well knew; and that the said M. A., did then and there, by means of the said inducement, procurement and persuasion, &c., take, drink and swallow down into his body the said large quantities, &c., so given, &c., unto him as aforesaid, by means whereof the said M. A., then and there became and was greatly drunk and * intoxicated, sick and greatly distempered in his body; and while he the said M. A., was so drunk, &c., as aforesaid, they the said J. R. P., J. P. and A. K., did then and there, to wit, on, &c., at, &c., make an assault on him the said M. A., and then and there unlawfully and feloniously forced and compelled him to go, and put, placed and confined him in a certain carriage, to wit, a cabriolet, and then and there drove and carried him about therein for a long time, to wit, for two hours then next following, and therein and thereby, then and there greatly shook, threw, pulled and knocked about the said M. A., by means whereof the said M. A., then and there also became mortally sick and greatly distempered in his body; of which said large and excessive quantities of the said spirituous liquors, &c., so by him the said M. A., taken, &c., as aforesaid, and of the said drunkenness, &c., occasioned

(*l*) R. *v.* Packard, 1 C. & M. 133. The defendants were found guilty before Mr. Baron Parke.

thereby, and of the said shaking, &c., and of the said sickness and distemper occasioned thereby, he the said M. A., then and there instantly died. (*Conclude with an allegation in the usual form, viz.*):—that the said J. R. P., J. P. and A. K., the said M. A., in manner and form aforesaid, unlawfully and feloniously did kill and slay, &c.

Against driver of a cart for driving over deceased.

That A. B., of, &c., on with force and arms, at in the county aforesaid, in the public highway there, in and upon one C. D., in the peace of the said commonwealth then and there being, feloniously and wilfully did make an assault, and a certain cart of the value of ten dollars, then and there drawn by two horses, which he the said A. B. was then and there driving in and along the highway aforesaid, in, upon and against the said C. D. feloniously and wilfully did then and there force and drive; and him the said C. D. did thereby, then and there, throw to and upon the ground, and did then and there feloniously and wilfully force and drive one of the wheels of the said cart against, upon and over the head of him the said C. D. then lying upon the ground, and thereby did then and there give to the said C. D., in and upon the head of him the said C. D., one mortal fracture and contusion of the breadth of four inches and of the depth of four inches, of which said mortal fracture and contusion, the said C. D. then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., him the said C. D., then and there in manner and form aforesaid, feloniously, unlawfully and wilfully did kill and slay.(*m*) (*Conclude as in book* 1, *chapter* 3).

Manslaughter. Against a husband for neglecting to provide shelter for his wife.(*n*)

That before, upon and during all the several days and times in this count hereinafter mentioned, and at, &c., G. P., late of the parish of N., in the County of Kent, labourer, was the husband of one M. P., she the said M. P., during all the days and times in this count mentioned, being sick, weak, diseased, distempered and disordered in her body, and through such weakness, &c., unable to provide herself with such food, raiment, apparel and shelter, as were necessary for the sustenance and protection of her body, and being unable, during all the days and times aforesaid, to provide herself with such medicines, care and treatment, as were necessary for the cure and alleviation of her said sickness, &c.; all which several premises the

(*m*) Davis' Precedents 166; Starkie's C. P. 425.

(*n*) R. *v.* Plummer, 1 C. & K. 600. Though in this case the husband and wife separated by common consent, the husband granting the wife a stipulated allowance, which was regularly paid, it was held that if he knew, or was informed that she was without shelter, and refused to provide her with it, in consequence of which her death ensued, he was guilty of manslaughter (even though the wife was labouring under disease which must ultimately have proved fatal), if it could be shown that her death was accelerated for want of the shelter which he had denied. The facts not supporting the indictment, the defendant was acquitted.

said G. P., on all the days, &c., well knew; and the jurors aforesaid, &c., further present that it was the duty of the said G. P., being such husband as aforesaid, during all the days and times aforesaid, to find, provide and supply the said M. P., with competent and sufficient meat and drink for the sustenance of her body, and also with competent and sufficient apparel, lodging and shelter for the protection of the body of the said M. P., and also with such medicines, care and treatment as were necessary for the cure and alleviation of her said sickness, &c.; and the jurors aforesaid, &c., present that the said G. P., on the nineteenth of November, one thousand eight hundred and forty-three, and on divers other days and times between that day and the twenty-fourth of November, one thousand eight hundred and forty-three, &c., at, &c., did assault the said M. P., and that the said G. P., on the said nineteenth of November, at, &c., feloniously and without lawful excuse, and contrary to his duty in that behalf, and against the will of the said M. P., did omit, neglect and refuse to find, provide and supply to the said M. P., competent and sufficient meat and drink for the sustenance of the body of the said M. P.; and also, during all the several days last aforesaid, at, &c., feloniously, without lawful excuse, contrary to his duty in that behalf, and against the will of the said M. P., did omit, neglect and refuse to provide and supply the said M. P. with competent and sufficient apparel, lodging and shelter for the protection of the body of the said M. P., and also during all the days last aforesaid, at, &c., feloniously without lawful excuse, contrary to his duty in that behalf, and against the will of the said M. P., did omit, neglect and refuse to find, provide and supply the said M. P. with such medicines, care and treatment, as were necessary for the cure and alleviation of the said sickness, weakness, &c., by means of which said several premises, she the said M. P., on and from the said nineteenth of November, one thousand eight hundred and forty-three, until the said twenty-fourth of November, in the said year, did languish and languishing did live, and then, to wit, on the said twenty-fourth * of November, at, &c., in the year aforesaid, &c., of the said mortal sickness, weakness, distemper and disorder of her body, did die. And the jurors, &c., do say, that the said G. P., her the said M. P., in manner and form aforesaid, feloniously did kill and slay, &c.(*o*)

Manslaughter in second degree against captain and engineer of a steamboat, under New York Rev. Statute, p. 531, *s.* 46.(*p*)

That A. B., late of the first ward of the City of New York, in the County of New York aforesaid, labourer, and C. D., late of the same place, also labourer, on the day of in the year of our Lord one thousand eight hundred and forty-seven, (the said A. B.

(*o*) The second count was similar to the first, except that it omitted the allegations of assault, and also of the acts having been done against the will of the deceased. The third count charged the death to have been caused by the inclemency of the weather; and the fourth and fifth and sixth counts repeated severally the allegations in the second, relative to the omitting to supply clothing, lodging, food and medicine.

(*p*) For this form I am indebted to J. B. Phillips Esq., the accomplished assistant of the district attorney of the City of New York.

then and there being the captain of a certain steamboat used for the conveyance of passengers, known and distinguished by the name and title of the "Niagara," and then and there having charge of the said steamboat; and the said C. D., then and there being the engineer of the said steamboat, having charge of the boiler of such boat, and other apparatus for the generation of steam), on the day and year aforesaid, and whilst the said steamboat was then and there navigated, sailed and propelled in and upon a certain river and public highway, known and distinguished by the name and title of the Hudson river, at the ward, city and county aforesaid, with force and arms, feloniously and unlawfully, from ignorance and gross neglect and for the purpose of excelling another boat (to wit, a certain other steamboat called the) in speed, did create and allow to be created such an undue quantity of steam as to burst and break the boiler of said boat, and other apparatus in which said steam was generated, and the other machinery and apparatus connected therewith, by which bursting and breaking, as well as by reason of the steam and scalding water escaping and issuing from and out of the said boiler and other apparatus, one E. F., in the peace of God and of the said people, then and there being, was then and there mortally burned, scalded and wounded in and upon the head, neck, breast, back, stomach and arms of him the said E. F., of which said mortal burns, scalds and wounds, the said E. F., then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said A. B. and C. D., him the said E. F., in the manner and by the means aforesaid, feloniously and wilfully did kill and slay, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

Involuntary manslaughter in Pennsylvania, by striking an infant with a dray.

That C. M'G., late of the county aforesaid, porter, on the day of in the year, &c., with force and arms, at the City of Philadelphia, in the county aforesaid, in and upon one S. G., an infant of tender years, to wit, of the age of two years, and in the peace of God and the commonwealth, then and there being, did make an assault; and that the said C. M'G., then and there driving one horse drawing a dray, did then and there, in the city aforesaid, unlawfully and violently drive the said horse, so as aforesaid drawing the said dray, to and against the said S. G., and that he the said C. M'G., with one of the wheels of the said dray, did then and there, in the city aforesaid, by such driving, unlawfully and violently, the said S. G., drive, force and throw to the ground, by means whereof one of the wheels of the said dray, against, upon and over the head of the said S., did strike and go, thereby and then and there giving unto the said S., one mortal fracture and contusion, of which said mortal fracture and contusion, she the said S., on the same day and year aforesaid, at the county aforesaid, died; and so the inquest

aforesaid, upon their oaths and affirmations aforesaid, do say that the said C. M'G., her the said S. G., in manner and by the means aforesaid, unlawfully did kill, contrary to the form of the act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Murder on the high seas. General form as used in the United States Courts. (With commencement and conclusion as adopted in the federal courts of New York).(q)

First count. By striking with a sharp instrument.

Southern District of New York, ss. The jurors of the United States of America, within and for the circuit and district aforesaid, on their oath present, that late of the City and County of New York in the circuit and district aforesaid, mariner, late of the City and County of New York, in the circuit and district aforesaid, mariner, and (*if as many as three were engaged*) late of the City and County of New York, in the circuit and district aforesaid, mariner, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year of our Lord one thousand eight hundred and with force and arms upon the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States and within the jurisdiction of this court, in and on board of a certain vessel being a called the owned by a certain person or persons whose names are to the said jurors unknown, being a citizen or citizens of the United States of America, in and upon one in the peace of God and the said United States, then and there being on board said called the on the high seas, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought did make an assault, and that the said with a certain instrument of called a of the value of which he the said in his hand then and there had and held, upon the of him the said then and there being on the high seas, in the aforesaid, and out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, then and there feloniously, wilfully and of his malice aforethought did strike, giving the said with the aforesaid in manner aforesaid, in and upon the of him the said , several mortal strokes, wounds and bruises, to wit, one mortal wound on the of him the said of the length of inches, and of the depth of inches, of which said mortal wound the said on the high seas aforesaid, out of the juris-

(q) This indictment, which is framed with great accuracy, is that on which Babe, the pirate, was lately convicted in the Southern District of New York. This, and the remaining federal forms from New York, were obtained from Mr. Mayberry, assistant to the U. S. district attorney.

diction of any particular state of the said United States, and within the jurisdiction of this court, instantly died (*or otherwise*), and that the said then and there feloniously, wilfully and of their malice aforethought were present aiding and assisting the said in the felony and murder aforesaid, in manner and form aforesaid to do and commit; and so the jurors aforesaid upon their oath aforesaid, do say, that the said in manner and form aforesaid, piratically, feloniously and of their malice aforethought did kill and murder, against the peace of the said United States of America and their dignity, and against the form of the statute of the said United States in such case made and provided.

Second count.

(*Same as first count, substituting*): "owned by citizens (*or a citizen*) of the United States of America," *for* "owned by a certain person or persons, whose names are to the said jurors unknown, being a citizen or citizens of the United States of America."

Third count.

(*Same as second count, specifying one other of the persons engaged, as principal, and the others as aiders and abettors*).

Fourth count.

(*Same as third count, specifying one other of the persons engaged, as principal, and the others as aiders and abettors, (and so on until the number is exhausted*).

Fifth count.

And the jurors aforesaid upon their oath aforesaid, do further present, that late of the City and County of New York in the circuit and district aforesaid, mariner, late of the same place in the circuit and district aforesaid, mariner, and late of the same place (*or otherwise*), not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year of our Lord one thousand eight hundred and , with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States and within the jurisdiction of this court, on board of a certain vessel being a called the owned by citizens of the United States of America, in and upon one in the peace of God and the said United States, then and there being on board the said called the on the high seas, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, did make an assault; and the said with a certain instrument of called a of the value of , which he the said then and there in his hand had and held, and the said (*here specify one other*) with a certain other instrument of called a of the value of which he the said in his hand, then and there had and held, and the said (*here specify one other, if as many are contained in the complaint*) with a certain other instrument of called a of the value of which he the said in his hand then and there had and held, the said in and upon the head, face, breast and

other parts of the body of him the said then and there being on the high seas, in the said called the out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there feloniously, wilfully, and of their malice aforethought did strike and beat, giving him, the said then and there with the aforesaid, by such striking and beating, divers mortal wounds, bruises and contusions, in and upon the head, face, breast and other parts of the body of him the said , of which said mortal wounds, bruises and contusions, he the said on the high seas aforesaid, out of the jurisdiction of any particular state of the said United States of America, and within the jurisdiction of this court, did instantly die (*or as in preceding indictment*). And so the jurors aforesaid on their oath aforesaid do say, that they the said in the manner and by the means last aforesaid, on the high seas, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, the said did kill and murder, against the peace of the said United States of America and their dignity, and against the form of the statute of the said United States in such case made and provided.

Sixth count. By drowning.

And the jurors aforesaid on their oath aforesaid, do further present that (*as in fifth count*), not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year of our Lord one thousand eight hundred and , with force and arms upon the high seas, out of the jurisdiction of any particular state of the said United States, and within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, on board of a certain vessel being a called the owned in whole or in part by one of the a citizen of the United States of America, in and upon one in the peace of God and of the said United States then and there being, on board of the said called the on the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, did take the said into their hands, he the said then and there being on the high seas, in the aforesaid, out of the jurisdiction of any particular state of the said United States, within, &c., and within the jurisdiction of this court, and did then and there feloniously, wilfully and of their malice aforethought, cast, throw and push the said from and out of the said called the so being on the high seas aforesaid, out of the jurisdiction of any particular state of the said United States and within the jurisdiction of this court, into the sea, by means of which said casting, throwing and pushing of the said into the sea aforesaid, by them the said in manner and form aforesaid, he the said in the sea aforesaid, with the waters thereof, was then and there choked, suffocated and drowned, of which said choking, suffocation and drowning, he the said

then and there in the sea aforesaid, out of the jurisdiction of any particular state of the said United States of America, within, &c., and within the jurisdiction of this court, instantly died; and so the jurors aforesaid on their oath aforesaid do say, that the said in the manner and by the means aforesaid, on the high seas, out of the jurisdiction of any particular state of the said United States of America, within, &c., and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, the said did kill and murder, against the peace and dignity of the United States of America, and against the form of the statute of the said United States in such case made and provided.

Seventh count. Same as last, stated differently, specifying one as principal and the others as aiding, &c.

And the jurors aforesaid upon their oath aforesaid, do further present, that (*as in preceding counts specified*), not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year of our Lord one thousand eight hundred and , with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States and within the jurisdiction of this court, on board of a certain vessel, being a called the owned in whole or in part by one (*specify one of the owners*) of the in the a citizen of the United States of America, in and upon one in the peace of God and of the said United States, then and there being on board the said called the on the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, did make an assault; and that he the said (*here name one as principal*), then and there feloniously, wilfully, and of his malice aforethought, did take the said in his hands, he the said then and there being on the high seas, in the aforesaid, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, and did then and there feloniously, wilfully and of his malice aforethought, cast, throw and push the said from and out of the said called the so being on the high seas as aforesaid, out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, into the sea, by means of which said casting, throwing and pushing of the said into the sea aforesaid, by him the said in manner and form aforesaid, he the said in the sea aforesaid, with the waters thereof, was then and there choked, suffocated and drowned, of which said choking, suffocation and drowning, he the said , then and there, in the sea aforesaid, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States and within the jurisdiction of this court, instantly died, and that the said (*here name the*

remaining ones), then and there, feloniously, wilfully and of their malice aforethought, were present, aiding, helping, abetting, assisting and maintaining the said in the felony and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors aforesaid, on their oath aforesaid do say, that the said in manner and form last aforesaid, piratically, feloniously, wilfully and of their malice aforethought the said did kill and murder, against the peace and dignity of the United States of America, and against the form of the statute of the said United States in such case made and provided.

Eighth count.

(*Same as seventh count, substituting one other as principal*).

Ninth count.

(*Same as eighth count, substituting one other as principal* (*if as many were engaged, and if more than three, go on as before as to each person*).

Tenth count. By wounding and drowning.

And the jurors aforesaid, on their oath aforesaid, do further present, that (*as in preceding counts specified*) heretofore, to wit, on the day of in the year of our Lord one thousand eight hundred and with force and arms, upon the high seas, out of the jurisdiction of any particular state of the United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain vessel, being a called the owned by citizens of the United States of America, in and upon a person known and commonly called by the name of a mariner (*or otherwise*), in and on board said vessel, in the peace of God and of the said United States, then and there being, piratically, feloniously, wilfully and of their malice aforethought, did make an assault, and that they the said with a certain instrument of called a which he the said in his hand then and there had and held, the said in and upon the head, breast and other parts of the body of him the said upon the high seas, and on board the vessel aforesaid, and out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, did strike and beat, giving to the said in and upon the head, breast and other parts of the body of him the said upon the high seas, in and on board the vessel aforesaid, several grievous wounds, and did then and there, in and on board the vessel aforesaid, on the high seas aforesaid, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, him the said cast and throw from and out of the said vessel into the sea, and plunge, sink and drown him the said in the sea aforesaid, of which said grievous wounds, casting, throwing, plunging, sinking and drowning the said upon the high seas aforesaid, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said him the said then and there, upon the high seas as aforesaid, and out of the jurisdiction of any particular state, piratically, feloniously, wilfully and of their malice aforethought, did kill and murder, against the peace and dignity of the said United States of America, and against the form of the statute of the said United States in such case made and provided.

Eleventh count.

(*Same as tenth count, inserting the name of one only of the persons engaged, as principal, with the others as accomplices, making the proper variations*).

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present, that the Southern District of New York (*or otherwise*), in the Second Circuit, is the district and circuit in which the said was first apprehended for the said offence.

Murder on the high seas, by striking with a handspike. (With commencement and conclusion as adopted in the federal courts of Pennsylvania).(r)

In the Circuit Court of the United States of America in and for the Eastern District of Pennsylvania, of Sessions, in the year, &c.

Eastern District of Pennsylvania, to wit:

The grand inquest of the United States of America, inquiring for the eastern district of Pennsylvania, upon their oaths and affirmations respectively do present, that A. B., late of the district aforesaid, one of the crew of an American vessel, to wit, the barque Active, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, on the day of in the year, &c., on the high seas, within the admiralty and maritime jurisdiction of the United States, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, in and upon one C. D., being the second mate of the said vessel, piratically, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said A. B., with a certain handspike of the value of ten cents, which he, the said A. B. in both his hands then and there had and held, him the said C. D. in and upon the right side of the head of him the said C. D., did strike and beat, giving the said C. D., then and there, with the handspike aforesaid, in and upon the right side of the head of him, the said C. D., one mortal wound and fracture, of the length of five inches and of the depth of two inches, of which said mortal wound and fracture the said C. D. then and there instantly died. And so the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do say, that the said A. B. the said C. D. in manner and form aforesaid, piratically, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the form of the

(r) Lewis' C. L. 644; see U. S. *v.* Moran, Phil. April Sess. 1837, where Judge Hopkinson sustained a capital conviction upon an indictment possessing the same general features as the present.

act of congress in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jury aforesaid, inquiring as aforesaid, upon their oaths and affirmations aforesaid, do further present, that after the commission of the said crime on the high seas, and within the jurisdiction of this court, the said A. B. was first brought, to wit, on or about the day of in the year, &c., into the said eastern district of Pennsylvania.

Striking with a glass bottle on the forehead, on board an American vessel in a foreign jurisdiction. (*With commencement and conclusion as adopted in the federal courts of Massachusetts*).(*s*)

The jurors of the said United States within and for the said district, upon their oath present, that F. M., late of Boston, in said district, mariner, on the day of in the year, &c., in and on board of the barque Eliza, then lying within the jurisdiction of a foreign state or sovereign, to wit, at one of the islands called the Navigators' Islands, in the South Pacific, the said barque then and there being a ship or vessel of the United States, belonging to certain citizens of the United States, whose names are to the jurors aforesaid unknown, with force and arms, in and upon one P. M., feloniously and wilfully did make an assault, and that the said F. M., with a certain glass bottle of the value of ten cents, which he the said F. M. in his right hand then and there held, him the said P. M. in and upon the head of him the said P. M., then and there feloniously and wilfully did strike, giving unto him, the said P. M., then and there, with the said glass bottle, by the stroke aforesaid, in the manner aforesaid, and upon the head of him the said P. M., one mortal wound, of the depth of one inch and of the length of one inch, of which said mortal wound he the said P. M., on and from the day of aforesaid, until the day of on board said barque, then lying at the said island, did languish, and languishing did live; on which said day of aforesaid, the said P. M. on the high seas (the said barque having then left the said island), and within the admiralty and maritime jurisdiction of the said United States, of the said mortal wound died. And so the jurors aforesaid, on their oath aforesaid, do say, that the said F. M. the said P. M. in manner and form aforesaid feloniously did kill and slay, against the peace and dignity of the said United States, and contrary to the form of the statute of the United States in such case made and provided.

And the jurors aforesaid, on their oath aforesaid, do further present, that afterwards, to wit, on the day of in the year, &c., the said F. M. was first apprehended in Nantucket, in the said district of Massachusetts, which was the district in which the said F. M. was first brought after the commission of the offence aforesaid.

(*s*) This form, as well as several that will follow, I have obtained through the valuable aid of F. O. Prince Esq. of Boston.

Against a mother for drowning her child, by throwing it from a steamboat on Long Island Sound. (Commencement and conclusion as adopted in the federal courts of Massachusetts).(t)

The jurors, &c., do present, that late of in the district of M., wife of of in on the day of in the waters of Long Island Sound, the same being an arm of the sea, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, in and on board of the steamer M., the same then and there being an American ship or vessel, in and upon the female child of her the said the said female child then and there being an infant of tender age, to wit, about the age of three weeks, whose name is as yet unknown to the jurors aforesaid, feloniously, wilfully and of her malice aforethought, did make an assault, and that the said then and there, feloniously, wilfully and of her malice aforethought, did take the said female child into both the hands of her the said and did then and there feloniously, wilfully and of her malice aforethought, cast and throw the said female child from on board the said steamer M. into the waters of the said Long Island Sound, by reason of which casting and throwing of the said female child into the waters aforesaid, the said female child in the said Long Island Sound, by the waters aforesaid was then and there choked, suffocated and drowned, of which said choking, suffocating and drowning, the said female child then and there instantly died. And the jurors aforesaid, on their oath aforesaid, do say, that the said the said female child, in the said arm of the sea, within the admiralty and maritime jurisdiction of the United States, and without the jurisdiction of any particular state, in the manner and by the means aforesaid, feloniously, wilfully and of her malice aforethought, did kill and murder, against the peace and dignity of the said United States, and contrary to the form, &c.

Second count. Omitting averment of relationship, and charging the sex to be unknown.

And the jurors, &c., further present, that late of in the district of M., wife of of in on the day of in the waters of the Long Island Sound, the same being an arm of the sea, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, in and on board of the steamer M., the same then and there being an American ship or vessel, in and upon a certain child, the said child then and there being an infant of tender age, to wit, under the age of one year, whose name and sex are unknown to the jurors aforesaid, feloniously, wilfully and of her malice aforethought, did make an assault; and that the said then and there feloniously, wilfully and of her malice aforethought, did take the said child into both the hands of her the said and did then and there feloniously, wilfully and of her malice aforethought, cast and throw the said child from on board the said steamer M. into the waters of said Long Island

(t) See U. S. v. Hewson, 7 Bost. L. R. 361; Wh. C. L. 225.

Sound, by reason of which casting or throwing of the said child into the waters aforesaid, the said child, in the said Long Island Sound, by the waters aforesaid, was then and there choked, suffocated and drowned, of which said choking, suffocating and drowning, the said child then and there instantly died. And the jurors aforesaid, on their oath aforesaid, do say, that the said the said child on the said arm of the sea, within the admiralty and maritime jurisdiction of the United States, and without the jurisdiction of any particular state, in the manner and by the means aforesaid, feloniously, wilfully and of her malice aforethought did kill and murder, against the peace and dignity of the said United States, and contrary to the form, &c.

And the jurors, &c., on, &c., further present, that afterwards, to wit, on the said the said was first apprehended at in said district of Massachusetts, and that, &c.

Murder on the high seas, with a hatchet.(*u*)

Southern District of New York, ss. The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that of the City and County of New York, in the district and circuit aforesaid, mariner, of the said city and county, mariner, and of the said city and county, mariner, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year, &c., with force and arms, upon the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, on board of a certain vessel, being a called the owned by a certain person or persons whose names are to the said jurors unknown, then being a citizen or citizens of the United States of America, in and upon one in the peace of God and of the said United States, then and there being, on board the said called the on the high seas, out of the jurisdiction of any particular state, and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, did make an assault; and that the said with a certain instrument of wood and iron called a hatchet (*or other instrument*), of the value of which the said in his right hand then and there had and held, the said in and upon the head, face, breast and other parts of the body of him the said then and there being, on the high seas, in the aforesaid, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there feloniously, wilfully and of his malice aforethought, did strike, giving to the said then and there, with the aforesaid, by such striking with the aforesaid, in manner aforesaid, in and upon the head, face, breast and other parts of the body of him the said several mortal strokes, wounds and bruises, to wit, one mortal wound on of

(*u*) On this indictment the defendants were convicted in the Circuit Court for the Southern District of New York in U. S. v. Wilhelm *et al.*

him the said of the length of inches, and of the depth of inches, one mortal wound on the of him the said of the length of inches, and of the depth of inches, and one mortal wound on the of him the said of the length of inches, and of the depth of inches, of which said mortal wounds the said from the said day of in the year aforesaid, until the day of the same month (*or otherwise*) of in the year aforesaid, on the high seas aforesaid, out of the jurisdiction of any particular state, and within the jurisdiction of this court, did languish and languishing did live; on which said day of in the year aforesaid, the said on the high seas aforesaid, out of the jurisdiction of any particular state, and within the jurisdiction of this court, of the said mortal wounds, died. And that the said and then and there feloniously, wilfully and of their malice aforethought, were present aiding, abetting, comforting, assisting and maintaining the said in the felony and murder aforesaid, in manner and form aforesaid, to do and commit, and so the jurors aforesaid, upon their oath aforesaid do say, that the said (*here insert the names of all*) in manner and form aforesaid, piratically, feloniously, wilfully and of their malice aforethought, the said did kill and murder, against the peace and dignity of the United States of America, and the form of the statute of the said United States in such case made and provided.

Second count.

(*Same as preceding count, inserting the name of one other as principal; and also, instead of* "being a called the owned by a certain person or persons, whose names are to the said jurors unknown, then being a citizen or citizens of the United States of America," *insert* "being a called the owned by citizens (*or a citizen*) of the United States of America)."

Third count.

(*Same as preceding count, inserting the name of one other person as principal* (*if as many as three were engaged*).

Fourth count.

And the jurors aforesaid, on their oath aforesaid, do further present, that of the City and County of New York, in the district and circuit aforesaid, mariner, of the said city and county, in the district and circuit aforesaid, mariner, and of the said city and county, in the district and circuit aforesaid, mariner, (*if as many are specified in the complaint*), not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the day of in the year, &c., with force and arms, upon the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, on board of a certain vessel being a called the owned by citizens (*or a citizen*) of the United States of America, in and upon one in the peace of God and the said United States, then and there being, on board the said called the on the high seas, out of the jurisdiction of any particular state, within the admiralty and maritime jurisdiction of the said United States of

America, and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, did make an assault, and that the said (*specify one*), with a certain instrument of called a of the value of which he the said then and there, in his hand had and held, and the said (*specify another*), with a certain other instrument of called a of the value of which he the said in his hand then and there had and held, and the said (*specify another if as many as three were engaged*), with a certain instrument of of the value of which he the said in his hand then and there had and held, the said in and upon the head, face, breast and other parts of the body of him the said then and there being on the high seas, in the aforesaid, out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there, feloniously, wilfully and of their malice aforethought, did strike, giving to the said then and there, with the aforesaid, by such striking, with the aforesaid, in manner aforesaid, in and upon the head, face, breast and other parts of the body of him the said several mortal strokes and wounds, to wit, one mortal stroke and wound on the of him the said of the length of inches, and of the depth of inches, one mortal stroke and wound on the of him the said of the length of inches, and of the depth of inches, one mortal stroke and wound on the side of the breast of him the said of the length of inches, and of the depth of inches, and one other mortal stroke and wound on the of him the said of the length of inches, and of the depth of inches, of which said mortal strokes and wounds the said from the said day of in the year, &c., on the high seas aforesaid, out of the jurisdiction of any particular state, and within the jurisdiction of this court, did languish and languishing did live, until the day of the same month (*or otherwise*) of in the year last aforesaid, on which said day of in the year last aforesaid, the said on the high seas aforesaid, out of the jurisdiction of any particular state, and within the jurisdiction of this court, of the said mortal strokes and wounds died.

And the jurors aforesaid, on their oath aforesaid, do say that they the said him the said in the manner and by the means last aforesaid, on the high seas, out of the jurisdiction of any particular state, and within the jurisdiction of this court, piratically, feloniously, wilfully and of their malice aforethought, the said did kill and murder, against, &c., and against, &c.

Last count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the Southern District of New York, in the second circuit aforesaid, is the district and circuit in which the said offenders, viz. the said were first brought and apprehended for the said offences.(*uu*)

(*uu*) As a matter of course, where the party or parties have not been arrested, but where the indictment is drawn for the purpose of issuing a bench warrant, the count in conclusion is not to be put in. Where an offence has been committed against the laws of the

Manslaughter on the high seas.(v)

First count. Drowning, &c., on a vessel whose name was unknown, &c.

The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, on their oaths and affirmations respectively, do present, that A. W. H., late of the district aforesaid, mariner, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the day of in the year, &c., upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, on board of a certain vessel, to wit, a vessel the name whereof is to the jurors unknown, then and there belonging to a citizen of the United States, to wit, one J. P. V., late of the district aforesaid, with force and arms, in and upon a person known and commonly called by the name of F. A., in and on board of said vessel, in the peace of God and of the United States then and there being, unlawfully and feloniously did make an assault; and that he the said A. W. H., then and there on board of the said vessel, upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, with force and arms, unlawfully and feloniously did cast and throw the said F. A. from and out of the said vessel into the high seas there, by means of which said casting and throwing of him the said F. A. from and out of the said vessel into the high seas aforesaid, he the said F. A., in and with the water thereof, upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there was suffocated and drowned, of which said suffocation and drowning he the said F. A. did then and there instantly die. And so the grand inquest aforesaid, inquiring as aforesaid, on their oaths and affirmations aforesaid, do say, that the said A. W. H., him the said F. A. in the manner and by the means aforesaid, unlawfully and feloniously did kill, contrary, &c., and against, &c.

Second count. Same on a long-boat belonging to J. P. V., &c.

And the grand inquest aforesaid, inquiring as aforesaid, on their oaths and affirmations aforesaid, do further present, that afterwards,

United States of America, under the admiralty and maritime jurisdiction, in or near a foreign port or place, in and on board of a vessel belonging in whole or in part to a citizen or citizens of the United States of America (see act of congress of March 3d, 1825, s. 5), the indictment should, after beginning in the usual way, proceed thus: on the high seas, near, &c., or, at a port or place within the jurisdiction of a foreign state or sovereign, to wit, (name distinctly the port or place, and the state or sovereign under whose jurisdiction it is), on waters out of the jurisdiction of any particular state of the said United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the belonging in whole or in part, to a certain person or persons, whose name or names are to the said jurors unknown, then and still being a citizen or citizens of the said United States of America, &c.

(v) The defendant was convicted under this indictment, and was sentenced to a small punishment, but was afterwards pardoned by the president. The case was of great singularity, involving the question, whether a mariner in a case of extreme necessity, is justified in throwing overboard a passenger from a boat unable to hold the two; see Wh. C. L. 261.

to wit, on the day and year aforesaid, the said A. W. H., not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, on board of a certain vessel, to wit, the long-boat of the ship W. B., then and there belonging to a citizen of the United States, to wit, one J. P. V., late of the district aforesaid, with force and arms, in and upon a person known and commonly called by the name of F. A., in and board of said vessel in the peace of God and of the United States then and there being, unlawfully and feloniously did make an assault; and that he the said A. W. H. then and there, on board of the said vessel upon the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, with force and arms, unlawfully and feloniously did cast and throw the said F. A. from and out of the said vessel into the high seas, by means of which said casting and throwing of him the said F. A., from and out of the said vessel into the high seas aforesaid, he the said F. A., in and with the waters thereof, upon the high seas aforesaid, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, and within the jurisdiction of this court, then and there was suffocated and drowned, of which said suffocation and drowning he the said F. A. did then and there instantly die. And so, &c. (*as in first count*).

Final count. And the grand inquest aforesaid, inquiring as aforesaid, on their oaths and affirmations aforesaid, do further present, that after the commission of the crimes so as aforesaid committed on the high seas, and out of the jurisdiction of any particular state, to wit, on the day of the said A. W. H., the offender aforesaid, was apprehended in the Eastern District of Pennsylvania.

Misdemeanor in concealing death of bastard child by casting it in a well, under the Pennsylvania statute.(*w*)

And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that the said R. P., on the said day of

(*w*) It is not necessary to set forth in what manner or by what arts the mother endeavoured to conceal the death of the child; Boyle *v.* Com., 2 S. & R. 40. It is a fatal objection that an indictment for concealing the death, does not directly aver the death of the child. It is not sufficient to aver that the defendant "did endeavour privately to conceal the death of the said female bastard child;" Douglas *v.* Com., 8 Watts 535; Com. *v.* Clark, 2 Ash. 105. Whether the child be born dead or alive would seem to be immaterial; Douglas *v.* Com., 8 Watts 535, Rogers J.; see R. *v.* Coxhead, 1 C. & K. 623. The concealment is not conclusive evidence of the fact, unless the circumstances attending it are sufficient to satisfy the jury that the mother did wilfully and maliciously destroy the child; Penna. *v.* M'Kee, Add. 2.

Under the North Carolina act against the mother, for concealing the birth of her bastard child, it is said that it is not incumbent on the prosecution to show that the child was born alive, but the burthen of showing the contrary is on the part of the accused; (see R. *v.* Douglas, 1 Mood. C. C. 462); and that the *corpus delicti* is concealing the death of a being upon whom the crime of murder would have been committed; and, therefore, if the child be born dead, concealment is not an offence against the statute; State *v.* Joiner, 4 Hawks 350.

in the year aforesaid, being big with a male child, the same day and year, in the county aforesaid, by the providence of God did bring forth the said child of the body of her the said R., alone and in secret, which said male child if it were born alive would by the laws of this commonwealth be a bastard, and that the said R. afterwards, to wit, on the day of in the year aforesaid, as soon as the said male child was born, did endeavour privately to conceal the death of the said child, and did take the said child into both the hands of her the said R., and did then and there wilfully and privately cast and throw the said child into and down the well of a certain privy there situate, so that it might not come to light, whether the said child was born dead or alive, or whether it were murdered or not, contrary, &c., and against, &c.

Same where means of concealment are not stated.(*x*)

That J. B., late of the county aforesaid, spinster, on, &c., at, &c., being big with a certain female infant, the same day and year, at the county aforesaid, did bring forth the said infant of the body of her the said A., alone and in secret, which same infant, so being brought forth alive, was by the laws of this commonwealth a bastard; and that the said S. B. afterwards, to wit, the same day and year aforesaid (the said female infant having on the day and year last aforesaid, at the township and county aforesaid, died) did endeavour privately to conceal the death of the said female infant, so that it might not come to light whether the said female infant was born dead or alive, or whether the said female infant was murdered or not, contrary, &c. and against, &c.

A mother having caused the body of her child to be buried privately, her object being to conceal its birth, it was held, under the stat. 43 Geo. III. c. 58, and 9 Geo. IV. c. 31, s. 14, from which the American acts differ but little, that the fact of her having previously acknowledged the birth to several persons, did not prevent her conviction of the concealment; R. *v.* Douglas, 1 Mood. C. C. 462. Where the woman was delivered of a child, the dead body of which was found in a bed amongst the feathers, but there was no evidence to show who put it there, and it appeared that the mother had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the judge directed an acquittal of the charge for endeavouring to conceal the birth; R. *v.* Higley, 4 C. & P. 366. Where a woman, delivered of a seven months' child, threw it down the privy, and it appeared that another woman, charged as an accomplice, knew of the birth; upon an indictment for murder against the two, the jury found the mother guilty of the concealment; and the point being saved upon a doubt, whether it was a case within the stat. 43 Geo. III. c. 58, as a second person knew of the birth, the judges held that the act of throwing the child down the privy was evidence of the endeavour to conceal the birth, and that the conviction was right; R. *v.* Cornwall, R. & R. 336. An indictment on stat. 9 Geo. IV. c. 31, s. 14, for endeavouring to conceal the birth of a dead child, need not state whether the child died before, at or after its birth; Reg. *v.* Coxhead, 1 C. & K. 623. An indictment which charged that the defendant did cast and throw the dead body of the child into soil in a certain privy, "and did thereby, then and there, unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof," sufficiently charges the endeavour to endeavour to conceal the birth, as the word "thereby" applies to the endeavour, as well as to the disposing of the dead body; R. *v.* Douglas, 1 Mood. C. C. 462.

By the act of 22d April, 1794 (Purd. 532), the grand jury may join a count for murder with a count for concealment. For forms for "Murder" in such cases, see *ante*, 77–8–9.

(*x*) See Boyle *v.* Com., 2 S. & R. 40, where this count was sustained. The usual form, however, is to charge the offence as a "child," and not an "infant," and I would add another count so stating it, notwithstanding the sanction by the Supreme Court of the form in the text.

Endeavour to conceal the birth of dead child, under the English statute.(*y*)

That A. C., late of, &c., on, &c., at, &c., being big with a certain female child, afterwards, to wit, on the same day and in the year aforesaid, in the parish aforesaid, in the county aforesaid, of the said child was delivered.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. C. afterwards, to wit, on the same day, and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, with both her hands unlawfully did cast and throw the dead body of the said child into and amongst the soil, waters and filth then being in a certain privy there, and did thereby then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof, against, &c., and against, &c.

CHAPTER II.

RAPE.

General Form.

That J. S., late of the parish of B., in the county of M., labourer, on the day of &c., with force and arms,(*a*) at the parish aforesaid, in the county aforesaid, in and upon one A. N.(*b*) in the peace of God and the said state then and there being, violently and feloniously did make an assault,(*c*) and her the said A. N. then and there forcibly and against her will(*d*) feloniously did ravish and carnally know;(*e*) against, &c. (*Conclude as in book* 1, *chapter* 3. *Add a count for assault with intent to ravish*).(*f*)

(*y*) R. *v.* Coxhead, 1 C. & K. 623.

(*a*) These words are surplusage; see *ante*, p. 9.

(*b*) It is not necessary to aver A. N. to have been a woman; State *v.* Farmer, 4 Iredell 224; nor that she was over the age limited by the statute for infancy; *ib.*

(*c*) An indictment charging that the defendant in and upon A. B., "feloniously and violently did make (omitting the words 'an assault'), and her the said A. B. then and there, against her will, violently and feloniously did ravish and carnally know," &c., was held sufficient in arrest of judgment; Reg. *v.* Allen, 1 Mood. C. C. 179; 9 C. & P. 521.

(*d*) Though these words used to be considered essential, State *v.* Jim, 1 Dev. 142, yet it has been held that the clause might be supplied by "feloniously did ravish and carnally know her;" Harman *v.* Com., 12 S. & R. 69; Com. *v* Bennett, 2 Va. Cases 235.

(*e*) The omission of the "*carnaliter cognovit*" makes the indictment bad on demurrer, but, as it seems, not after verdict, under the late English statute of jeofails; R. *v.* Warren, 1 Russ. 686.

A general conviction of defendant, charged both as principal in the first degree, and as

CHAPTER III.

SODOMY.(a)

That A. B., on, &c., at, &c., in and upon T. L., then and there being, feloniously did make an assault, and then and there feloniously, wickedly, diabolically and against the order of nature, had a venereal affair with the said T. L., and then and there carnally knew the said T. L., and then and there feloniously, wickedly and diabolically, and against the order of nature, with the said T. L. did commit and perpetrate that detestable and abominable crime of buggery(b) (not to be named among christians), to the great displeasure of Almighty God, to the great scandal of all human kind, against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER IV.

MAYHEM.

Indictment on Coventry Act, 22 *and* 23 *Car.* 2, *c.* 1, *for felony by slitting a nose, and against the aider and abettor.*(a)

That J. W., late of, &c., labourer, and A. C., late of, &c., esq., on, &c., contriving and intending one E. C., to maim and disfigure,(b) at, &c., with force and arms, in and upon the said E. C., in the peace of

an aider and abettor of other men in rape, is valid on the count charging him as principal. And on such an indictment, evidence may be given of several rapes on the same woman, at the same time, by the defendant and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed; R. *v.* Folkes, 1 Mood. C. C. 344; R. *v.* Gray, 7 C. & P. 164.

An indictment is good which charges that A. committed a rape, and that B. was present aiding and abetting him in the commission of the felony; for the party aiding may be charged either as he was in law, a principal in the first degree, or as he was in fact, a principal in the second degree; R. *v.* Crisham, C. & M. 187.

(*f*) See *ante*, p. 13, as to the propriety of such a joinder.

(*a*) Stark. C. P. 434.

(*b*) This word is essential; Co. Ent. 351; Fost. 424; 3 Ins. 59.

(*a*) Chit. C. L. vol. 3, 786. Though mayhem is still an offence at common law, and as such is the subject of prosecutions in England, there are few precedents of indictments for it as a common law offence. This form was taken by Mr. Chitty (3 C. L. 786), from the Cro. C. C. 264. In the United States, however, so far as the ground is unoccupied by statute, the common law remedy remains, and mayhem may still be treated as a common law offence.

(*b*) The intent as thus laid is necessary; 1 East P. C. 402; see *ante*, p. 11.

God and the said state, then and there being, on purpose,(*c*) and on (*or* "of their") malice aforethought,(*c*) and by lying in wait, unlawfully and feloniously(*d*) did make an assault, and the said J. W., with a certain iron bill of the value of one penny, which he the said J. W. in his right hand then and there had and held,(*e*) the nose of the said E. C., on purpose, and of his malice aforethought, and by lying in wait, then and there unlawfully and feloniously(*f*) did slit(*g*) with intention, the said E. C., in so doing, in manner aforesaid, to maim and disfigure, and that the aforesaid A. C., at the time the aforesaid felony by the said J. W., in manner and form aforesaid, was done and committed, to wit, on the said, &c., at, &c., with force and arms, on purpose, and of his malice aforethought, and by lying in wait, unlawfully and feloniously was present (*knowing of and privy to the said felony*,(*h*) aiding and abetting the said J. W., in the felony aforesaid, in manner and form aforesaid done and committed. And so the jurors, &c., do say,(*i*) that the said J. W. and A. C., on the said, &c., at, &c., aforesaid, with force and arms, on purpose, and of their malice aforethought, and by lying in wait, the felony aforesaid, in form aforesaid, unlawfully and feloniously did do and commit, and each of them did do and commit, against, &c., and against, &c.

Mayhem by slitting the nose, under the Massachusetts statute.(*j*)

That A. B., of &c., on with force and arms, at in the county aforesaid, contriving and intending one C. D. to maim and disfigure, in and upon the said C. D., in the peace of said commonwealth then and there being, with set purpose and aforethought malice, and with intention him the said C. D. to maim and disfigure, unlawfully and maliciously(*k*) did make an assault; and that he the

(*c*) The omission of these words would be unsafe; 1 East P. C. 402; Penna. *v.* M'Birnie, Add. R. 28.

(*d*) This is requisite; Hawk. b. 2, c. 23, s. 18; Chit. C. L. 786, 787; see *post*, note *f*.

(*e*) The same precision necessary as in murder; Hawk. b. 2, c. 23, s. 79.

(*f*) In England, 3 Chit. C. L. 786, and in Pennsylvania, *post*, p. 104, the practice is to charge the offence as a felony; but in Massachusetts and Alabama it is treated as a misdemeanor.

"Every indictment for maiming," says Mr. Chitty, 3 C. L. 787, "though at common law, must charge the offence to have been done *feloniously*, because the defendant was formerly punished with loss of member; Hawk. b. 2, c. 23, s. 18. The term *maheimavit* was always essential formerly, as the word *maim* is at present; *ib.* s. 17; Com. *v.* Newell, 7 Mass. R. 245. The wound should be set forth with the same degree of precision as in cases of murder; and a similar conclusion must be drawn, that *so* the defendant did *feloniously maim*, &c., though this will not supply the omission of either of these words in the previous description of the violence; 1 East P. C. 402. In case of indictment on the statute of Charles, its language must be accurately followed; so that the expressions *on purpose, of malice aforethought*, and *by lying in wait*, as well as the allegation that the act was done *with intent to maim and disfigure*, are material; *ib.*; Penna. *v.* M'Birnie, Add. R. 28.

(*g*) The wound should be laid with the same precision as in murder; 3 Chit. C. L. 786.

(*h*) The words of the statute.

(*i*) This conclusion is necessary; 1 East P. C. 402; Chit. C. L. 786, 787.

(*j*) Davis' Prec. 167; see a precedent in 3 Chit. 787, on the Coventry Act, 22 and 23 Car. II. c. 1, and also 6th ed. of Cro. C. C. p. 430.

(*k*) The word *feloniously* is used in the English precedents as well as in those in Pennsylvania, as will be presently seen, but is changed for *maliciously* in this, upon the authority of Com. *v.* Newall *et al.*, 7 Mass. R. 245. "This form," says Mr. Davis, "will answer for

said A. B., with a certain iron bill of the value of five cents,(*l*) which he the said A. B., in his right hand then and there had and held, the nose of him the said C. D., with set purpose and aforethought malice, then and there, unlawfully and maliciously did slit, with intention the said C. D., in so doing, in manner aforesaid, to maim and disfigure; against, &c., and contrary, &c.

Mayhem by cutting out one of the testicles, under the Pennsylvania statute.(*m*)

That negro T., late of the said county, yeoman, on the second day of May, A. D. one thousand eight hundred and six, at the county aforesaid, and within the jurisdiction of this court, contriving and intending one T. W. to maim and disfigure, with force and arms, in and upon the said T. W., in the peace of God and the commonwealth then and there being, feloniously, voluntarily and maliciously did make an assault; and the said negro T., with a certain knife of the value of ten cents, which he the said negro T., in his right hand then and there had and held, on purpose, and of his malice aforethought, then and there, unlawfully, voluntarily, maliciously and feloniously did cut out, mutilate and destroy one of the testicles, to wit, the left testicle of him the said T. W., with intention, him the said T. W., in so doing, in manner aforesaid, to maim and disfigure; and so the jurors aforesaid, upon their oaths, &c., aforesaid, do say that the said negro T., on the said day of in the year aforesaid, at the county aforesaid, with force and arms, on purpose, and of his malice aforethought, the offence aforesaid, in manner and form aforesaid, did do and commit, contrary &c., and against, &c.(*n*)

all the other species of mayhem mentioned in the section of the statute on which this precedent is drawn. All persons present aiding and abetting may be charged as principals. If *not present*, but accessaries *before* the fact, they may be charged as such;" see 3 Chit. 787.

(*l*) See as to the necessity of this averment, *ante*, p. 44.

(*m*) The defendant was convicted in 1806, under this indictment, in the Philadelphia Quarter Sessions.

(*n*) In an early indictment in Pennsylvania, Resp. *v.* Langcake, 1 Yeates 415, the first count stated, that Langcake contriving and intending Jonathan Carmalt, a citizen of Pennsylvania, to maim and disfigure, with force and arms, &c., on purpose and of his malice aforethought, *and by lying in wait*, on the 13th August, 1794, at, &c., unlawfully and feloniously did make an assault on the said Jonathan with a cart-whip, of the value of 1*s.*, and the right eye of the said Jonathan then and there did strike and put out, with an intent in so doing to maim and disfigure him, against the act of assembly, &c., and that Hook was then and there present, aiding and abetting the fact, &c., against the act, &c.

The second count was grounded on the latter part of the 6th sect. of the act of 22d April, 1794 (p. 601), and pursued the words of the first count, leaving out the words "and by lying in wait," and charging the fact to have been done "voluntarily and maliciously and of purpose," both against the principal and accessary.

The third count stated, that Langcake and Hook, contriving to maim and disfigure Jonathan Carmalt, in the peace of God and of the commonwealth then and there being, the said Langcake on the 13th August, 1794, at, &c., voluntarily, wickedly, maliciously, unlawfully and feloniously did assault the said Jonathan, and him with a cart-whip, which he in his right hand had and held, the right eye of the said Jonathan, then and there voluntarily, &c., did strike and put out, with intent in so doing to maim and disfigure him, and that Hook, at the time of the felony by Langcake done and committed voluntarily,

Against principal in first and second degree for mayhem in biting off an ear, under the statute of Alabama.(*o*)

That W. M., on, &c., at, &c., in and upon one W. E. W., in the

&c., was present aiding and abetting the said Langcake in the felony aforesaid, &c., concluding as in mayhem at common law, against the peace, &c.

"The first clause of our act of assembly of 22d April, 1784, s. 6, is borrowed from the words of the British statute of 22 and 23 Car. II. c. 1, s. 7. It pursues the same language, except that our act particularly enumerates the cutting off "the ear," and mildly varies the mode of punishment. Under that statute, commonly called the Coventry Act it, has been adjudged not necessary that either the malice aforethought, or lying in wait, should be expressly proved to be on purpose to maim or disfigure; Leach's case 193; Tickner's case. And also that he who intends to do this kind of mischief to another, *and by deliberately watching an opportunity*, carries that intention into execution, may be said *to lie in wait on purpose; ib.* 194; Mills' case.

"Under the first clause of the act of assembly, no intent to maim or disfigure in a *particular* manner is necessary, and therefore on the first count in the indictment, if the general intent is established to the satisfaction of the jury, their next material inquiries will be, as to the malice and lying in wait, whether the same has been proved, or can fairly be inferred from all the circumstances which have been disclosed in evidence.

"The second clause of the 6th section of the act goes further than the Coventry Act, and was evidently introduced to prevent the infamous practice of *gouging*. The words are very comprehensive, and extend to pulling out or putting out the eye, while fighting or otherwise. But we hold it necessary, in order to convict on this clause, that a specific intent to pull out or put out the eye, must be shown to the satisfaction of the jury. We apprehend that the evidence will scarcely warrant the conviction of Langcake on the second count; and though Hook has behaved himself grossly amiss during the whole transaction, yet he cannot properly be convicted on either of the two first counts in the indictment.

"Of the third and fourth counts, Langcake is admitted by his counsel to be guilty, and perhaps the evidence will suffice to reach Hook on these two last counts.

Sentence was afterwards pronounced against Langcake, that he should undergo a confinement in the gaol and penitentiary house for three years, the one-twelfth part to be in the solitary cells, to pay a fine of $1000, whereof three-fourth parts to be for the use of Carmalt, and give security for his good behaviour for seven years, himself in £500, and two sufficient sureties in £250 each, and pay costs.

(*o*) State *v.* Absence, 4 Port. 397. The court said: "The indictment seems to be in the form pointed out by the most usual and correct precedents, and contains only one count, which charges Mosely with committing the act, and Absence with being present, and aiding and assisting.

"It is objected, however, that the statute having declared the biting off of an ear to be mayhem, it was necessary to charge the individuals indicted with this legal conclusion; Hawk. vol. 1, p. 107, and 2 Hawk. 311, are relied on to establish this position.

"It is admitted, if a statute adopt a common law offence, without otherwise defining the crime, all the common law raquirements should be followed in the indictment; thus our statutes affix the punishment of death to murder and rape, without attempting to define the crimes. Here, no doubt, the terms '*murdravit*' and '*rapuit*' would be essential; but when a statute describes a particular act or acts as a misdemeanor or crime of a particular grade, it is not necessary in an indictment, after charging the acts, to state the legal conclusion, that they amount to the misdemeanor or crime of the grade declared by statute, *because such is the conclusion of the law on the facts alleged.* The same reason is conceived applicable to the omission of the word 'feloniously.' If the statute had declared, that all persons who should be guilty of the crime of mayhem, should be punished in a particular manner, without attempting to further define the offence, the question would properly arise on an indictment framed under such a statute, whether it was necessary to allege the mayhem to have been done feloniously.

"It is sufficient to decide, that the word entering into no part of the definition of this offence, as created by the statute, it was properly omitted in the indictment.

"It is further urged, that there is no sufficient allegation of time and place, so far as Absence is noticed in the indictment.

"The court recognises the authority of the rule requiring an averment of time and place to each substantive fact charged in the indictment; (Arch. C. P. 36). But the indictment, it is believed, conforms to this rule with the utmost precision.

"It follows, as the consequence of these views, that there was no error in refusing to arrest the judgment in the court below."

peace of the said state then and there being, did make an assault, and that the said W. M., the right ear of him the said W. E. W., then and there on purpose, and of his malice aforethought, unlawfully did bite off. And the jurors aforesaid, upon their oaths aforesaid, do further present, that E. A., late of the county aforesaid, in the county aforesaid, &c., with force and arms, on the day and year aforesaid, unlawfully and on purpose, and of his malice aforethought, was present aiding and abetting and assisting the said W. M., the said mayhem to do and commit, contrary, &c., and against, &c.

Biting off an ear, under Rev. Stat. N. C. 34, c. 34.(p)

That defendant on, &c., at, &c., unlawfully and on purpose, did bite off the left ear of one J. W., contrary, &c.

Maliciously breaking prosecutor's arm with intent to maim him, under the Alabama statute.(q)

That the defendant, with force and arms, in and upon one P. J. did make an assault, and upon the left arm of him the said P. J., with a certain stick, which he the said defendant then and there held in both his hands, did strike and break, and did on purpose and of malice aforethought, unlawfully disable the said left arm of him the said P. J., with intent him the said P. J. then and there to maim, contrary, &c., and against, &c.(r)

(p) State *v.* Girkin, 1 Iredell 121. Under this indictment it was held, that an intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. It is not necessary, it was said, in an indictment under this statute, to prove malice aforethought, or a preconceived intention to commit the maim. To constitute a maim under this statute, by biting off an ear, it is not necessary that the whole ear should be bitten off; it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and to ordinary observation to render the person less comely.

(q) See State *v.* Bailey, 8 Port. 472, where it was held, that where the act of eighteen hundred and seven (Aik. Dig. 102), speaks of disabling a limb or member, a permanent injury is contemplated, such as at common law would constitute *mayhem;* a temporary disabling of a finger, an arm, or an eye, is not sufficient to constitute the statutory offence.

(r) A demurrer was filed to the indictment, which was overruled, and upon a plea of "not guilty" the defendant was convicted, and the sufficiency of the indictment was reserved by the court below for review.

CHAPTER V.

ABDUCTION—KIDNAPPING.

Misdemeanor in Massachusetts in kidnappiug a slave.(*a*)

That S. and T., &c., at, &c., on, &c., unlawfully, fraudulently and wickedly, without any lawful warrant or authority whatever, did seize, take, steal and kidnap one S. O. F., of said W., the minor child and son of J. F. F., of said W., a free citizen of said commonwealth, with intent the said S. O. F. to send and transport, and to cause and procure the said S. O. F. to be sent and transported from and out of the said commonwealth, without the consent of said S. O. F., and against his will, and against the will and without the consent of said J. F. F., the said father of said S. O. F., to sell and transfer the said S. O. F. as a slave, against, &c., and contrary, &c.

Misdemeanor in Pennsylvania in seducing away a negro from the state, &c.(*b*)

That S. R., late, &c., on, &c., with force and arms, &c., at the city aforesaid, and within the jurisdiction of this court, unlawfully and by fraud, did seduce a certain negro named T., from the said city into the State of New Jersey, with a design and intention of carrying the said negro T. to be kept and detained a slave for life, contrary to the form of the act of assembly in such case made and provided, and against the peace and dignity, &c.

Second count. Causing such negro to be seduced, &c.

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said S. R. afterwards, to wit, on, &c., at the city aforesaid, and within the jurisdiction of this court, with force and arms, &c., the said negro named T., then and there unlawfully and by fraud did cause to be seduced from the said city to the State of New Jersey, with a design and intention of causing the said negro named T. to be kept and detained as a slave for life, contrary, &c., and against, &c.

Abduction under New York Rev. Stat., vol. 2, p. 553, s. 25.

That T. M., late of the First Ward of the City of New York, in the County of New York, aforesaid, labourer, on, &c., at the ward, city

(*a*) This was the second count of the indictment in Com. *v.* Turner, 3 Met. 19. "The second count in this indictment," says Dewey J., in giving the opinion of the court, "being unquestionably good and sufficient, the court have not thought it necessary to consider the question raised as to the sufficiency of the first count."

(*b*) This indictment was found in 1794.

and county aforesaid, with force and arms, in and upon one J. T., in the peace of God and of the said people then and there being, feloniously did make an assault, and her the said J. T. then and there feloniously did take against her will, with the intent to compel her by force, menace and duress to be defiled, and other wrongs to the said J. T. then and there did, to the great damage of the said J. T., against, &c., and contrary, &c.

CHAPTER VI.

ABORTION.

Production of abortion at common law.(*a*)

First count. By assault and thrusting an instrument in the prosecutor's womb, she being big, quick and pregnant.

That W. B. T., late of the said county, yeoman, A. D. *alias* A. F., late of the said county, singlewoman, and — F., late of the said county,

(*a*) This indictment, containing besides two counts for assault and battery, and two for conspiracy, was removed to the Supreme Court of Pennsylvania, by allocatur, in May, 1845, and was there met with a special demurrer as follows:

"And now, July 8, 1845, the above named defendants respectively, to wit, William B. Taylor and Ann Ford come into court, and for a plea in this behalf say, the said Ann Ford protesting that she is not and never was known by the name of Ann Demain, that she is a married woman, and that her true and only name is Ann Ford; that they ought not and cannot be called upon in law to plead or answer to the above bill of indictment, because they in fact say,

"The said bill of indictment is informal and insufficient, and cannot be supported in law.

"Because they state and set forth the following reasons and grounds for demurrer, specially to the said bill of indictment, to wit:

"1st. The name of Ford is connected with that of said Taylor and Ann Ford, without other name, qualification, or addition to designate the man intended.

"2d. The said indictment does not sufficiently aver the fact that the said Susannah R. Schoch, therein mentioned, was at the time and place therein stated, pregnant and quick with child, which said child was destroyed and killed in its mother's womb, or attempted by said defendants to be so destroyed and killed.

"3d. The said indictment contains two counts, to wit, the 6th and 8th, which are without proper conclusion, and are therefore nugatory.

"4th. Counts are joined in said indictment for producing the abortion of the child therein mentioned, and for attempting to produce it, and for assault and battery, and for attempt to commit said assault and battery, and for conspiring to perpetrate all the said offences.

"5th. The said indictment includes but two of the alleged parties to the conspiracy charged, to wit, the said Taylor and Ann Ford, the name of Ford following it, being a nullity; and omits the name of Susannah R. Schoch, the alleged third party, through

yeoman, on, &c., with force and arms, &c., at the county aforesaid, and within the jurisdiction of the said court, in and upon one S. R. S., then and there being big, pregnant and quick with child, did make a violent assault, and her the said S., then and there did violently bruise, wound and ill-treat, so that her life was thereby despaired of; and a

whom, and by sole means of whose agency in the transaction, the alleged conspiracy was entered into, arranged and carried into effect, or attempted to be carried into effect by the other parties, the said Susannah R. Schoch being, if such conspiracy existed, one of the parties concerned, and the only medium of communication and combination between them, and as such an indispensable party to be charged and embraced with the other defendants in said indictment."

Judgment was entered for the commonwealth, Sergeant J. delivering the following opinion:

"We see nothing in any of the points taken by the defendants in demurrer.

"1. This exception is only pleadable in abatement, in which the defendant must give a better name. It is not cause of demurrer.

"2. The indictment is in proper form, and sufficiently avers that she (the party injured) was pregnant and quick with child, which was destroyed and killed, &c.

"3. This exception is not true in fact. The indictment contains but seven counts, with the usual conclusions.

"4. This exception is not cause of demurrer. If the counts are improperly joined, the court may be asked to interfere before the trial, and put the commonwealth to its election.

"5. The name Ford alone, there being no plea in abatement, is not a nullity; and as to inserting Susannah Schoch as a party, that rests with the prosecution. Two or more may be indicted for a conspiracy with others not parties." See Com. *v.* Demain, 6 Pa. L. J. 29.

It will be observed that there is ambiguity in the language of the court in overruling the exception as to quickness. The second count avers merely that the prosecutor is "big and pregnant;" the court, on a demurrer pointing particularly at this feature, says that it is sufficiently charged that the prosecutor was "big and quick" with child. When it is recollected, however, that the case was one of those which under the act of April 11, 1845, was not certified by the court to the reporter for publication, the apparent incongruity may be explained by treating Judge Sergeant's opinion as indicating the conclusions of the court on the points submitted, rather than their reasoning on the questions involved. One thing is clear, and that is that the defendants were compelled to answer to the second count, where no averment of quickness was introduced; and as far as *they* were concerned, the question was settled. Notwithstanding the ingenious commentary on this case by Judge Lewis, in his late valuable and instructive treatise on criminal law (Lewis' C. L. 13), I cannot withhold my concurrence from the marginal abstract given by the editors of the Law Journal in reporting it, viz. that it is not necessary to aver quickness on the part of the mother, but that it is sufficient to set forth that she was big and pregnant. That such is the common law, both on ground of principle and analogy, there is strong reason to maintain. It is true that the Supreme Court of Massachusetts ruled differently in two instances; in Com. *v.* Bangs, 9 Mass. 387, and in Com. *v.* Parker, 9 Met. 263; and that in the latter case the grave and anxious examination of the question entitles the judgment of the court to the greatest weight. But the positions taken at a former period still appear to me to have a preponderating influence. "There is no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder; 1 Russ. on Cr. 671; 1 Ves. 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; 1 Hale 434; 1 East P. C. 90; 3 Chit. C. L. 798. If the child dies subsequently to birth, from wounds received in the womb, it is clearly homicide; R. *v.* Senior, 1 Mood. C. C. 346; 3 Inst. 50; (see Wh. C. L. 225). It has been said that it is not an indictable offence to administer a drug to a woman and thereby to procure an abortion, unless the mother is *quick* with child; Com. *v.* Bangs, 9 Mass. 387, though such a distinction, it is submitted, is neither in accordance with the result of medical experience; Guy's Med. Juris. tit. Abortion; 1 Beck 172; nor with the principles of common law; 1 Russ. on Cr. 671; 1 Ves. 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; Bracton, l. 3, c. 21. The civil rights of an infant in *ventre sa mere*, are equally respected at every period of gestation; and it is clear that no matter at how early a stage he may be appointed executor, Bac. Ab. tit. Infants, is capable of taking as legatee, 2 Vern. 710; or under a marriage settlement, Doe *v.* Clark, 2 H. Bl. 399; 2 Ves. jr. 673; Thelluson *v.* Woodford, 4 Ves. 227; may take specifically under a devise, Fearne 429; and may obtain an injunction to stay waste, Smith *v.* Duffield, 5 S. & R. 38; 2 Vern. 710;" Wh. C. L. 398. This view is strengthened by the precedents of Mr. Chitty; Chit. C. L. 799, 800; in which the allegation of quickness is omitted.

The notion that a man is not accountable for destroying a child before it quickens,

certain instrument made of silver or other metal, in the shape and form of a hook, up and into the womb and body of the said S., then and there violently, wickedly and inhumanly did force and thrust, with a wicked intent, to cause and procure the said S. R. S. to mis-

arose from the hypothesis that quickening was the commencement of vitality with it, before which it could not be considered as existing. This "absurd distinction," as it is called by Dr. Guy (Med. Jur. 133), is now exploded in medicine, the fact being considered indisputable, that "quickening" is the incident, not the inception of vitality. This view is clearly expounded by Dr. Beck, in his Med. Jurisp. vol. 1, p. 173. "The motion of the fœtus," he says, "when felt by the mother, is called QUICKENING. It is important to understand the sense attached to this word formerly, and at the present day. The ancient opinion, and on which indeed the laws of some countries have been founded was, that the fœtus became animated at this period—that it acquired a new mode of existence. This is altogether abandoned. The fœtus is certainly, if we speak physiologically, as much a living being immediately after conception, as at any other time before delivery; and its future progress is but the development and increase of those constituent principles which it then received. The next theory attached to the term, and which is yet to be found in many standard works, is, that from the increase of the fœtus, its motions, which hitherto had been feeble and imperfect, now are of sufficient strength to communicate a sensible impulse to the adjacent parts of the mother. In this sense, then, quickening implies the first sensation which the mother has of the motion of the child which she had conceived.

"A far more rational, and undoubtedly more correct opinion, is that which considers quickening to be produced by the *impregnated uterus starting suddenly out of the pelvis into the abdominal cavity.* This explains several peculiarities attendant on the phenomenon in question—the variety in the period of its occurrence—the faintness which usually accompanies it, owing to the pressure being removed from the iliac vessels, and the blood suddenly rushing to them; and the distinctness of its character, differing, as all mothers assert, from any subsequent motions of the fœtus. Its occasional absence in some females is readily accounted for, from the ascent being gradual and unobserved."

The true meaning of quickening, and the absurdity of the doctrine that it is the inception of life, is pointedly shown by Orfila, in the recent edition of his very authoritative treatise—Traité de Médecine Legale—Paris, 1848 (vol i. p. 226):

"Chez la plupart des femmes le fœtus exerce des mouvemens que l'on a appelés *actifs:* c'est particulièrement vers la fin du quatrième mois, lorsque les organes de la locomotion jouissent deja d'une certaine énergie, que ces mouvemens sont sensibles; ils deviennent quelquefois si forts par la suite, qu'on les apercoit même à travers les vêtemens, et que la femme en est réveillée pendant la nuit: l'homme de l'art parvient souvent à les provoquer en appliquant sur les parois du ventre la main préalablement trempée dans l'eau froide. Ce signe qui paraîtrait au premier abord devoir permettre d'affirmer que la femme est ou n'est pas enceinte, présente pourtant beaucoup d'incertitude; non seulement il y a des femmes qui n'ont senti de pareils mouvemens à aucune époque de la grossesse, mais il en est beaucoup d'autres chez lesquelles des contractions spasmodiques de l'utérus et des intestins simulaient tellement les mouvemens du fœtus qu'elles se disaient enceintes."

It appears, then, that quickening is a mere circumstance in the physiological history of the fœtus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another—that it is uncertain in its periods, sometimes coming at three months, sometimes at five, sometimes not at all—and that it is dependent so entirely upon foreign influences as even to make it a very incorrect index, and one on which no practitioner can depend, of the progress of pregnancy. There is as much vitality in a physical point of view, on one side of quickening as on the other, and in a social and a moral point of view, the infant is as much entitled to protection, and society is as likely to be injured by its destruction, a week before it quickens as a week afterwards. But if the common law in making fœticide penal, had in view the great mischiefs which would result from even its qualified toleration, *e. g.* the removal of the chief restraint upon illicit intercourse, and the shock which would be sustained thereby by the institution of marriage and its incidents—we can have no authority now for withdrawing any epoch in gestation from the operation of the principle. Certainly the restraints upon illicit intercourse are equally removed—the inducements to marriage are equally diminished—the delicacy of the woman is as effectually destroyed—no matter what may be the period chosen for the operation. Acting under these views, the legislatures of Massachusetts and New York, in order to fill up the supposed gap, passed acts making ante-quickening-fœticide individually penal. If however, as has been argued, no such gap exists, it will be worth while for the courts of those states which have not legislated on the subject, to consider how far an exploded notion in physics is to be allowed to suspend the operation of one of the most conservative doctrines of the common law.

carry, abort and to bring forth the said child, of which she was big, quick and pregnant, as aforesaid, dead, and to kill and murder the said child, by reason and means of which said last mentioned premises, the said child was killed and its life destroyed and taken away in its mother's womb; and she, the said S. afterwards, to wit, on, &c., miscarried and was aborted and delivered of the said child, being a female child, and being at the time of its birth dead, to the great injury and detriment of the said S., to the evil example of all others in like manner offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count, averring prosecutrix to be "big and pregnant."

That the said W. B. T., A. D. *alias* A. F., and — F., afterwards, to wit, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of the said court, in and upon the said S. R. S., then and there being big and pregnant with a certain other child, did make another violent assault, and a certain other instrument made of silver or other metal in the shape and form of a hook, up and into the womb and body of the said S. then and there violently, wickedly and inhumanly did force and thrust, with a wicked intent to cause and procure the said S. to miscarry, and to bring forth the said child of which she was big and pregnant, as last aforesaid, dead, by reason and means of which said last mentioned premises, she the said S., afterwards, to wit, on, &c., miscarried, and was delivered of the said child, being a female child, the said child being dead at the time of delivery, to the great injury and detriment of the said S., to the evil example of all others in like manner offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count, merely averring pregnancy in same.

That the said W. B. T., A. D. *alias* A. F., and — F., afterwards, to wit, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of the said court, in and upon the said S. R. S., then and there being pregnant with a certain other child, did make another violent assault, and a certain other instrument made of silver or other metal, in the shape and form of a hook, up and into the womb and body of the said S., then and there violently, wickedly and inhumanly did force and thrust with a wicked intent, to wit, to cause and procure the said S. to miscarry and to bring forth the said child of which she was big and pregnant, as last aforesaid, dead, to the great injury and detriment of the said S., to the evil example of all others in like manner offending, and against, &c.(*b*) (*Conclude as in book* 1, *chap.* 3).

Assault on a woman with quick child, so that the child was brought forth dead. (*At common law*).(*c*)

That defendant, on, &c., at, &c., in and upon M., the wife of one

(*b*) By the act of 31st May, 1781, Purdon's Digest 531, it is provided, that "If any person or persons shall counsel, advise or direct such woman to kill the child she goes with, and after she is delivered of such child she kills it, every such person so advising or directing, shall be deemed accessary to such murder, and shall have the same punishment as the principal shall have." Of course in case of the child dying after birth, the misdemeanor merges; and this is so at common law; Wh. C. L. 225.

(*c*) Stark. C. P. 429.

W. E., then and there being big with a quick child, did make an assault; and her the said M., then and there did beat, wound and ill-treat, so that her life was greatly despaired of, by reason whereof she the said M., afterwards, to wit, on, &c., at, &c., did bring forth the said child dead, and other wrongs to the said M., then and there did, against, &c. (*Conclude as in book* 1, *chap.* 3).

Against A. the principal, for producing an abortion by using an instrument on the person of a third party, and B. an accessary before the fact, under the English statute.(*d*)

That T. A., late of, &c., on, &c., at, &c., feloniously, unlawfully and maliciously did use a certain instrument, the name of which instrument is to the jurors unknown, by then and there forcing, thrusting and inserting the said instrument into the private parts of H. L., now known by the name of H. E., with intent in so doing, then and there and thereby to procure the miscarriage of the said H. L., now known by the name of H. E., against, &c., and against, &c. And the jurors aforesaid, upon their oath aforesaid, do further present, that T. J. F., late of, &c., before the committing of the felony by the said T. A., as aforesaid, to wit, on, &c., at, &c., feloniously did procure, counsel and command the said T. A., the felony aforesaid, in manner and form aforesaid to commit, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Administering a potion at common law with intent to produce abortion.(*e*)

That A. B., of in the county of labourer, on, &c., at B. aforesaid, in the county aforesaid, did, unlawfully and wickedly, administer to, and cause to be administered to and taken by one C. D., singlewoman, she the said C. D., being then and there pregnant and quick with child, divers quantities, to wit, four ounces of a certain noxious, pernicious and destructive substance called *savin;* with

(*d*) R. *v.* Ashmall, 9 C. & P. 236. At the trial the defendant Ashmall was called, but did not appear, but Fay, who had been on bail, appeared. Godson, for the defendant Fay —"I submit that my client is not compellable to plead to this indictment. He is indicted as an accessary, and as an accessary only. Formerly an accessary before the fact could, in no case, be brought to trial without his principal, except after the conviction of his principal, or by his own consent. But now, by the stat. 7 Geo. IV. c. 64, s. 9, accessaries before the fact may be tried in either one of three modes:—1st, with the principal, 2d, after the conviction of the principal felon, or 3d, for a substantive felony. This indictment is not for a substantive felony, because every thing charged against Mr. Fay is charged as having been done accessarily to Ashmall; and what shows decisively that Mr. Fay is charged as an accessary only, is, that if Mr. Ashmall was acquitted on this indictment, Fay must be acquitted also as a legal consequence." Carrington on the same side: "At the time of the passing of the act, 7 Geo. IV. c. 64, I had occasion to compare it with all the previous enactments on the subject, and I believe I am correct in stating that the only alteration in the law then made, as to the trial of accessaries without and before the conviction of the principal, was by the provisions relating to the accessary being indicted for a substantive felony. I submit, also, that an indictment for a substantive felony must be so framed as not to depend on the conviction or acquittal of any person, except the party who is charged with the substantive felony; indeed, the ordinary counts for the substantive felony of being accessary, do not even name the principal, but merely state him to be "a certain evil disposed person." Gurney, B., (after conferring with Patteson, J.), my learned brother Patteson concurs with me in opinion that Mr. Fay is not compellable to plead to this indictment at present. There might have been an indictment against him for a substantive felony, but this is not so.

(*e*) 3 Chit. C. L. 797, 800; Davis' Prec. 33.

intent thereby to cause and procure the miscarriage of the said C. D., and the premature birth of the said child, of which the said C. D. was then and there pregnant and quick; by the means whereof, the abortion, miscarriage and premature birth of the said child was caused and produced. And she the said C. D., afterwards, to wit, on, &c., next following, at B. aforesaid, in the county aforesaid, by means of the noxious, pernicious and destructive substance aforesaid, so as aforesaid administered by the said A. B., and taken by the said C. D., was prematurely delivered of the said child, against, &c. (*Conclude as in book* 1, *chap.* 3).

Producing abortion in New York, 2 *R. S.* 550–51, *s.* 9, 2*d ed.*

That, &c., on, &c., in and upon one S. S., &c., she the said S. S., then and there, &c., being pregnant with a quick child, feloniously and wilfully did make an assault; and that the said defendant, on, &c., feloniously and wilfully did use and employ on and upon the body and womb of the said S. S., the mother of the said quick child, certain instruments, to wit, one piece of wire, &c., with the intent thereby then and there feloniously and wilfully to destroy the said quick child, the same not being necessary to preserve the life of the said S. S., the mother of the said child, and not having been advised by two physicians to be necessary for such purpose; by means whereof the death of the said quick child was thereby produced, contrary, &c., and against, &c.(*f*) (*Conclude as in book* 1, *chap.* 3).

Administering medicine under the Indiana statute with intent to produce abortion.(*g*)

That A. B., on, &c., at, &c., did feloniously, wilfully and unlawfully administer to one L. H., then and there being pregnant with a child, a large quantity of medicine with intent thereby feloniously, &c., to procure the miscarriage of said L. H., the administering said medicine to said L. H., not then and there being necessary to preserve the life of said L. H., contrary to the statute, &c. (*Conclude as in book* 1, *chap.* 3).

(*f*) On this indictment—to which there was a second count averring the operation to have been with an instrument unknown—the court on trial held that if the jury doubted as to the killing of the *quick* child, which is manslaughter by the Rev. Statutes, they could convict of killing the child not quick, which is but a misdemeanor. The jury having found the defendant guilty of the misdemeanor, the directions given below were sustained by the Supreme Court; People *v.* Jackson, 3 Hill 93.

(*g*) State *v.* Vawter, 7 Blackf. 592. The objection made to the indictment was, that it neither names the medicine administered, nor states that it was noxious.

The language of the statute is, that "every person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or employ any instrument, &c., with intent thereby to procure the miscarriage of any woman," &c. "This statute," said the court, "so far as the present case is concerned, is similar to the second section of the statute of 43 Geo. III.; and it has been held that on the trial of an indictment on that section, the name of the medicine administered need not be proved; that the question is, whether the prisoner administered any matter or thing to the woman with intent to procure abortion;" Rex *v.* Phillips, 3 Campb. 73. I think the name of the medicine need not be proved; there seems to be no good reason for naming it in the indictment. It is also decided in the case first referred to, that the indictment need not describe the medicine as noxious.

CHAPTER VII.

ASSAULTS.

Indictment for a common assault.

THAT A. B., late of, &c., on, &c., with force and arms,(*a*) in and upon one C. D., in the peace of God and of the said state then and there being,(*b*) did make an assault; and him the said C. D., did then and there beat,(*c*) wound and ill-treat, and other wrongs to the said C. D., then and there did, against the peace, &c.(*d*) (*Conclude as in book* 1, *chap.* 3).

(*a*) As to necessity of these words, see *ante*, p. 9.

(*b*) See *ante*, p. 10.

(*c*) The practice is to allege a battery, though if no battery be shown, the defendant may be convicted of a common assault.

(*d*) (*Of common assaults*). An assault is an attempt or offer to do an injury to the person of another, under circumstances denoting a present intention, coupled with a present ability to do such injury, whether that injury be actually done or not; Selw. N. P. 10th ed. 25. See Stephens *v.* Myers, 4 C. & P. 349, Tindal C. J.; and Hawk. b. 2, c. 62, s. 1; Wh. C. L. 311. Thus, lifting up a stick or fist in a threatening attitude, so near to the party threatened that a blow might take effect, although the fist or the stick is not brought in actual contact with his person; presenting a loaded fire-arm at a person within the distance to which it will carry, though without firing it, or even unloaded, if having the appearance to him of being loaded, and so near that if it was loaded and went off, it might produce injury; *dict.* Parke B., Reg. *v.* St. George, 9 C. & P. 493; *quere*, see Selw. N. P. 10th ed. 25; see Stephens *v.* Myers, 4 C. & P. 349, Tindal C. J.; and Hawk. b. 2, c. 62, s. 1; Wh. C. L. 311. Striking at or throwing any substance at another with intent to strike, though the attempt fail, are assaults in law; and it is said that though the persecutor was beyond the defendant's reach, yet if the distance was such to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he will at once receive a blow, unless he strikes back in self-defence, it is an assault; State *v.* Davis, 1 Iredell 125. Mere words, however, whatever violence they may threaten, never amount to an assault; Hawk. b. 2, c. 62, s. 1. The fact of firing a gun into a room of A.'s house with intent to shoot A., the prisoner supposing him to be in the room, will not support a charge of shooting *at* A., if he is shown not to be in the room, or within reach of the shot; Reg. *v.* Lovel, 2 M. & R. 39. (Gurney B.). So where the defendant at the time qualifies the action by saying "were you not so old I would knock you down," or words to that effect, the purpose thus restricted does not amount to an assault; State *v.* Crow, 1 Iredell 375; Com. *v.* Eyre, 1 S. & R. 347; State *v.* Davis, 1 Iredell 125. Such assaults do not include a battery, which consists in some actual and unwarranted force applied to the person; but every battery, however small, includes an assault; *e. g.* spitting in a man's face, cutting off his hair in derision; Forde *v.* Skinner, 4 C. & P. 239; see C. & K. 160; forcibly stripping him of his clothes; see Sunbolf *v.* Alford, 3 M. & W. 248; or even touching him, if done with the purpose to insult him; King *et ux. v.* Jebbert, Skinner 387, cited 1 Saund. 14. And the assault and battery will be equally committed, whether by actually employing the hand, or by any other means, as giving cantharides, or placing an infant in a bag, hanging the bag on palings and leaving it there; Reg. *v.* March, C. & K. 496. Setting a dog on another, or driving a cart wilfully against the carriage of another, by which bodily injury is done to those within it; for every party in an assault, whether acting by himself or through another, is liable as principal; State *v.* Lymburn, 1 Brevard 397; Wh. C. L. 33, 313. So if a drunken person be wilfully pushed against the complainant; Short *v.* Lovejoy, Bull. N. P. 16; but the rule does not bear where the act is merely the result of accident, or an injury in an amicable contest (if lawful), as in wrestling; Com. Dig. Pleader (3 M. 18); see Bull. N. P. 16; Bac. Abr. *tit. Assault and Battery*, B.; 1 East P. C. 268. All struggles in *anger*, however, whether by wrestling, pushing, &c.,

Assault without battery.

That A. B., of in the county of labourer, on, &c., with force and arms, at in the county aforesaid, in and upon one C. D. (in the peace of the said commonwealth then and there being), with a certain offensive weapon called a cane, did make an assault, and other wrongs to the said C. D., then and there did and committed, to the great injury of him the said C. D., &c. (*Conclude as in book* 1, *chap.* 3).

Assault and battery. Massachusetts form.

That A. B., of in the county of labourer, on, &c., with force and arms, at in the county aforesaid, in and upon the body of one C. D., (in the peace of the said commonwealth then and there

are unlawful, so that death occasioned thereby, is manslaughter at least; Reg. *v.* Canniff, 9 C. & P. 359; and this same principle applies where one party gives another a whipping at the request of the latter, who was under the impression that he would thereby be relieved from a prosecution for felony; State *v.* Beck, 1 Hill 363.

An assault may also be committed by exposing a servant of tender years to the inclemency of the weather; R. *v.* Ridley, 2 Campb. 650, 653; see s. 10 of c. 6 Dickinson's Q. S., by taking indecent liberties with a female pupil of thirteen years of age, without her consent, though she may not offer actual resistance; R. *v.* Nicholl, R. & R. 130; and even by a medical practitioner who wantonly strips a female, under false pretence that he cannot otherwise judge of her illness, even though she, under such impression, acquiesces; R. *v.* Resinski, 1 Mood. C. C. 19; but not by "attempting to assault a girl by inducing and soliciting her to place herself in an indecent attitude," the defendant doing the like; R. *v.* Butler, 6 C. & P. 368. Being present at a prize fight in order to see it, is indictable as an assault; R. *v.* Perkins, 4 C. & P. 537; see R. *v.* Billingham, 2 C. & P. 234.

(*Cases where even battery is no offence*). There are many cases, however, in which a battery is no offence. Thus, whenever a man is first assaulted, he may lawfully strike with a violence not exceeding that which appears necessary for the defence of his person; though he cannot justify a battery manifestly excessive by setting up the first assault from his adversary; Bull. N. P. 18; see Fish *v.* Scott, Peake C. N. P. 135. (*Quere*, if an assault committed by A., after being first assaulted by B., is not an *indictable* offence by A.; see Hinton *v.* Heather; Dickinson's Q. S. 316). So he may remove a trespasser from his land, after requesting him to depart; and even without such request, where the party is proceeding to acts of destruction and violence, or is forcibly removing goods; Green *v.* Goddard, 2 Salk. 641; Com. *v.* Kennard, 8 Pick. 133; though the application of any unnecessary amount of force is indictable; State *v.* Lazarus, 1 Const. S. C. R. 34. The use of necessary force in extending legal process on the person, and for frustrating an attempt to escape, may also, at all times, be justified; but the force must be necessary and not wanton; 2 Roll. Abr. 546, A. And there are relationships which justify a battery in defence of another; thus, a husband may justify a battery in defence of a wife; a wife in defence of her husband; a parent in defence of his child; a child in defence of his parent; a master in defence of his servant; and a servant in defence of his master; Hawk. b. 1, c. 60, s. 23. But it has been said, that a servant cannot justify beating another in defence of his master's son, though he was commanded to do so by his master, because he is not a servant to the son; and that a tenant may not beat another in defence of his landlord; Hawk. b. 1, c. 60, s. 24.

A battery may also be justified when done in the way of domestic correction by a party having authority to employ it; as if a father correct his infant son; a school-master his scholar; or a master his apprentice; State *v.* Pondergrass, 2 Dev. & Bat. 407; provided the punishment be moderate, and the instrument of correction proper; Johnson *v.* State, 2 Humph. 283; Hawk. b. 1, c. 60, s. 24. And it has been holden, that an officer of the army may justify even a wounding, if done for disobedience of orders; and that a sentence of a council of war in his favour, on the petition of the soldier wounded, will conclusively entitle him to an acquittal; Lane *v.* Hegberg, Bull. N. P. 19. *Semble:* an imprisonment will not necessarily amount to battery. See Wilson *v.* Lainson, 3 New. C. 307; Briggs *v.* Bowgin, 1 New R. 355.

being), an assault did make, and him the said C. D., did then and there beat, abuse, wound and ill-treat, and other wrongs, then and there did and committed, to the great damage of the said C. D., and against the peace and dignity of the commonwealth aforesaid.

Information in Connecticut for assault and battery and breach of peace, with commencement and conclusion.

State of Connecticut, New Haven County, ss. New Haven, day of 184

To justice of the peace for said county, residing in said town, comes a grand juror for said town, and on his oath of office, information makes, that, at said New Haven, on the day of 184 with force and arms, in and upon in the peace then and their being, did make an assault, and the said then and there did beat, bruise, wound and ill-treat; and other wrongs and injuries then and there did, to the great damage of the said and against the peace. And the grand juror further informs, that the said with force and arms, on the day and year, last aforesaid, at New Haven aforesaid, by tumultuous and offensive carriage towards, and by threatening, traducing, challenging, quarreling, assaulting, beating and striking in the peace then and there being, did greatly disturb the public peace, and other wrongs and injuries, then and there committed, against the peace, of evil example, and contrary to the statutes in such cases made and provided. And the grand juror aforesaid further complains, that (*setting forth further breach of peace, if any, &c.*) Wherefore the grand juror aforesaid prays process, and that the said may be arrested and held to answer the complaint, and be dealt with according to law. Dated at New Haven the day and year first aforesaid.

Grand Juror.

Assault and battery in New York, with commencement and conclusion.

City and County of New York, ss. The jurors of the people of the State of New York, in and for the body of the City and County of New York, upon their oath present,

That A. B., late of the First Ward of the City of New York, in the County of New York aforesaid, &c., on &c., at the ward, city and county aforesaid, in and upon the body of C. D., in the peace of God and of the said people, then and there being, with force and arms did make an assault; and him the said C. D., did then and there beat, wound and ill-treat, and other wrongs and injuries to the said C. D., then and there did, to the great damage of the said C. D., to the evil example of all others in like case offending, and against the peace of the people of the State of New York, and their dignity.

Assault and battery in New Jersey, with commencement and conclusion.

County, to wit: The grand inquest for the State of New Jersey, and for the body of the county of upon their present,

That A. B., late of the township of in the county of

on, &c., with force and arms at the township aforesaid, in the county aforesaid, and within the jurisdiction of this court, in and upon one C. D., in the peace of God and of this state, then and there being, an assault did make, and him the said C. D., then and there did beat, wound and ill-treat, and other wrongs to the said C. D., then and there did to the great damage of the said C. D., contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.

Assault and battery in Pennsylvania, with commencement and conclusion.

In the Court of Quarter Sessions of the Peace for the City and County of Philadelphia, sessions, 184

City and County of Philadelphia, ss.

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the City and County of Philadelphia, upon their respective oaths and affirmations, do present, that A. B., late of said county, &c., at the county aforesaid, and within the jurisdiction of this court, with force and arms, in and upon one C. D., in the peace of the said commonwealth, then and there being, did make an assault, and him the said C. D., did beat, wound and ill-treat, and other wrongs to him the said C. D., then and there did, to the great damage of the said C. D., and against the peace and dignity of the Commonwealth of Pennsylvania.

Assault and encouraging a dog to bite.(e)

That A. B., of in the county aforesaid, labourer, on, &c., now last past, at B., aforesaid, in the county aforesaid, in and upon one C. D., an assault did make, and him the said C. D., did then and there beat, wound and abuse, and that he the said A. B., did then and there unlawfully incite, provoke and encourage a certain dog, belonging to him the said A. B., him the said C. D., then and there to beset and bite; by means whereof the same dog did then and there grievously bite the right leg of him the said C. D., whereby the said leg of him the said C. D., was grievously hurt and wounded, and his life greatly endangered, and other wrongs to the said C. D., then and there did, to the great damage of the said C. D., against, &c.

Assault and tearing prosecutor's hair.(f)

That A. B., of in the county aforesaid, labourer, on, &c., with force and arms, at in the county aforesaid, in and upon the body of one C. D. (in the peace of the said commonwealth then and there being), did make an assault, and her the said G. D., did then and there beat, wound and abuse; and that he the said A. B., did then and there unlawfully, violently, and cruelly seize and lay hold of the said C. D., by the hair of her head; and did then and there with great force, wrath and violence, pull and drag the said C. D., by

(e) 3 Chit. C. L. 823; Cro. C. C. 145; Stark. C. P. 389; Davis' Prec. 58.
(f) Davis' Prec. 56.

the same; by means whereof he the said A. B., did then and there unlawfully, cruelly and brutally pull and tear the hair of the head of her the said C. D., off by the roots; and the head of her the said C. D., was thereby grievously wounded and hurt, and the said C. D. thereby put in great pain and torture; and other wrongs then and there did and committed, to the great damage of her the said C. D., against, &c. (*Conclude as in book* 1, *chap.* 3).

Assaulting the driver of a chaise, and overturning the chaise with the wheel of a cart.(*g*)

That A. B., of in the county of labourer, on, &c., with force and arms, at B., in the county aforesaid, in and upon one C. D., did make an assault; he the said C. D., being then and there in a certain chaise drawn by one horse, and in the public street and common highway there; and that he the said A. B., then and there driving a horse drawing a cart, did, in the highway aforesaid, unlawfully, violently, wantonly and maliciously drive said horse, so as aforesaid drawing said cart, to and against the chaise aforesaid; and that by such driving, did then and there in the highway aforesaid, unlawfully, wantonly and maliciously force said cart against the said chaise, and thereby overturn, with one of the wheels of said cart, the said chaise in which the said C. D., then was as aforesaid; by means whereof, he the said C. D., was then and there grievously hurt, bruised and wounded; and other wrongs then and there did and committed, to the great damage of him the said C. D., against, &c. (*Conclude as in book* 1, *chap.* 3).

Assault and beating out an eye.(*h*)

That A. B., of in the county of widow (being a person of depraved and malicious disposition), on, &c., with force and arms, at aforesaid, in the county aforesaid, in and upon one C. D., violently did make an assault, and her the said C. D., did then and there beat, wound and ill-treat, and that she the said A. B., with her right hand, the said C. D., in and upon the left eye of her the said C. D., then and there unlawfully, violently and maliciously did strike; by means whereof the said C. D., then and there, the use, sight and benefit of her said left eye entirely lost and was deprived of; and also by means of the premises, she, the said C. D., became weak and sick, and remained so weak and sick, from thence, until the day of taking this inquisition, and other wrongs then and there did and committed, to the great damage of the said C. D., against, &c. (*Conclude as in book* 1, *chap.* 3).

Assault and riding over a person with a horse.(*i*)

That A. B., of in the county of labourer, on, &c., at B., aforesaid, in the county aforesaid, in and upon the body of one C. D.,

(*g*) *Ib.* 57.
(*h*) 3 Chit. C. L. 822; Davis' Prec. 55.
(*i*) 3 Chit. C. L. 823; Davis' Prec. 58

an assault did make, and him the said C. D., did then and there beat, wound and abuse; and that the said A. B., did then and there, unlawfully, maliciously and with great force and violence, ride and drive a certain horse, then and there under the guidance and command of him the said A. B., against, upon and over the body of the said C. D., whereby the said C. D., was then and there grievously wounded and bruised, and his life thereby greatly endangered; and other wrongs then and there did and committed, to the great damage of him the said C. D., against, &c. (*Conclude as in book* 1, *chap.* 3).

[*For assaults on a pregnant woman, see ante, "Abortion."*]

Assault by administering cantharides to prosecutor.(*j*)

That defendant on, &c., at &c., in and upon one E. J., did make an assault, and then and there did unlawfully and maliciously administer and cause to be administered to and taken by the said E. J., a large quantity, that is to say, two scruples of cantharides, the same being then and there a deleterious and destructive drug, with intent thereby to injure the health of the said E. J., and the said E. J. became in consequence thereof sick, sore and diseased, and disordered in her body, insomuch that her life was greatly despaired of, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add count for common assault.*)

Assault with intent to kill an infirm person, by throwing him on the ground and beating him.(*k*)

That A. N., late of the county aforesaid, labourer, on, &c., with force and arms, at and in the county aforesaid, in and upon one A., a man of colour, then and there being a deformed person, and by reason of his being such a deformed person, being unable to walk or otherwise to move himself from place to place, and also then and

(*j*) This count was sustained in R. *v.* Button, 8 C. & P. 660.

(*k*) Nixon *v.* People, 2 Scam. 267. On this case Browne J., said: "This was an indictment to commit murder, upon which Nixon was tried at the last April term of the White Circuit Court, and found guilty; and a motion made in arrest of judgment, which was overruled.

"The errors assigned bring into full view such parts of the record as require particular attention from the court, and are as follows: 1. The facts set forth in the indictment below do not constitute the offence with which said Nixon was charged. 2. The indictment does not sufficiently describe the place where Adam was abandoned, so as to show that death would probably have been caused by such abandonment. 3. The indictment does not sufficiently set forth the means by which the offence charged was committed. 4. The court cred in refusing the motion for a new trial.

"This indictment was brought under a statute of this state (R. L. 180, s. 52; Gale's Stat. 206), which provides, that an assault with an intent to commit murder, shall subject the offender to confinement in the penitentiary for a term not less than one year nor more than fourteen years. This indictment has every ingredient necessary to constitute a good one, under this statute. The offence is well set out. There may be a thousand forms of deaths by which human nature may be overcome, by poisoning, starving, drowning, &c. This differs from most cases of assault with intent to commit murder; it is more malignant, and discovers more depravity. But if one assault with intent to commit murder differs from another, it makes it no less a crime. This one seems to be of a very atrocious character."

there being deficient in voice, so as to be unable to call aloud, and in the peace of God and of the people of the State of Illinois then and there also being, unlawfully did make an assault, and then and there forced and threw the said A. from a certain wagon, in which he, the said A., then and there was, to and upon the ground, the said ground then and there being frozen and very cold, and then and there did force and compel the said A. (so being such deformed person as aforesaid, and also by reason of his being such deformed person, being unable to move himself from place to place as aforesaid, and also being deficient in voice, so as to be unable to call aloud as aforesaid), then and there to lie upon the ground, so being frozen and very cold as aforesaid, and then and there did abandon and leave him, the said A., lying on the ground as aforesaid, to the great pain and torture of the said A., and to the great damage and impoverishment of his health and strength of body, with intent him the said A., by the means aforesaid, then and there feloniously, wilfully and of his malice aforethought, to kill and murder, and other wrongs to him, the said A., then and there did, to the great damage of him the said A., against, &c. (*Conclude as in book* 1, *chap.* 3).

[*See for "Assaults with intent," &c., post, p.* 124 *et seq., and also book v. chap.* 12].

Assault with beating and wounding on the high seas.

The jurors of the said United States, within and for the said district, upon their oath present, that C. W. C., mariner, and C. G. A., both late of Nantucket in said district, on, &c., in and on board of a certain ship or vessel called the J. M., then lying within the jurisdiction of a foreign state or sovereign, to wit, in the port of Paita, in Peru, the said J. M. then and there being an American ship or vessel belonging to certain persons citizens of the United States, whose names to the jurors aforesaid are as yet unknown, with force and arms, an assault did make in and upon one T. B., and him the said B. then and there, from malice, hatred and revenge, and without justifiable cause did beat and wound, he the said C. then and there being the chief-mate of said ship or vessel, he the said A. then and there being the third-mate of said ship or vessel, and he the said B. then and there being one of the crew thereof; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Assault on high seas, by binding the prosecutor and forcing an iron bolt down his throat.

And the jurors aforesaid, on their oath aforesaid, do further present, that the said C. W. C. and C. G. A., both late of Nantucket in said district, on, &c., in and on board of a certain ship or vessel called, &c., then lying within the jurisdiction of a foreign state or sovereign, to wit, in the port of Paita, in Peru, the said J. M. then and there being an American ship or vessel belonging to certain persons citizens of the United States, whose names to the jurors aforesaid are as yet unknown, with force and arms, an assault did make in and upon one

T. B., and him the said B. then and there, from malice, hatred and revenge, and without justifiable cause, did bind and imprison, and being so bound and imprisoned, did force into the mouth and between the teeth of him the said B., with great force and violence, an iron bolt called a pump bolt, and the same bolt did then and there bind and tie in the mouth and between the teeth of him the said B., and by the said forcing of the said bolt into the mouth and between the teeth of said B., did bruise and lacerate the lips and gums of said B., which said forcing of said bolt into the mouth and between the teeth of said B., and so binding and tying the same therein, was a cruel and unusual punishment; he the said B. then and there being one of the crew of the said ship, and they the said C. W. C. and C. G. A. being officers thereof, to wit, the said C. being then and there the first-mate, and said A. being then and there third-mate of said ship; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

And the jurors aforesaid, on their oath aforesaid, do further present, that afterwards, to wit, on, &c., the said C. W. C. and C. G. A. were first apprehended in said District of Massachusetts, to wit, at Boston, which was the district in which the said C. and A. were first apprehended after the commission of the offence aforesaid.(*l*)

Assault on high seas, with dangerous weapon.

That late of the City and County of New York, in the district aforesaid, (*state occupation*), heretofore on, &c., with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the belonging in whole or in part to a citizen or citizens of the said United States, whose name or names are to the said jurors unknown, with a dangerous weapon, to wit, with a (*state particularly the weapon and dimensions of the same*), in and upon one in the peace of God and of the said United States, then and there being in and on board of said called the feloniously did commit an assault, to the great damage of the said against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said heretofore, on, &c., in and on board of a certain American vessel, being a called the then and there belonging and appertaining to a certain person or persons, then and still being a citizen or citizens of the said United States, whose name or names are to the said jurors unknown, with force and arms on the high seas, in and on board said out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, with a dangerous weapon, to wit, with

(*l*) See *post*, book v. chap. 6, for further forms on this head.

a (*repeat description and dimensions as in first count*), in and upon one belonging to the company of said vessel, being a called the in the peace of God and of the said United States, then and there being feloniously did make an assault, he the said being one of the company of the said to the great damage of the said against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

Like second count, inserting after "being one of the company of the said ," *and before* "to the great damage of the said ," "and other wrongs to the said then and there did."

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present, that the Southern District of New York (*or otherwise*) in the second circuit, is the district and circuit in which the said was first apprehended for the said offence.

Another form for same.

That late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms, on the high seas, (*or, as the case may be*), on waters within the admiralty and maritime jurisdiction of the United States of America, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, in and on board of a certain vessel, being a called the belonging and appertaining to a certain person or persons whose names are to the said jurors unknown, then and still being a citizen or citizens of the United States of America, with a dangerous weapon, called a (*describe the dimensions*), in and upon one in the peace of God and of the said United States then and there being, feloniously did make an assault, and other wrongs to the said then and there did, to the great damage of the said against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms on the high seas, on waters within the admiralty and maritime jurisdiction of the United States of America, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, in and on board of a certain vessel, being a called the belonging and appertaining to a certain person or persons, whose names are to the said jurors unknown, then and still being a citizen or citizens of the United States of America, with a dangerous weapon, called a (*describe as before*), in and upon one in the peace of God and of the said United States, then and there being, and also then and there being master (*or otherwise*) of the said vessel, being a called the feloniously did make an assault, and other wrongs to the said then and there did, to the great damage of the said against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present, that the Southern District of New York, in the second circuit, is the circuit and district into which the said was first brought, and in which he was first apprehended for the said offence.

Same in a foreign port, the weapon being a Spanish knife.

That heretofore, to wit, on, &c., on board of a certain vessel, to wit, the brig Volta, belonging to a citizen and citizens of the United States, whose name or names are to this inquest unknown, while lying in a port, to wit, the port of Rio de Janeiro, within the jurisdiction of a foreign state, to wit, of Brazil, to wit, at the Eastern District of Pennsylvania aforesaid, and within the jurisdiction of this court, a person, to wit, one S. T., then and there being a person belonging to the company of the said vessel, did then and there, with a dangerous weapon, to wit, a Spanish knife, commit an assault on another person, to wit, one W. A. R., then and there belonging to the company of the said vessel, and other wrongs to him the said W. A. R., he the said S. T., then and there unlawfully, violently and maliciously did, to the great damage of him the said W. A. R., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count, same as first, charging the instrument as follows:

"With a dangerous weapon, to wit, a sharp cutting instrument."

Third count. Assault with intent to kill.

That at, &c., on, &c., on board of a certain vesssl, to wit, the brig Volta, belonging to a citizen and citizens of the United States, while lying in a port, to wit, the port of Rio de Janeiro, within the jurisdiction of a foreign state, to wit, of Brazil, to wit, at the Eastern District of Pennsylvania aforesaid, and within the jurisdiction of the court aforesaid, a person, to wit, one S. T., then and there being a person belonging to the company of the said vessel, did then and there, with intent to kill a person, to wit, one W. A. R., then and there belonging to the company of the said vessel, did then and there commit an assault on the said W. A. R., then and there belonging to the company of said vessel as aforesaid, and other wrongs to him the said W. A. R., he the said S. T., then and there unlawfully, violently, wickedly and maliciously did, to the great damage of him the said W. A. R., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Final count as on p.* 17).(*ll*)

(*ll*) On p. 17, the final counts are given in cases where the offender was either first brought or first apprehended within the particular district in which the indictment is found. In the second form on p. 18, in cases where the offender is first *brought* within the particular circuit, a misprint occurs which is noticed in the *errata*, viz. that the last line should read "was first *brought* for the said offence," instead of "was first *apprehended*, &c.," as appears in the text. These counts, one of which is necessary in all cases where the offence was committed within mere admiralty jurisdiction, are varied in phraseology in the several circuits, and would seem, in fact, with their several modifications, to be used indiscriminately in cases where the offender is either first brought or first apprehended, &c. The following forms, in addition to those in the text, are of frequent occurrence.

That afterwards, to wit, &c., the said A. B. was first brought into S. in said district, and

Assault and false imprisonment at common law.(*m*)

That J. S., late of the parish of B., in the County of M., labourer, on, &c., with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J. N., in the peace of God and of the said state, then and there being, did make an assault, and him the said J. N. then and there unlawfully and injuriously, and against the will of the said J. N., and also against the laws of this state, and without any legal warrant, authority or reasonable or justifiable cause whatsoever, did imprison and detain so imprisoned there for a long space of time, to wit, for the space of ten hours then next following, * and other wrongs to the said J. N. then and there did, to the great damage of the said J. N., and against, &c. (*If any money were extorted from the prosecutor for setting him at liberty, add an averment of it immediately after the above asterisk, as thus*): Then next following, and until he the said J. N. had paid to the said J. S. the sum of five dollars of the moneys of the said J. N., for his enlargement; and other wrongs, &c. (*Add a count for a common assault*).

Assault and false imprisonment, with the obtaining of five dollars. (*If there be no extortion, the paragraph in brackets can be omitted.*)(*n*)

That A. B., of, &c., on, &c., at, &c., with force and arms, in and upon one E. F. did make an assault, and him the said E. F. then and there unlawfully and injuriously, and against the will and without the consent of the said E. F., and also against the laws of this state, without any legal warrant, authority or justifiable cause whatsoever, did imprison and detain for a long time, to wit, for the space of hours then next following, (and until he the said E. F. had paid to him the said A. B. the sum of five dollars, lawful money of the United States, of the moneys of the said E. F. for his enlargement), and other wrongs to the said E. F. then and there did, to the great damage of the said E. F., against, &c. (*If a note was obtained instead of a sum of money, insert instead of the above passage in brackets*): And until he the said E. F., for his delivery from the said imprisonment, had signed and given to the said A. B. a note under the hand of the said E. F., whereby he the said E. F. promised to pay to the said A. B. the sum of ten pounds, &c.

that the said district of M. is the district into which he was first brought after committing the offence aforesaid.

That the Southern District of New York is the district in which the said A. B. was first brought and apprehended for the said offence.

That the said A. B., &c., after the commission of the said offence, to wit, on, &c., was first brought into the said M. district, and that the said M. district is the district into which the said offender was first brought as aforesaid. (Davis' Prec. 224).

That the said C. D., the offender aforesaid, was first brought into B. aforesaid, in the district of after the commission of said offence, and that the said district of is the district into which they were first brought. (Lewis' C. L. 645).

See for other forms of same, pp. 92, 93, 94, 97, 99, 122.

Where the offender is out of the jurisdiction, and the bill is found for the purpose of issuing a bench warrant, of course the final count is to be omitted.

(*m*) Arch. C. P. 5th Am. ed. 558. (*n*) Stark. C. P. 428.

Assault with intent to murder at common law.(*o*)

That A. B., &c., on, &c., at, &c., with a certain drawn sword, which he the said A. B. in his right hand then and there had and held, in and upon one S. W. did make an assault, with an intent him the said S. then and there feloniously, wilfully and of his malice aforethought, to kill and murder, and other wrongs to the said S. W. then and there did, against, &c.(*oo*)

Another form for same.

That at on, &c., with force and arms, to wit, with knives, hatchets and tomahawks, in and upon one E. G. of &c., in the peace of the people then and there being, did make an assault, and with intent to commit murder on the said E. G., did then and there cut, beat, strike, wound and evil-treat him the said E. G., and other wrongs to the said E. G., then and there did, to the damage of the said E. G., and against, &c.(*p*) (*Conclude as in book* 1, *chap.* 3).

Assault with intent to drown.(*q*)

That A. B., of in the County of labourer, on with force and arms, at in the county aforesaid, in and upon the body of one C. D., with a dangerous weapon, to wit, with a large stick, which he the said A. B. in both his hands then and there had and held, did make an assault, and him the said C. D. did then and there beat, wound and abuse; and that he the said A. B., with both his hands, did then and there unlawfully, violently and maliciously cast, push and throw the said C. D. into a certain pond there situate and being, wherein there was a large quantity of water, and did then and there keep, press down and confine the said C. D. in and under the said water for the space of five minutes, with intention him the said C. D. then and there feloniously, wilfully and of his malice aforethought, to suffocate and drown in the said water; and him the said C. D., by means thereof, wilfully, feloniously and of his malice aforethought, to kill and murder; and other wrongs to the said C. D. then and there did, to the great damage of him the said C. D., against, &c. (*Conclude as in book* 1, *chap.* 3).

(*o*) Stark. C. P. 430. See for a form of assault with intent to murder, &c., under the Indiana statute, *ante*, p. 119.

(*oo*) For assault with intent to kill, in the United States courts, see *ante*, p. 123; see also *ante*, p. 120.

(*p*) People v. Pettit, 3 Johns. R. 511. This indictment was attacked, 1st, because it did not charge the offence to have been committed feloniously; 2dly, because the instruments were not accurately described; and 3dly, because the intent was not set out with sufficient precision. "*Per curiam:* The intent to commit murder was here charged in the words of the statute, and we think that was sufficient. The indictment is for an assault and battery, and the *quo animo* is to be collected from the circumstances. It was enough to state, with the usual precision, the facts requisite to constitute an assault and battery, and to aver the intent with which it was made. The indictment required no other *facts* than were necessary to establish an assault and battery. The crime charged was, after all, but a misdemeanor. It was not a felony, though the intent was to commit one."

(*q*) Davis' Prec. 66.

Assault with intent to murder under the New York Rev. Stat.

That E. L., late of the First Ward of the City of New York, in the County of New York aforesaid, labourer, on the day of in the year, &c., with force and arms, at the ward, city and county aforesaid, in and upon N. J., then and there being, feloniously did make an assault, and him the said N. J. with a certain knife, which the said E. L. in his right hand then and there had and held (the said knife being a deadly weapon), feloniously did beat, strike, cut and wound, with intent him the said N. J. then and there feloniously and wilfully to kill, and other wrongs to the said N. J. then and there did, to the great damage of the said N. J.; against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. With intent to maim.

That the said E. L., on the said day of in the year last aforesaid, with force and arms, at the ward, city and county aforesaid, in and upon the said N. J. then and there being, feloniously did make another assault, and him the said N. J. with a certain knife, which he the said E. L. in his right hand then and there had and held, the said knife being a deadly weapon, feloniously did beat, strike, cut and wound, with intent him the said N. J. then and there feloniously and wilfully to maim, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Assault with intent to commit a felony generally.(*r*)

That A. B., &c., at, &c., aforesaid, in and upon one J. N., in the peace of God and of our lady the queen then and there being, unlawfully did make an assault, and him the said J. N. then and there did beat, wound and ill-treat, with intent (*here state the felony intended thus*): him the said J. N. then and there feloniously, wilfully and of his malice aforethought, to kill and murder, and other wrongs to the said J. N. then and there did, to the great damage of the said J. N.; against the form of the statute in such case made and provided, and against, &c.

(*Add a count for common assault*).

Felonious assault under the Massachusetts statute.(*s*)

That A. B., of B. aforesaid, yeoman, on, &c., at B. aforesaid, with force and arms, the said A. B. then and there being armed with a dangerous weapon, to wit, a sword, in and upon one E. F., then and there in the peace of said commonwealth being, an assault did make,

(*r*) This form is given by Mr. Archbold, C. P. 5th Am. ed. 544, as good under the stat. 9 Geo. IV. c. 31, s. 25, which enacts, that any person who shall be convicted "of any assault to commit felony," shall be punished, &c. As will be seen by a comparison of this statute with that in New York (2 Rev. Stat. 665–6, s. 39), the indictment in the text will be good in that state in the particular cases provided for.

(*s*) An assault with an intent to murder is not a felony under the statute, and consequently the word "feloniously" should not be admitted, and this though the statute provides that the defendant shall be deemed a felonious assaulter; Com. *v.* Barlow, 4 Mass. 439. It would seem, however, that if the term be improperly used, it may be rejected as surplusage; Com. *v.* Squire, 1 Met. 258; see Wh. C. L. 7.

with intent him the said E. F., to, &c., and by so doing, and by force of the statute in such case made and provided, he the said A. B., is deemed a felonious assaulter. And so the jurors aforesaid, on their oath aforesaid, do say and present, that the said A. B., at B. aforesaid, on, &c., with force and arms, feloniously assaulted the said E. F., in manner and form aforesaid, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Assault with intent to murder in South Carolina.

That A. B., on, &c., with force and arms, at in the district of and state aforesaid, in and upon E. F., in the peace of God and of the said state aforesaid, then and there being, did make an assault, and him the said E. F., did, &c., with intent him the said E. F., then and there feloniously, wilfully and of his malice aforethought, to kill and murder, and other wrongs to the said E. F., then and there did, to the great damage of the said E. F., and against &c. (*Conclude as in book* 1, *chap.* 3).

Assault with intent to rob, against two.(*t*)

That the prisoners, on, &c., at, &c., in and upon R. B., in the peace of God and our said lady the queen, then and there being, feloniously did together make an assault with intent the moneys, goods and chattels of the said R. B., from the person and against the will of him the said R. B., then and there feloniously and violently to rob, steal, take and carry away, against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form for same.(*u*)

That defendants, late of the said county, on, &c., in the County of C. aforesaid, in and upon the person of G. H. G., in the peace of the people of the State of Illinois, then and there being, with force and arms, did make an assault, with an intent, then and there, unlawfully, wilfully and feloniously to commit a robbery, and other wrongs to the said G. H. G., did then and there, &c.

Assault with intent to ravish.(*v*)

That A. B., &c., on, &c., at, &c., on one E. F., did make an assault, and her the said E. F., then and there did beat, wound and ill-treat so that her life was greatly despaired of, with an intent her the said E. F., against her will, then and there feloniously to ravish and carnally know, and other wrongs to her the said E. F., then and there did, against, &c. (*Conclude as in book* 1, *chap.* 3).

(*t*) R. *v.* Huxley, 1 C. & M. 596. This appears to be the form used in the Central Criminal Court, and was sustained by Patteson and Creswell Js., in the above case.

(*u*) Conolly *v.* State, 3 Scam. 477. This form, though very loose, was sustained.

(*v*) Stark. C. P. 429. "If the offence of rape," remarks Mr. Starkie, "appears to have been actually committed, the prisoner should be acquitted, since the misdemeanor merges in the felony; see East P. C. 411." See also Wh. C. L. 7, 294. As to propriety of joining this count with a count for rape, see *ante*, p. 13.

Another form for same.(*w*)

That W. S., of the county aforesaid, yeoman, on, &c., at the county aforesaid, and within the jurisdiction of this court, in and upon S. C., spinster, in the peace of God, then and there being, with force and arms, an assault did make, with an intention to ravish and carnally know the said S. C., and the same S. C., did beat, wound and evilly treat, so that her life was greatly despaired of, and other harms to her then and there did to the great damage of the said S., and against &c. (*Conclude as in book* 1, *chap.* 3).

Same against two.(*x*)

That A. B., late, &c., and C. D., late, &c., on, &c., at, &c., in and upon E., the wife of one H. S., did make an assault, and her the said E., then and there did beat, wound and ill-treat, so that her life was greatly despaired of, with intent that he the said C. D., should then and there feloniously and against the will of the said E., ravish and carnally know her the said E., and that they the said A. B. and C. D., other wrongs to the said C. D., then and there did, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add a count for a common assault*).

Same against a person of colour, in North Carolina, under the statute.(*y*)

That S., a person of colour, &c., on, &c., with force and arms, in, &c., in and upon the body of one L. S., a white female, in the peace, &c., violently and feloniously did make an assault, with intent to commit a rape upon the body of the said L. S., then and there did beat, &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

Assault with intent to steal.(*z*)

That A. B., on, &c., on C. D., &c., did make an assault, &c., with intent feloniously to steal, take and carry away the money of the said E., from his person; he put his right hand into the pocket of the coat of the said E., on the body of the said E., and other harms then and there did, &c.

(*Add a count for an assault*).

(*w*) Stout *v.* Com., 11 S. & R. 177. The omission of the word "feloniously," which was the first ground of exception to the indictment, was sustained by the court; and the want of an averment of time and place to the concluding allegation, was declared to be immaterial, the time and place named in the first clause qualifying the whole offence.

(*x*) Stark. C. P. 429.

(*y*) State *v.* Sam, a slave, 2 Dev. 567.

(*z*) Rogers *v.* Com., 5 S. & R. 463. It is not necessary, as was held here, in assault with intent to steal, that the goods stolen should be set out. "The intention of the person was to pick the pocket of Earle, of whatever he found in it; and although there might be nothing in the pocket, the intention to steal is the same; he had no intention to steal any particular article, for he might not know what was in it; it would be impossible to lay the intention in any other way than a general intention to pick the pocket of Earle. The crime was the assault, the intention is only aggravation."

BOOK THE FOURTH.

OFFENCES AGAINST PROPERTY.

CHAPTER I.

FORGERY.

General frame of indictment at common law.(*a*)

THAT, &c., on., &c., falsely and fraudulently did forge and counterfeit(*b*) (and cause and procure to be forged and counterfeited),(*c*) a certain promissory note for the payment of money, purporting to be made by one A. B., payable on demand to one C. D.,(*d*) the tenor of which said forged and counterfeited promissory note is as follows, that is to say: (*here set out the instrument in the manner prescribed in note*(*e*), with intent to defraud the said A. B.,(*f*) (to the great damage of the said A. B.),(*g*) against, &c. (*Conclude as in book* 1, *chap.* 3).

(*a*) This form is introduced, not because it can ever be of use as a precedent, the common law remedy having been absorbed by statutes, but in order to place in a more regular shape the necessary notes. For the ground work of the latter, I have depended on Mr. Starkie, (C. P. 106), adding at large the American and the later English authorities.

(*b*) "It is sufficient to allege that the defendant forged and counterfeited, though it is usual to aver that he did *falsely* forge and counterfeit, for the adverb is sufficiently implied in the former words; Sty. 12; 1 Str. 19; East P. C. 985; R. *v.* Mariot, 2 Lev. 221; R. *v.* Dawson, 1 Str. 19. In Elsworth's case, *coram* Willes, York Lent Assizes, 1780, East P. C. 986, the indictment stated that the said T. E., the said bill of exchange did feloniously *alter* and cause to be altered, by falsely making, forging and adding the letter *y* to the word eight in the bill mentioned, whereby, &c. The second count alleged, that certain persons unknown altered the bill, and charged the defendant with uttering and publishing the bill as true, knowing it to be forged. The words of the statute on which the indictment was founded (2 Geo. II. c. 25, s. 1), are, 'If any person shall *falsely make, forge or counterfeit.*' It was objected, in arrest of judgment, that the indictment merely charged that certain persons unknown did alter, by *falsely making*, &c., and did not charge, in the words of the act, that they *falsely made, forged*, &c., and that the word *alter*, was not used in the statute. But the judges held that the indictment was good, and that there was no difference in substance or in the nature of the charge, whether the indictment were for feloniously altering, by falsely making and forging, or for feloniously

making and forging, by falsely altering. In the case of King *v.* Bigg, 3 P. Wms. 419, the indictment alleged that the defendant feloniously *erased* an endorsement from a bank note; the jury found that the defendant had expunged the inscription, by means of some unknown liquor, and the judges held that the prisoner was guilty. The *majority* were of this opinion, but the case involved many other points, and the prisoner was afterwards pardoned on condition of transporting himself; Str. 19;" Stark. C. P. 108.

"In consideration of law, every *alteration* of an instrument amounts to a forgery of the whole. In Dawson's case, it was holden by ten judges, that the *alteration* of the figure 2 in a bank note, to 5, was a forging of a bank note; East P. C. 978;" Stark. C. P. 108.

The indictment in Teague's case; East P. C. 979; for making, forging and counterfeiting a bill of exchange, under the stat. 7 Geo. II. c. 22, was holden to be supported by proof, that the defendant had altered a bill of exchange for the payment of £10 into £50, both in words and figures. It was objected, that the defendant ought to have been charged with altering the genuine bill, since the stat. 7 Geo. II. c. 22, makes it a distinct offence to *alter;* but the judges, on the authority of Dawson's case, held that the conviction was proper, and that every alteration of a true instrument, for such a purpose, made it when altered, a forgery for the whole instrument; see also State *v.* Hitchens, 2 Harringt. 527; Com. *v.* Ladd, 15 Mass. 526; State *v.* Waters, 3 Brev. 507; Com. *v.* Hayward, 10 Mass. 34.

But in cases where a genuine note or instrument has been altered, it is usual to allege the *alteration* in one count of the indictment; see East P. C. 980; R. *v.* Harrison; R. *v.* Elsworth, there referred to.

It is not sufficient to aver, that the defendant forged *or* caused to be forged, for it is not certain and positive; 1 Salk. 342; 5 Mod. 137; Holt R. 345. An indictment which charges a prisoner with the offences of falsely making, forging and counterfeiting, of causing and procuring to be falsely made, forged and counterfeited, and of willingly acting and assisting in the said false making, forging and counterfeiting, is a good indictment, though all of these charges are contained in a single count; and as the words of the statute have been pursued, there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct; Rasnick *v.* Com., 2 Va. Cases 356; State *v.* Houseall, 1 Rice's Dig. 346; see Wh. C. L. 81. But where two distinct offences, requiring different punishments, are alleged in the same count, as where the forging of a mortgage, and of a receipt endorsed thereon, are both charged in the same count, and the defendant be convicted, the judgment will be arrested; People *v.* Wright, 9 Wend. 193.

(*c*) The allegation in brackets, though rarely necessary, is not duplicity when introduced; see last paragraph. It is not necessary, as it seems, to go on to allege by what means the "causing and procuring" was brought about; Brown *v.* Com., 2 Leigh 769.

(*d*) It is essential that the purport of the instrument should be properly described, so as to bring it within the statute. The authorities on this point are collected in the next note.

(*e*) In considering the particular instrument set forth will be considered,

1. *In what manner it should be set forth.*

2. *How it should be shown to be the instrument* (supposing it to be genuine), *the forging of which is prohibited.*

1. The instrument set forth may be prefaced by the words, "*to the tenor following*," or "*in these words*," or "*as follows*," or "*in the words and figures following:*" for though the setting out an instrument by the *tenor*, R. *v.* Drake, 3 Salk. 224; Holt R. 347, 349, 350, 425; 11 Mod. 95; which imports a true copy, is the most technical mode, yet it has been holden that the words "*as follows*," are equivalent to the words, "according to the tenor following," or "in the words and figures following," and that, if under such an allegation, the prosecutor fail in proving the instrument *verbatim* as laid, the variance will be fatal; R. *v.* Powell, 1 Leach 110; 2 Bl. Rep. 787; East P. C. 97; Wh. C. L. 82, 83. And unless the indictment profess, by these or similar expressions, to set out a copy of the instrument in words and figures, it will be vicious; Lyon's case, Leach 696; Dougl. 193, 194; 2 Leach 660, 661; 6 East 418 to 426; 11 Mod. 96, 97; Holt 347, 348, 349, 350, 425; 1 Chit. C. L. 234; 3 Salk. 225; Stam. 181; *ib.* Com *v.* Stevens, 1 Mass. 203; State *v.* Street, Ty. 158; People *v.* Franklin, 3 Johns. Cas. 299; see State *v.* Bradley, 1 Hay. 403; Com. *v.* Searle, 2 Binn. 332; State *v.* Coffey, N. C. T. R. 272; State *v.* Carr, 5 N. Hamp. 367; Com. *v.* Bailey, 1 Mass. 62; U. S. *v.* Britton, 2 Mason 462; Com. *v.* M'Atee, 8 Dana's Ky. R. 29; Fost. 194; R. *v.* Holland, 5 T. R. 623; 1 Stark. C. P. 73; Cowp. 672; 5 T. R. 623; 3 Inst. 41; State *v.* Gustin, 2 South. R. 749; State *v.* Stephens, Wright's Ohio R. 73; State *v.* Farrand, 3 Halst. 333; R. *v.* Mason, 2 East 180; Com. *v.* Bailey, 1 Mass. 62; Com. *v.* Stow, 1 Mass. 54; Com. *v.* Gillespie, 7 S. & R. 469; 2 East P. C. 976; R. *v.* Hart, 1 Leach 145; R. *v.* Paul, 1 Leach 77; Cowp. 672; Com. *v.* Sweney, 10 S. & R. 173; Com. *v.* Parmenter, 5 Pick. 279; Dougl. 193, 194; State *v.* Waters, Const. R. 169; Com. *v.* Kearns, 1 Va. Cases 109; 2 Bla. Rep. 787; State *v.* Wimberly, 3 M'Cord 190; Dougl. 300; State *v.*

Carter, Conf. N. C. R. 210; State *v.* Molier, 1 Dev. 263; 2 Leach 624; Dougl. 97; State *v.* Twitty, 2 Hawks 487; 1 Marsh. 522; State *v.* Handy, 20 Maine 81; People *v.* Warner, 5 Wend. 271; Dougl. 193, 194; Com. *v.* Riley, Thacher's C. C. 67; Hoffman *v.* Com., 6 Rand. 685; U. S. *v.* Hinman, 1 Bald. 292; State *v.* Showley, 5 Hay. 256; State *v.* Calvin, &c., Charlt. 151; Com. *v.* Buckingham, Thacher's C. C. 29; State *v.* Twitty, 2 Hawks 248; Ohio *v.* M'Millen, 5 Ohio 269.

An accurate copy, as in Hunter's case, Leach 721; Mason's case, Leach 548; of the instrument, in *words* and *figures*, R. *v.* Powell, 1 Leach 90; Hart's case, Leach 172; must then be set forth, to enable the court to see that it is one of those instruments, the false making of which the law considers to be a forgery; Lyon's case, 1 Leach 696; Mason's case, East P. C. 975; Gilchrist's case, Leach 753. In indictments for forging particular stamps which the legislature has directed to be used, it appears to be unnecessary to give any particular description of the stamp; see Palmer's case, East P. C. 893; Collicot's case, 4 Taunt. 300; a reason which applies with equal force to indictments for libels and for the sale of lottery tickets; Com. *v.* Gillespie, 7 S. & R. 469; and for the sending of threatening letters; R. *v.* Lloyd, East P. C. 976. Sewing to the parchment on which the indictment is written, impressions of forged notes taken from engraved plates, is not a regular mode of setting out the notes in the indictment; R. *v.* Warshaner, 1 Mood. C. C. 656; R. *v.* Harris, R. *v.* Moses, R. *v.* Balls, 7 C. & P. 429.

"In setting forth the *tenor* of an instrument, a mere variance of a letter will not vitiate the indictment, provided the sense be not altered by changing the word mis-spelt into another of a different meaning. Thus (R. *v.* Hart, Leach 172), in an indictment for forging a bill of exchange, the tenor was "value *received*;" the bill proved in evidence was for value *reieevd*, and the judges (De Grey C. J., and Willes J., were absent), East P. C. 978; upon the reserved question were of opinion, that the variance was not fatal, since it did not change the *word* into another. So in an indictment for perjury, R. *v.* Beech, Leach 137; 2 Hawk. c. 46, s. 190; it was assigned for perjury, that the defendant had sworn that he *undertood* and believed, in the affidavit he swore, that he *understood* and believed. Upon a motion for a new trial, Ld. Mansfield C. J., said: "We have looked into all the cases on this subject, some of which go to a great length of nicety indeed, particularly the case in Hutton, where the word *indicari* was written for *indictari;* but that case is shaken by the doctrine laid down in Hawkins. The true distinction seems to be taken in the Queen *v.* Drake, Salk. 660, that where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material; R. *v.* Beech, Leach 158; see Salk. 660; R. *v.* Bear, Carth. 408; Holt R. 350; Cowp. 229; R. *v.* Mag, Dougl. 193. In Oldfield's case, *cor.* Bayley J., *v.* Durham, Sum. Ass. 1811, and afterwards before the judges, where in setting out the bill it was alleged to be directed to Messrs. M. P. & Co., and the bill on being produced was directed to Messs. M. P. & Co., the *r* in Messrs. being omitted, the variance was held to be immaterial; see Russell 1482;" Stark. C. P. 110. In the same way, "Keen" for "Keene," and "promise" for "promised," have been held immaterial; Com. *v.* Riley, Thacher's C. C. 67; Com. *v.* Parmenter, 5 Pick. 279. But the omission of "evening" after the word "Tuesday," was held fatal; Com. *v.* Buckingham, Thacher's C. C. 29. The most severe application of the rule is in Com. *v.* Gillespie, 7 S. & R. 469, where "Burrall" was held a fatal departure from "Burrill."

An indictment for forgery, alleging the word *birch* to have been altered to *batch*, by erasing the letters *irc* and inserting the letters *atc*, is supported by evidence of the erasure of *ir* and substitution of *at*; State *v.* Rowley, Brayt. 76. Where the indictment charged that Joseph G. Fogg, the defendant, did feloniously and fraudulently forge and make a certain writing obligatory, as follows, that is to say, &c.; but the instrument set out purported on its face to be executed by James G. Fogg and Joseph G. Fogg, the defendant, it was held that there was no repugnance in the charge in the indictment; Fogg *v.* State, 9 Yerg. 392. In Elizabeth Dunn's case, the indictment charged the defendant with forging a promissory note, the tenor of which is as follows, and then set out the note, including the attestation, "Witness, John Whettal," and also the words, "*Mary Wallace, her mark.*" The fact was, that the attestation and the subsequent words had been added after the defendant had affixed her mark; and the recorder doubted whether the indictment had been proved, since the note forged by her differed from the tenor set out. But Mr. Baron Perrot and Mr. J. Aston were of opinion, that the indictment in this respect was well proved; Leach 68; East P. C. 961. Where an indictment alleged that a forged certificate was signed by Bowling Starke, but the instrument was signed B. Starke, and the signer's true name was Bolling Starke, the variance was held fatal; State *v.* Waters, 1 Const. Ct. R. 669; Com. *v.* Kearns, 1 Va. Cases 109. Where an indictment charged that an alleged counterfeit bill was a note, purporting to be a note of the P. & M. Bank of South Carolina, which was the name given by the charter, but the tenor of the note as set forth was, "the President, Directors & Co.," as in the note, it was held that the statement in the note was a mere designation of the persons composing the corporation, who made themselves liable for the payment of the note,

and that there was no variance or repugnancy between the tenor and the purport; State *v.* Calvin, &c., Charlt. 151. But an indictment for forging a writing, describing the same as purporting to be signed by the president and directors of a bank, and setting out the forged writing *verbatim*, but upon the face of it not appearing to have been by order of the president and directors, is bad; State *v.* Showley, 5 Hay. 256. If the instrument forged be in a foreign language, it must be set out in that language, and a complete and accurate translation must be set out; see R. *v.* Szudurskie, 1 Mood. C. C. 419; R. *v.* Harris, 7 C. & P. 416, 429; R. *v.* Warshaner, *ib.* 466. "Where the instrument on which the indictment is founded was destroyed, lost, or in the possession of the defendant before bill found," as was remarked in another place, Wh. C. L. 161, "it will be sufficient to set forth the substance and effect of the instrument, averring, at the same time, as an excuse for its non-production, its loss, destruction or detention, as the case may be. In such case it will be admissible on trial to give parol evidence of the instrument, and such evidence, if there be no substantial variance, will sustain the indictment; R. *v.* Haworth, 4 C. & P. 254; R. *v.* Hunter, *ib.* 128; People *v.* Kingsley, 6 Cow. 522; 8 Mass. 110; People *v.* Badgely, 16 Wend. 53; State *v.* Parker, 1 Chapman 298; State *v.* Potts, 4 Halst. 293; Pendleton *v.* Com., 4 Leigh 694; U. S. *v.* Britton, 2 Mason 468; Bucher *v.* Jarrett, 5 Bos. & Pull. 145; Howe *v.* Hall, 14 East 275. In England, the practice is to give notice to the prisoner to produce the writing at the assize, so that it may be brought before the grand jury. Such notice, however, it would appear from the cases in this country, is not considered necessary wherever the indictment in itself is a notice; Pendleton *v.* Com., 4 Leigh 694; People *v.* Kingsley, 6 Cow. 522; State *v.* Potts, 4 Halst. 293; People *v.* Badgeley, 16 Wend. 522. Thus, on the trial of an indictment for stealing a bank bill, where the bill is in the defendant's possession, it is not necessary to account for the non-production, the fact of the indictment being found sufficient notice to the defendant to produce; Com. *v.* Messinger, 1 Binn. 274; People *v.* Holbrook, 13 Johns. R. 90. So though an indictment for passing counterfeit money purport to set forth the counterfeit note according to its tenor, and contain no averment of its loss or destruction, the production of the note may be dispensed with, upon proof that the same has been mutilated and destroyed by the defendant, and other evidence of its contents may be admitted; State *v.* Potts, 4 Halst. 26." So it was said in another case, where the note was described as made on the day of May, and the proof was that the forged note was dated on a particular day, a conviction would be sustained notwithstanding the variance, when a satisfactory reason for the omission of a more particular description is given in the indictment; People *v.* Badgely, 16 Wend. 53. It has been ruled, however, that upon a rule to show cause, the court will not order an attorney of the court to deliver to the state attorney for the inspection of the grand jury, promissory notes suggested to have been forged, which had been delivered to the attorney in the common course of business by his client suspected of committing the forgery; State *v.* Squires, 1 Tyler's Vt. R. p. 147. Where a forged paper is passed by a prisoner, bearing date in 1828, and immediately after, with the knowledge of the holder, the prisoner alters the date to 1827, and the indictment set forth its tenor, and describes it as dated in 1827, it was held that the paper was proper evidence to go to the jury in support of the indictment, notwithstanding the proof that it bore date in 1828, when passed; Hoffman *v.* Com., 6 Rand. 685.

Whether it be necessary to set out the whole of the forged writing.

"In the short report of Smith's case, in the first volume of Salkeld, Salk. 342, Pasch. 2 Ann, it is stated, that the defendant was indicted for forging a deed of assignment of a lease, signed with the mark of one Goddard, *cujus tenor sequitur*, but set not down the mark as in the assignment; it was objected that without the mark it could be no forgery, and the objection was overruled. But this is a very loose report of the case, which appears to be the same with that reported in the third volume of Salkeld, and by Ld. Raymond, under the title of the Queen *v.* Goddard, in 3 Salk. 171; Trin. 2 Ann; R. *v.* Goddard *et al.*, Ld. Raym. 920; R. *v.* Goddard and Carlton; according to which the defendant was indicted for forging an assignment of a lease, and the tenor was set out; at the bottom of the assignment was the mark of the assignor, but no mark appeared upon the postea; and the whole court held, that since, by the statute of frauds, an assignment must be signed, the want of the mark of the defendant upon the postea, was a fatal defect; but as another indictment had been found against the defendant, the court gave no judgment, but ruled that the defendant should plead to the signing. But Ld. Holt held, that if the indictment had been for forging *a deed* of assignment (Mr. East, in his Pleas of the Crown 776, cites Salk. 342, and questions this point), and the deed had been set forth without any mark or signature, that might have been good, because signing is not necessary to a deed; for in former times they were sealed only, and not signed; Salk. 342; Pasch. 2 Ann." Where the instrument forged was a bond, purporting to be attested by one A. B, and the indictment charged that the defendant "wittingly and willingly did forge and cause to be forged a certain paper writing, purporting to be a bond, and to be signed by one C. D., with the name of him the said C. D., and to be sealed with the seal of the said C. D.; and the tenor of the bond, with a subscribing wit-

ness was set forth, but did not charge that the bond purported to be attested by one A. B, a motion to arrest the judgment on this account was overruled, on the ground that nothing need be averred in the indictment which is not necessary to constitute the offence charged. It is not necessary, it was said, that there should be a subscribing witness to a bond, and if there be one, it is not his signature, but the signing, sealing and delivery by the obligor, that contitutes the instrument a deed; State *v.* Ballard, 2 Murph. 186. And it seems, in all cases, to be sufficient to set out that part of a written document, which comprehends the particular instrument forged, though connected with other matter. Thus, in an indictment, for publishing a forged receipt *for money*, the receipt alone was set forth, as follows: "18th March, 1733, received the contents above, by me, Stephen Withers;" and, upon its appearing in evidence, that the above was forged at the bottom of a certain account, it was objected, that the account itself should have been set forth, for otherwise, it would not appear that it was a receipt for money. But all the judges held, the indictment to be sufficent; for it was laid to be a forged receipt for money, under the hand of S. W., for £1 4s., and the bill itself was only evidence to make out that charge; R. *v.* Testick, 1 East 181; East P. C. 925. The number of a bank bill, its vignettes, mottoes and devices, and the words and figures in the margin, need not be set out in the indictment. It is enough to set forth what constitutes the contract of the bill; but that must be done truly and precisely; Com. *v.* Stow, 1 Mass. 54; Com. *v.* Bailey, 1 Mass. 62; State *v.* Carr, 5 N. Hamp. 371; State *v.* Franklin, 3 Johns. Cas. 299; Com. *v.* Searle, 2 Binn. 332; Com. *v.* Stevens, 1 Mass. 203. On the trial of an indictment for passing a counterfeit bank note, the prisoner moved to exclude the note produced from going in evidence to the jury, on the ground that the name of one of the firm of engravers, set out in the description of the note in the indictment, did not appear on the note produced; the attorney for the commonwealth proved that when he drew the indictment, he had been able to make out the name on the note from his knowledge that one of the firm of engravers bore that name, though he could not say he would have been able to do so without the knowledge of the fact, but that the word has since become indistinct, he supposed, by handling the note; the court below thereupon overruled the motion to exclude, and permitted evidence to be given of the note thus produced. It was held by the General Court that it was right for the court below to do so; Buckland *v.* Com., 8 Leigh 732.

2. *How the forged instrument should be shown to be of the kind prohibited.*

It must invariably be shown on the face of the indictment, by proper averments, that the instrument forged is of the particular kind prohibited, in respect to which an indictment lies; State *v.* Jones, 1 M'M. 236; Wh. C. L. 83, 84, 160, 161, 345.

"A forged instrument cannot in strictness be called by the name of the real instrument which it assumes to be; an instrument, purporting to be a bond or writing obligatory, is not such, for no one is bound by it; and a forged writing, purporting to be a will, ought not in strictness to be called *a will*, for it is not so in any sense, and can have no legal operation whatever;" Stark. C. P. 113.

"But many statutes describing the offence of forgery, use the words, 'and if any person shall forge any *will*, or *bond*, 22 Geo. II. c. 25, or *writing obligatory*, *&c.*;' and, therefore, it may be averred in the indictment, that the defendant forged the will; R. *v.* Birch and Martin, Leach 92; East P. C. 980; bond, or writing obligatory; Dunnett's case, East P. C. 985. But it is in all cases proper, and seemingly more correct, to aver, that the defendant forged and counterfeited a certain paper writing *purporting* to be the last will (*or other instrument whose forgery is penal*). In the case of the King *v.* Birch and Martin, it was so averred, and the judges held, that although the statute uses the words, 'shall forge a will,' it was sufficient to lay it either way; R. *v.* Birch and Martin, Leach 92; East P. C. 980; 2 Bl. R. 790. And, therefore, in general, if it can be collected from the forged writing itself, that it assumes to be a bond, &c., it may be averred in the indictment, either that the defendant forged a certain bond, or that he forged a certain writing purporting to be a bond. Thus, in Taylor's case, R. *v.* Taylor, Leach 255; East P. C. 977; the defendant was charged with forging a receipt for the sum of £20, as followeth, 'Re'd. R. Wilson.' And in Testick's case, 1 East 181, the tenor set out was, 'Received the contents above, by me, William Withers,' and this was holden to be properly described as a receipt. In fact in such case the very terms of the instrument showed it to be a receipt.

"The *purport* of a writing is that which appears on the face of that writing; R. *v.* Gilchrist, Leach 753; if, therefore, the forged writing assumes in terms to be a will, bond or receipt, it may be described as *purporting* to be a will, bond or receipt. But in alleging the *purport* of a forged writing, great caution is necessary; for unless it can be collected plainly from the terms of the writing set forth, that it is in form and assumes to be that particular instrument which, according to the allegation, it purports to be, the indictment will be vicious; R. *v.* Hunter, R. & R. 510; R. *v.* Birkett, *id.* 251. Thus in William Jones'

case, Leach 243; East P. C. 883; Doug. 302; the indictment alleged 'purporting to be a bank note,' the writing set forth was as follows: 'No. F. 946—I promise to pay John Wilson, esquire, or bearer, ten pounds, London, March 4th, 1776, for self and company of *my* bank in England, entered, S. Jones.' And the court were of opinion that the paper writing did not *purport* to be a bank note, and therefore that the indictment was repugnant. So an indictment for forging a bill of exchange, as purporting to be directed to John *King* by the name and addition of John *Ring*, esq., was for the same reason holden to be vicious; R. *v.* Jeremiah Reading, Leach 672. The same was holden of an indictment, which described the subscription C. Oliver as purporting to be the name of Christopher Oliver; R. *v.* Reeves, Leach 933. The objection was at first overruled by Heath and Lawrence Js., and Thomson B., who thought that there was a shade of difference between this case and that of Gilchrist; and it does not appear what the ultimate opinion was. In Lovell's case, East P. C. 990, Leach 282, the indictment ran thus, 'purporting to be directed to Messrs. Drummond and Co, Charing Cross,' by the name of Mr. Drummond, and the indictment was held to be good, but it does not appear that the objection was taken. An indictment for uttering as true a forged promissory note, purporting to be made by A., payable to B., or order, is proved by evidence of the uttering of such note with the endorsement of B.'s name on the back thereof; Com. *v.* Adams, 7 Met. 50.

"In Gilchrist's case, Leach 753; East P. C. 982; the indictment charged the defendant with forging a paper writing, &c., purporting to have been signed by Thomas Exon, clerk, and to be directed to *George Lord Kinnaird*, William Morland, and Thomas Hammersley, of, &c., bankers and partners, by the name and description of Messrs. Rawson, Morland and Hammersley; the tenor of the bill was then set out as follows: '*Messrs. Rawson, Morland and Hammersley*, please to pay, &c., (signed), T. Exon;' and the indictment was by the ten judges present at the conference, holden to be repugnant and defective, for it could not *purport* to be directed to Lord Kinnaird, since his name did not appear upon the bill.

"And with respect to the word *purport*, it is to be observed generally, that its use is to show that the forged writing falls within the prohibited description; and, therefore, no other description should be given under the word purport, except of the particular nature of the forged writing, as that it purports to be a bond, a bill of exchange, a bank note, or the like. Any further description is highly objectionable, since it is unnecessary, and exposes the record to great danger from variance. See Mr. Justice Buller's observations, R. *v.* Gilchrist, Leach 753.

"And the same objection applies to giving any other description of the written instrument, (whose tenor is afterwards set forth), beyond that of its general nature.

"The defendant was indicted for forging and uttering a bill of exchange, requiring, &c., and *signed by Henry Hutchinson*, for, &c. Upon the trial, the prosecutor proved, that the signature *Henry Hutchinson* was forged; it was then objected that the indictment averring it to have been signed by him, was disproved; and so the judges held, upon reference to them after conviction; East P. C. 985. And an indictment will be defective, if it allege, after describing the forged writing, 'by which A., is bound to B.;' for since it is a forgery, A. could not be bound by it; Bac. Abr. tit. Ind. 556." Stark. C. P. 117.

Where a bill of parcels of this tenor, viz.: 'Mr. J. L. bought of E. and O.—the above charged to G. C.,' the purchaser, J. L. added these words, 'by order of C. C.:' It was held, that the addition amounted to an acquittance or discharge, and was a forgery within the Massachusetts statute; Com. *v.* Ladd, 15 Mass. 526. A bill issued by a bank in another state, is a promissory note under section third of the Mass. Rev. Stat. chap. 127; Com. *v.* Ripley, Thacher's C. C. 67.

"An indictment charged the defendant with forging a *bond and writing obligatory*. The statute upon which it was founded, mentions bond and also writing obligatory. The instrument set forth purported to be a bond, but the judge held, that it was properly described; R. *v.* Dunnett, East P. C. 985. For a bond is a writing obligatory, and at all events, *semble:* the subsequent description would be but surplusage." Stark. C. P. 117.

An indictment charging the forging of 'a certain bond,' instead of a certain paper writing purporting to be a bond, is proper; State *v.* Gardiner, 1 Iredell 27.

"In Bigg's case, the prisoner was charged with erasing an endorsement *on* a bank note; 3 P. Wms. Str.; it turned out in evidence, that the inscription charged to have been erased, had been written, according to the custom of the bank, upon the *inside and face* of the bill. The jury found especially, that an inscription so written was commonly called an *endorsement*, and a majority of the judges held, that the description was correct;" Stark. C. P. 117.

An order on the cashier of the Bank of the United States, is evidence in support of an indictment for forging an order on the cashier of the corporation of the Bank of the United States; U. S. *v.* Hinman, 1 Bald. 292.

Instruments of other specific denominations, may, it seems, be described as warrants or orders, if they be in effect such; Lockett's case, East P. C. 940; Leach 110; R. *v.* Shepard, Leach 265; East P. C. 944. And a bill of exchange, it has been held, may be laid as an order for the payment of money; Willoughby's case, East P. C. 944. "Where the forged instrument is actually within the meaning of the statute on which you intend framing your indictment," says Mr. Archbold, C. P. 357, "but does not sufficiently appear to be so on the face of it, you must, if the instrument be set out, not only set out a literal copy of it in the indictment, but must also add such averments of extrinsic facts as may be necessary to make it appear upon the face of the record, that the forged instrument is one of those intended by and described in the statute. Thus, for instance, where, by the usage of a public office, the bare signature of a party upon a navy bill operated as a receipt, an indictment for forging such a receipt, setting forth the navy bill and endorsement, and charging the defendant with having forged 'a certain receipt of money,' to wit, the sum of twenty-five pounds, mentioned and contained in the said paper called a navy bill, which forged receipt was as follows: that is to say—'William Thornton, William Hunter,'" was holden bad, because it did not show, by proper averments, that these signatures imported a receipt; R. *v.* Hunter, 2 Leach 624; 2 East P. C. 928. So, where an indictment charged the defendant with forging a receipt in the handwriting of Henry Hargreaves, as thus:—"Received, H. H.," it was holden that the indictment was bad, because there was nothing to show what H. H. meant; R. *v.* Barton, 1 Mood. C. C. 141;" see R. *v.* Testick, 1 East 181, n.; *ante*, p. 133; (see Archbold's C. P. p. 46). So the words, "settled, Sam. Hughes," written at the foot of a bill of parcels, were held of themselves to import a receipt of acquittance, and that no averment was necessary that the word "settled" meant a receipt or acquittance; R. *v.* Martin, 1 Mood. C. C. 483; 7 C. & P. 549; overruling R. *v.* Thompson, 2 Leach 810. And see R. *v.* Houseman, 8 C. & P. 180; R. *v.* Vaughan, *id.* 276; Reg. *v.* Boardman, 2 M. & Rob. 147."

At common law, to constitute forgery, the intent to defraud must either be apparent from the false making, or become so by extrinsic facts. Therefore an indictment, which charged the false making to have been in the alteration of an order, given by the defendant, without charging that the alteration was made after it was circulated and had been taken up by him, was held to be fatally erroneous; State *v.* Greenlee, 1 Dev. 523. For the same reason, an indictment for forging a deed must aver that it was sealed; 3 Keb. 388; 3 Inst. 169; Smith's case, 3 Salk. 171; though see Pa. *v.* Misner, Add. R. 44.

"An indictment for forging an order for the delivery of goods, must show that the person whose name is subscribed, had authority to make such an order; East P. C. 958; 2 Leach, 3d ed. 611. But it is sufficient, if the order purport that the party sending it had such authority, although, in fact, he had not; Fost. 119; East P. C. 940. And it must, for the same reason, appear that the person to whom the order is directed, had possession of the goods." Stark. C. P. 119.

An indictment for forging an acquittance need not allege that it was presented, or delivered to any person as a genuine acquittance for goods delivered, and in consideration thereof; Com. *v.* Ladd, 15 Mass. 526.

"And further it has been holden, that if the instrument, as stated with proper averments upon the record, be such as if genuine would be illegal, the indictment will be vicious and ineffectual; and therefore, in the case of the King *v.* Moffat, Leach 483, for forging a bill of exchange for the payment of three guineas, without specifying the payee's place of abode, the judges were of opinion, that the forgery did not amount to a capital offence; since, by the stats. 15 Geo. III. c. 51, and 17 Geo. III. c. 30, made perpetual by 27 Geo. III. c. 16, the bill of exchange, if read, would not have been valid; Wall's case, East P. C. 953.

"And in Smith's case, 3 Salk. 371, above alluded to, the court were of opinion, that an indictment for forging an assignment would be vicious, unless it showed that the assignment was signed. *The distinction seems to be this*, where the instrument appears to be valid, an indictment may be maintained, although from some collateral defect, that instrument, if genuine, could never legally have been put in use; otherwise, where the defect is apparent on the face of the instrument; per Eyre, J. R. *v.* Jones and Palmer, East P. C. 991; Leach 405. Hence an indictment has been holden to be maintainable for forging a conveyance, though the estate was described by the wrong name; Japhet Crooke's case, Str. 901; Fitzg. 57; Masterman's notes; for forging a protection in the name of one as member of parliament, who was not so; R. *v.* Deakins, 1 Sid. 142; for forging and publishing a writing as the last will of a person still living; R. *v.* Murphy, 10 St. Tr. 183; R. *v.* Sterling, Leach 117; Cogan's case, 2 Leach 503; for forging an order for the payment of a seaman's prize money, though in fact the seaman was, at the time the note bore date, in a situation which rendered the order invalid under the stat.; R. *v.* M'Intosh, East P. C. 956; 32 Geo. III. c. 34, s. 2; and for forging a name to an assignment of a bond, though the bond have no seal; Pa. *v.* Misner, Add. 44. The uttering and publishing a

promissory note with forged endorsements upon it, is an offence within the statute against forgery, although the passing of the note is accompanied with communications which would exonerate the endorsers if the endorsements were genuine; People *v.* Rathbun, 21 Wend. 509.

If, from circumstances, the jury can presume that it was the defendant's intention to defraud J. N., or if, in fact, J. N. might have been defrauded if the forgery had succeeded, it is sufficient to satisfy this allegation in the indictment; for, where the intent to defraud exists in the mind of the defendant, it is sufficient, though, from circumstances of which he is not apprised, he could not in fact defraud the prosecutor; R. *v.* Holden, R. & R. 154; even though the party to whom the forged instrument is uttered, believes that the defendant did not intend to defraud him; R. *v.* Sheppard, R. & R. 169; see R. *v.* Harvey, 2 B. & C. 261.

(*f*) The manner of averring intent generally has been already examined; *ante*, p. 11. In forging it is sufficient to allege a general intention to defraud a particular person, *which intention must be proved as laid;* Powell's case, Leach 90; Elsworth's case, East P. C. 986; and see East P. C. 988; People *v.* Rathbun, 21 Wend. 509; Com. *v.* Goodenough, Thacher's C. C. 132; State *v.* Odel, 2 Tr. Con. Rep. S. C. 758; Rosc. Cr. Ev. 400; 3 Brevard 552; State *v.* Greenlee, 1 Dev. 523. It is not necessary, however, to allege the intention to defraud; where the statute upon which such indictment is founded, does not contain these terms, such intention is embraced in the words "falsely and fraudulently;" State *v.* Calvin, &c., Charlt. 151.

"But it is not essential, either in indictments for obtaining money under false pretences, or in case of forgery, after setting out the false pretences or forged writing, to aver the particular means by which the false pretences were made available in the one case, or how the forged writing was to be made the instrument of fraud in the other. Thus an indictment for causing and procuring a counterfeit bank note to be offered to be passed, without stating by whom or how the accused caused and procured it to be done, is sufficiently certain and good;" Stark. C. P. 122; see also Brown *v.* Com., 2 Leigh 769.

"Thus, in the case of R. *v.* Young, 3 T. R. 176, above referred to, after stating the false pretence; namely, a wager, which was pretended to have been betted upon a foot-race, the indictment averred that the defendant, under colour and pretence of having made the bet, obtained from the prosecutor the sum of 20 guineas, as a part of such pretended debt, with intent to defraud and cheat him thereof, without stating by what particular inducement he obtained the money. And in the case of forgery, it is sufficient to aver generally, that the defendant intended to defraud a particular person, without showing upon the record how he intended to do so; Powell's case, Leach 90; East P. C. 989; Elsworth's case; Crook's case, P. C. 992; Stark. C. P. 122.

The indictment is good if it set forth the instrument alleged to have been forged, averring it to have been falsely made, with the intent to injure or defraud some person or body corporate, provided the instrument be such as on its face to show that the rights or property of such person may thereby be injured or affected; it is not necessary that the facts and circumstances of the case showing the intent, should be specially set forth in the indictment; it is enough that they be given in evidence on the trial. Thus, where the defendant was indicted for forging an instrument purporting to be a request from the cashier of a bank in Kentucky to the cashier of a bank in New York, to deliver to engravers the plates of the bank for the purpose of having new impressions taken, it was held that it was not necessary to allege either that there was such a bank in Kentucky, or that the person who purported to be the writer of the request was cashier thereof, and had authority to make such request, or that there were such plates in existence, and in the possession of or under the control of the cashier to whom the writing was addressed; all this being matter of evidence and not necessary to be set forth in the indictment. Extrinsic facts are necessary to be stated only, when the operation of the instrument upon the rights or property of another is not manifest or probable from the face of the writing. It was further held, that it was not necessary to aver in the indictment that the bank of Kentucky was a corporation duly incorporated; that it was enough to allege that the instrument set forth was falsely made, with the intent to injure and defraud the bank; and that under such allegation an exemplification of the act of incorporation was admissible in evidence; People *v.* Stearns, 21 Wend. 409.

Where the intent is charged to be to defraud an incorporated bank, and its corporate name is set forth, it is sufficient if it appears to be an incorporated bank within the state; People *v.* Peabody, 25 Wend. 472; People *v.* Davis, 21 Wend. 309; State *v.* Jones, 1 M'M. 236; Com. *v.* Smith, 6 S. & R. 568. It seems that all the partners need not set out in averring the intent to defraud. Thus, where the first count charged the offence to have been committed with intent to defraud D. L. and D. L. Jr.; the second count stated the offence to have been committed with intent to defraud the president and directors of said com-

First count. Forging at common law, a certificate of an officer of the American army, in 1777, *to the effect that he had received certain stores, &c.*(*h*)

That C. S., late of the county aforesaid, yeoman, on, &c., and long before and since, was a clerk to the department of the commissary-general of military stores in the armies of the United States of America, and entrusted and employed by colonel B. F., the commissary-general of military stores in the armies aforesaid, and by the honourable continental congress, to make payments and take receipts, bills of parcels and other vouchers for military stores and for divers articles necessary and fitting in the preparation of military stores purchased for the use of the armies aforesaid, and to keep the accounts thereof. And the jurors aforesaid upon their oaths and affirmations aforesaid, do further present, that the same C. S., on, &c., at the City of Philadelphia, in the county aforesaid, contriving and intending falsely and fraudulently to deceive and defraud the United States aforesaid, with force and arms, falsely, wickedly and unlawfully did make, forge and counterfeit, and cause to be made, forged and counterfeited, a certain writing purporting to be a receipt for one thousand and twenty pounds and fifteen shillings, and purporting to be signed in the name of one A. F., in the words and figures following, to wit, "3. Received 1st July, 1777, of colonel B. F., C. G. U. S., one thousand and twenty pounds, fifteen shillings for 820 bayonet belts, and 920 cartouch boxes for the use of the army.

"—£ 1020 15— A. F."

to the evil example of all others in like case offending, to the great damage of the United States, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Publishing the same.

And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said C. S., contriving and intending the said United States, falsely and fraudulently to deceive and defraud, then and there, with force and arms, the said writing so as aforesaid falsely made and counterfeited, purporting to be a receipt for the sum of one thousand and twenty pounds and fifteen shillings,

pany; the fourth count, &c., with an intent to defraud D. L.; the court, on motion in arrest of judgment, held, that the omission of one of the partners in one count, and of two of them in another, was not fatal; for an acquittal on such an indictment, will always be a bar to another prosecution for the same forgery, though laid with intent to injure some other person; People *v.* Curling, 1 Johns. R. 320; R. *v.* Hanson, 1 C. & M. 334.

The allegation, &c., "commonly called a bank note, purporting to be a good and genuine bank note of one hundred dollars, on the bank of the state of South Carolina," contains a sufficient averment of the existence of such a bank as the bank of the state of South Carolina; State *v.* Ward, 2 Hawks 443.

(*g*) This averment is unnecessary in statutory forgeries, and does not seem to be required at common law; People *v.* Rynders, 12 Wend. 425; though in the latter class of indictments, it is more prudent to insert it.

(*h*) Res. *v.* Sweers, 1 Dall. 41. The objection taken to this and the succeeding indictment, that the intent to defraud the United States was vicious, was overruled by M'Kean C. J., and the defendant sentenced. The trial, it must be observed, was in the Supreme Court of Pennsylvania.

and purporting to be signed in the name of the said A. F., wickedly, unlawfully and fraudulently did publish and cause to be published as and for a true writing and receipt of the said A. F.; which said falsely forged and counterfeited writing is in the words and figures following, to wit, "3. Received 1st July, 1777, of colonel B. F., C. G. U. S., one thousand and twenty pounds fifteen shillings, for 820 bayonet belts, and 920 cartouch boxes for the use of the army.

"—£1020 15— A. F."

(he the said C. S., at the time of publishing the said false and counterfeit writing, there by him in form aforesaid, well knowing the said writing to have been falsely forged and counterfeited as aforesaid), to the evil example of all others in like case offending, to the great damage of the said United States, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forgery. Altering a certificate of an officer of the American army in 1778, *to the effect he had received for the use of the troops at Carlisle certain articles of clothing. Offence laid at common law, the intent being to defraud the United States.*(*i*)

That C. S., late of the county aforesaid, yeoman, on, &c., was a deputy commissary-general of military stores in the armies of the United States of America, and entrusted and employed by colonel B. F., the commissary-general of military stores in the armies aforesaid, and by the honourable continental congress, to make purchases of military stores and of divers other articles necessary and fitting in the preparation of military stores, for the use of the armies aforesaid, and to make payments and take receipts, bills of parcels and other vouchers therefor. And the jurors aforesaid, upon their oaths and affirmations aforesaid, do say, and further present, that the said C. S., on, &c., at the City of Philadelphia, in the county aforesaid, having in his custody and possession a certain bill of parcels or account, with a certificate and receipt all in writing, for a parcel or quantity of flannel cloth by him purchased of one M. D., for the use of the laboratory of the same armies, and which said writing was in the words, figures, ciphers and letters following—that is to say:

"U. S. A.

To M. D., Dr.

"1778, Feb. 4th.	To 57 & a qr. yds. flannel,		32*s.* 6*d.*	£83	5	7
	To 9 yds.	do.	35*s.*	15	15	0
	To 107 & 3 qr. yds.	do.	52*s.* 6*d.*	282	16	10
				£381	17	5"

"I do certify, that the above was purchased and delivered to me for the use of the laboratory at Carlisle.

"I. C., *Cap. of the Artillery.*"

And on the back side of which said writing is endorsed and written

(*i*) R. *v.* Sweers, 1 Dall. 41.

the words following: "Received the within contents in full, M. D." He the said C. S., afterwards, to wit, on the same day and year aforesaid, at Philadelphia aforesaid, in the county aforesaid, with force and arms, the said bill of parcels or writing, falsely, fraudulently and deceitfully did alter and cause to be altered, by falsely making, forging and adding the figure 4 to and before the figure 9, in the second item of the said bill of parcels or writing, which figures and letters did before such last mentioned forgery import and signify nine yards, but by reason and means of such last mentioned forgery and addition did become, import and signify forty-nine yards; and also by forging and altering the figure 1, in the sum of the said second item in the bill of parcels or writing aforesaid, to the figure 8; which figures did, before such mentioned alteration and forgery import and signify fifteen pounds and fifteen shillings, but by reason and means of such last mentioned forgery and alteration, did become, import and signify eighty-five pounds and fifteen shillings; and also by falsely forging and altering the figure 3 to the figure 4, and the figure 8 to the figure 5, in the sum total or amount of the said bill of parcels or writing; which figures did before such last mentioned forgery and alteration import and signify three hundred and eighty-one pounds, seventeen shillings and five pence, but by reason and means of such last mentioned forgery and alteration, did become, import and signify four hundred and fifty-one pounds, seventeen shillings and five pence, with intention to defraud the United States of America aforesaid of seventy pounds, of lawful money of Pennsylvania, to the evil example of all others in like case offending, to the great damage of the said United States, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forgery. Altering and defacing a certain registry and record, &c., under the Pennsylvania act of 1700.(*j*)

That H. R., &c., at, &c., aforesaid, on, &c., being an evil disposed person, and devising, designing and intending evil to the people of this commonwealth, under the pretext of examining the enrolments, registers and records in the office of the surveyor-general of this commonwealth, on, &c., aforesaid, at the county aforesaid, with the intention to defraud and deceive one G. R., falsely, deceitfully and corruptly in and on a certain registry and record, then and there being and remaining as a public record, in the office of the surveyor-general of this commonwealth, to wit, in book F., and on the page of the said book numbered one hundred and ninety-five, containing the list of returns made by him, the said H. R., while acting as deputy-surveyor of the surveyor-general of this commonwealth, did then and there falsely alter and deface the registry and records of said office and of this commonwealth, by a false and corrupt interlineation made in writing and figures, as follows, to wit, in the said book F., and on the page of said book numbered therein one hundred and ninety-five, and

(*j*) Ream *v.* Com., 3 S. & R. 207. The judgment of the Quarter Sessions of Dauphin County, passing sentence on this indictment, was affirmed by the Supreme Court.

between the lines of writing on said page, counted from the upper line of said page, including the said upper line, numbers twenty-three and twenty-four: "April, 1794. H. R., in right of S. S., 161 acres and 95 perches." To the great damage of the said G. R., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For forging, &c., a bill of exchange, an acceptance thereof, and an endorsement thereon.(*k*)

That defendant, &c., feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting * certain bill of exchange; the tenor of which said false, forged and counterfeited bill of exchange, is as follows, that is to say:

"No. £54. 1*s*. Bristol, America, 17th Sept. 1797.

"Three months' after sight, pay to Messrs. S. R. and Son, or order, fifty-four pounds, one shilling, value received.

"To Mr. R. G. A. M."

"Old Change, London."

with intention to defraud A. S., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count for uttering.

Feloniously did utter and publish as true, a certain false, forged and counterfeited bill of exchange, which said last mentioned false, forged and counterfeited bill of exchange, is as follows, that is to say, (*set out the bill as before*), with intention to defraud the said A. S., he the said A. B., at the said time he so uttered and published the said last mentioned false, forged and counterfeited bill of exchange as aforesaid, then and there, to wit, on, &c., at, &c., well knowing the same to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count, for forging an acceptance.(*l*)

That the said A. B., having in his possession a certain other bill of exchange, whose tenor follows, that is to say, (*set out the bill*), * on, &c., with force and arms, at, &c., feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeting on the said last mentioned bill of exchange, ** an acceptance of the said last mentioned bill of exchange, to the tenor following, that is to say, "Accepted R. G., Nov. 13th," with intent to defraud the said A. S., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

*Fourth count for uttering a forged acceptance, as in the last count to the *, and proceed:*

On which said last mentioned bill of exchange was written a cer-

(*k*) Stark. C. P. 455.

(*l*) It is usual, in a count of this kind, first to aver the date, direction and other circumstances of the bill, and then set it out; but the first averments seem to be superfluous, and the above form is much more concise. It does not appear to be absolutely essential to set out the whole of the bill, since the acceptance only is alleged to have been forged. See Stark. C. P. p. 112–13.

tain false, forged and counterfeited acceptance of the said last mentioned bill of exchange, whose tenor follows, that is to say, "Accepted, R. G., Nov. 13th," on, &c., with force and arms, at, &c., feloniously did utter and publish as true, the said last mentioned false, forged and counterfeited acceptance of the said last mentioned bill of exchange, with intent to defraud the said A. S., he the said A. B., at the time of uttering and publishing as true the said last mentioned false, forged and counterfeited acceptance of the said last mentioned bill of exchange, then and there, to wit, on, &c., at, &c., well knowing the said last mentioned false, forged and counterfeited acceptance to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

*Fifth count, for forging an endorsement, &c., as in the third count to the *, and proceed:*

An endorsement(*m*) of the said last mentioned bill of exchange, whose tenor follows, &c., that is to say, "S. R. and Son," with intent to defraud, &c., (*as before*).

Sixth count, for publishing a forged endorsement, &c.

(*Same with that of the fourth count, substituting the endorsement and its tenor for the acceptance, and its tenor*): against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For forgery at common law in ante-dating a mortgage deed with interest, to take place of a prior mortgage.(*n*)

That whereas, a certain M. N., yeoman, on, &c., at, &c., was seized in his demesne as of fee, of and in, two certain lots or pieces of ground, one of them situate, lying and being in Prince street, in the Borough of Lancaster, in Lancaster County aforesaid, containing, &c.; the other of which said lots, situate, &c., and that the said M. N., the same day and year aforesaid, at Lancaster County aforesaid, for a good and valuable consideration, to him the said M. N., by a certain A. K., before that time paid, did make and execute, seal and deliver, to the said A. K., a certain indenture and deed of mortgage, dated the same day and year aforesaid, wherein and whereby the said M. N. did grant, bargain, sell, alien, release and confirm unto the said A. K., his heirs and assigns, all those two adjacent lots or pieces of ground, before mentioned and described, situate on Prince street aforesaid, in the borough and county aforesaid, together with the houses and outhouses, edifices and buildings thereon erected, and all and singular their appurtenances, to have and hold the same to the said A. K., his heirs and assigns forever, with a proviso in the same indenture contained, that if the same M. N., his heirs, executors or administrators should, and did well and truly pay, or cause to be paid to the said A. K., or his executors, administrators, assigns, the sum of

(*m*) See Stark. C. P. 116–17; R. *v.* Biggs, 3 P. Wms. 419.

(*n*) This indictment, which was drawn in 1763, is signed by "Benj. Chew, attorney-general," but a note on a manuscript copy with which, among others, I have been very kindly furnished by Mr. Dillingham, of this city, states that it was "settled by Edward Shippen, deputy attorney-general," and afterwards chief justice.

pounds, on the day of together with lawful interest for the same, then that indenture to be void, and the estate thereby granted to cease and determine, (*here recite the proof or acknowledgment of the deed and enrolment, with the day, place and book*), as by the said indenture, reference being thereunto had, more fully and at large appears.

And that M. R., of L., in Lancaster County aforesaid, yeoman, and D. S., of the Borough of Lancaster, in Lancaster County, attorney at law, well knowing the premises, and designing and fraudulently intending the said A. K., falsely and unlawfully to deceive and defraud, and with an intent to destroy, invalidate and render of no effect, the mortgage deed aforesaid, and to deprive the said A. K., of all benefit and advantage therefrom, and to lessen and destroy the security which the said A. K. had by the said mortgage deed, for the payment of the said sum of pounds, with the interest thereof, afterwards, to wit, the fourth day of November, A. D. 1763, at Lancaster County aforesaid, and within the jurisdiction of this court, with force and arms, knowingly, subtelly and falsely, did forge and make, and cause to be forged and made, one false writing sealed, purporting to be an indenture of mortgage from the said M. N. to the said M. R., for the two lots of ground aforesaid, before granted and mortgaged as aforesaid, by the said M. N. to the said A. K., and purporting to bear date and to have been sealed and delivered, by the said M. N., on the fourth day of June, 1763, which same false and forged writing, contains the matter following, to wit, this indenture, &c. (*setting forth the same*), as by the said false and forged indenture fully appears.

And the inquest aforesaid, do further present, that the said M. R. and D. S., the said fourth day of November, at Lancaster County aforesaid, fraudulently and deceitfully designing to defraud and supplant the said A. K., with an intent that the said false and forged writing should invalidate, defeat and become prior to the indenture of mortgage aforesaid, of the said M. N., before that time made, sealed and delivered to the said A. K., (the last mentioned indenture of mortgage being then and there in full force, and the moneys mentioned in the proviso aforesaid, being unpaid to the said A. K., his attorney or assigns), the same false and forged writing, did ante-date and cause to be ante-dated, and to bear date on a day prior to the sealing and delivery of the indenture aforesaid, to the said A. K., to wit, on the fourth day of June aforesaid, and the said M. R. and D. S., on the fourth day of November aforesaid, at the county aforesaid, falsely, unlawfully and deceitfully did prevail upon and procure the aforesaid M. N., to execute and acknowledge, sign, seal and deliver, as his act and deed, the same false and forged writing, he the said M. N., then and there not knowing the same false writing to have been as aforesaid antedated, but believing the same to have borne date on the day of the execution and delivery of the same, to wit, on the fourth day of November aforesaid. And the inquest &c., do further present, that the said M. R. and D. S., afterwards, to wit, the same fourth day of November, at Lancaster County aforesaid, with an intent, the said A. K. to injure, cheat, deceive and defraud, and to cause the aforesaid false and forged writing, to invalidate, defeat and become prior to the true, genuine and lawful

deed aforesaid, made and sealed as aforesaid, and delivered to the said A. K., the same false, forged and ante-dated deed, as the true and genuine deed of the said M. N., by him made, executed, sealed and delivered, on the fourth day of June aforesaid, falsely, unlawfully, knowingly, fraudulently and deceitfully did publish, and cause to be published, when in truth the said M. R. and D. S., then and there well knew the said last mentioned writing to be false, forged and ante-dated, and not to have been sealed and delivered by him the said M. N., on the fourth day of June aforesaid, but on the fourth day of November aforesaid, to the great injury and deceit of the said A. K., to the evil example of all others in such case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

At common law. Against a member of a dissolved firm for forging the name of the firm to a promissory note.

That D. G., late, &c., on, &c., and after the dissolution of the co-partnership of the said D. G. and J. O. who had shortly before carried on trade and merchandise, under the name and firm of O. and G. at &c., did falsely make, forge and counterfeit and did cause and procure to be falsely made, forged and counterfeited, a certain prommissory note, for the payment of money signed by the said D. G., with the partnership names of O. and G. and purporting to have been signed by the said D. G. with the partnership name of O. and G. before the said partnership was dissolved, the tenor of which promissory note is as follows. "$5000. Ninety days' after date we promise to pay W. S., or order, five thousand dollars, at the State Bank at Elizabeth, without defalcation or discount, for merchandise rec'd, E. T., 30th December, 1812. O. and G.," with intent to defraud the said J. O., and to render him liable to the payment of the said sum of money in the said note mentioned and made payable, contrary, &c.(*o*) (*Conclude as in book* 1, *chap.* 3).

Forging a letter of attorney at common law.

That J. B., late of the said county, yeoman, on, &c., with force and arms, at the county aforesaid, falsely, fraudulently and deceitfully did make, forge and counterfeit a certain letter of attorney, purporting to be signed by one T. R., with the mark of him the said T. R., and to be sealed and delivered by him the said T. R., the tenor of which said letter of attorney is as follows, (*here recite letter of attorney, verbatim et literatim*), with an intent to defraud the said T. R., against, &c. (*Conclude as in book* 1, *chap.* 3).

(*o*) State *v.* Gustine, 2 Southard 744. Halsey moved to quash: 1. For uncertainty and inconsistency. 2. Because the purport was incorrectly stated, it being stated to be signed by defendant, with the partnership name of Ogden and Gustin, whereas it did not purport to be signed by D. Gustine, 2 East 982. 3. Because partner before or after dissolution of partnership, may sign partnership name for a separate business, and not be liable to the pains of forgery. Chetwood answered, and referred to 2 Hawk. 344; 1 Mod. 78; 1 Str. 234, 241, 266; 1 Salk. 384. 1 Leach 239, 410; 2 Str. 486; 2 Leach 660. The court, Southard J. dissenting, overruled the motion, and put the defendant to plead, &c.

Uttering a forged order at common law.

That L. G., late of the said county, yeoman, on the tenth day of November, 1787, at the said county and within the jurisdiction of this court, having in his possession a certain false, forged and counterfeited written paper, purporting to be an order for the payment of the sum of one pound and five shillings, and to be signed by one G. B., which false and forged order is in the words and figures following, that is to say,

"Sir. Please to pay the bearer for cleaning the bank.
"£1. 5. 0. G. B."

The same false, forged and counterfeited written paper or order, for and as a good, true and genuine order for the payment of the sum aforesaid, to G. C., esq., then and there falsely, deceitfully and fraudulently did utter, publish and present and deliver with an intent to defraud the said G. C. to his great damage, contrary &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forgery of bill of exchange. First count, forging the bill.(*p*)

That defendant, on, &c., at, &c., feloniously, &c., did forge a certain bill of exchange, which said forged bill of exchange is as follows, that is to say: "£50. Bristol, 25th March, 1830. Three months' after date pay to," &c., &c., (*setting out the bill of exchange in words and figures correctly,*) with intent to defraud one J. N., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Uttering the same.

That the defendant "did offer, utter, dispose of and put off" a certain other, &c., &c.

Third count. Forging an acceptance on the same.

(*If the acceptance be also forged, add counts for it in this form*): And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the year and day last aforesaid, at the parish aforesaid, in the county aforesaid, having in his custody and possession a certain other bill of exchange, which said last mentioned bill of exchange is as follows, that is to say, (*here set out the bill*), he the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did forge on the said last mentioned bill of exchange an acceptance ("any endorsement on, or assignment of, any bill of exchange, or promissory note for the payment of money, or any acceptance of a bill of exchange"), of the said last mentioned bill of exchange, which said forged acceptance is as follows, that is to say, "Accepted, payable at the bank of Messrs. C. & Co., J. G.," (*or as the acceptance may be*), with intent to defraud the said J. N., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*p*) Arch. C. P. 5th Am. ed. 444. This form is drawn under the stat. 11 Geo. IV. and 1 Wm. IV. c. 66, s. 3, which makes it felony to forge "any bill of exchange or promissory note for the payment of money."

Fourth count. Offering, &c., a forged acceptance.(*pp*)

(*Same as the last to the end of the copy of the bill of exchange, then as follows*): and on which said last mentioned bill of exchange was then and there written a certain forged acceptance of the said last mentioned bill of exchange, which said forged acceptance of the said last mentioned bill of exchange, is as follows, that is to say, (*here set out the acceptance as in the last count*), he, the said J. S., well knowing the premises last aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of and put off the said forged acceptance of the said last mentioned bill of exchange, with intent to defraud the said J. N., (he the said J. S. at the time he so offered, uttered, disposed of and put off the said forged acceptance of the said last mentioned bill of exchange, then and there well knowing the said acceptance to be forged,) against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*If an endorsement be also forged, add counts for it in this form*).

Fifth count.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, having in his custody and possession a certain other bill of exchange, which said last mentioned bill of exchange is as follows, that is to say, (*here set out the bill*), he the said J. S., afterwards, to wit, on the day and year last aforesaid, at the parish in the county aforesaid, feloniously did forge on the back of the said last mentioned bill of exchange, a certain endorsement of the said bill of exchange, which said forged endorsement is as follows, that is to say, "J. S. & Co.," with intent to defraud the said J. N., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count. Offering, &c., forged endorsement.

(*Same as the last, to the end of the copy of the bill of exchange, then as follows*): and on the back of which said last mentioned bill of exchange was then and there written a certain forged endorsement of the said last mentioned bill of exchange, which said last mentioned forged endorsement is as follows, that is to say, "J. S. & Co.," he the said J. S. well knowing the premises last aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of and put off the said last mentioned forged endorsement of the said last mentioned bill of exchange, with intent to defraud the said J. N. (he the said J. S., at the time he so offered, uttered, disposed of and put off the said last mentioned forged endorsement of the said last mentioned bill of exchange, then and there well knowing the said endorsement to be forged), against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*pp*) This form, as will be perceived, is in the division and subject matter of its counts, the same as that on p. 140, though drawn on a subsequent statute. In framing counts in parallel cases, under the American statutes, it will be important to keep both precedents in view.

Indictment for forging and publishing a receipt for payment of money.(*q*)

That defendant, &c., (*averring forgery as in preceding forms*), a certain acquittance and receipt(*r*) for money, to wit, for the sum of three pounds and three shillings, in the words, letters and figures following, that is to say, "August the 26th, 1781. Received of Mr. J. B. for Moustone quarry, the full sum of three pounds and three shillings. Received by me, T. F.," with intent to defraud J. B., &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count, for uttering.

A certain false, forged and counterfeited acquittance and receipt for money, to wit, for the sum of three pounds and three shillings, feloniously did utter and publish as true; which said last mentioned false, forged and counterfeited acquittance and receipt is in the words, letters and figures following, that is to say, (*set out the receipt as before*), with intent to defraud the said T. B., he the said A. B., at the time when he so uttered and published the said last mentioned false, forged and counterfeited acquittance and receipt, well knowing the same acquittance and receipt so by him uttered and published, to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forging a receipt under the North Carolina statute.(*s*)

That J. S., late of the County of Johnston, in the State of North Carolina, on, &c., with force and arms, in the County of Johnston

(*q*) Stark. C. P. 457.

(*r*) Unless the instrument on the face of it appear to be a receipt, it must be shown by the aid of proper averments, that it could so operate; Stark. C. P. 116, 117; *ante*, p. 136.

(*s*) State *v.* Stanton, 1 Iredell 424. "Upon the form of the indictment, the court would perhaps not be bound now to decide, since the other point disposes of the case here. But as the point may be material upon the next trial, and would, probably, soon arise in other cases, we deem it fit to state the opinion we have formed out of it, with the view of settling the question. It would have been more satisfactory to us if in the books of criminal pleading or in an adjudication, a precedent or a direct authority could have been found. We have, however, looked through the standard works on crown law, from Ld. Coke's commentary on the statute 5 Elizabeth c. 14, in the third institute, down to Mr. Chitty's treatise, and through many books of forms, without succeeding in finding an indictment upon these words in that statute, 'show forth in evidence,' or a rule laid down upon them. This circumstance may not perhaps be deemed so very singular, when it is remembered that the same act contains also the words 'pronounce and publish,' which are more extensive, and include 'show forth in evidence.' This furnishes a reason why the indictment should always be for 'pronouncing and publishing,' and not for 'showing forth in evidence;' since, although every publication is not showing forth in evidence, yet showing forth in evidence is a publishing of it. Ld. Coke saying that using any words, written or oral, whereby the instrument is set forth or held up as true, is 'to pronounce and publish it.' We have therefore only principle for our guide, and, being so guided, we have arrived at the conclusion that the second count is sufficient.

"In the first place, we adhere to Britt's case, 3 Dev. 122, that the words 'show forth in evidence,' refer to a judicial proceeding. The question then is, whether the particular proceeding must be set forth at large in the indictment, or may not be shown on evidence under the general words used in the statute and in this indictment.

"It seems to be proper, and perhaps may be said to be necessary, when an offence is created by statute, to describe it in the indictment, whether consisting of the commission or omission of particular acts, or of certain acts accompanied by a particular intent in the words of the statute. This is certainly so, unless, for a word or phrase in the statute, another is used in the indictment, which is clearly of the same legal import, or has a broader sense including that in the statute. Of this exception, Rex *v.* Fuller, 1 B. & P. 180, is an

aforesaid, feloniously did wittingly and falsely forge, make and counterfeit, and did cause and procure to be falsely made, forged and counterfeited, and did willingly act and assist in the false making, forging and counterfeiting a certain receipt, which said false, forged and counterfeited receipt is as follows, that is to say, "Received of J. S. thirty-five dollars and ninety-one cents, this 22d day of May, 1838, in part of the rent of land that I rented to him for the year 1837.

W. W."

with intention to defraud one W. W., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

And the jurors aforesaid, upon their oath aforesaid, do further say and present, that the said J. S., afterwards, to wit, on, &c., in the County of Johnston aforesaid, feloniously did utter and publish as true, and show forth in evidence a certain other false, forged and counterfeit receipt, which said last mentioned false, forged and coun-

example. But such examples are very rare; and on the contrary, the case of Rex *v.* Davis, Leach 493, and others of that kind, show how strictly the courts adhere to the letter of the law. Finding it thus to be generally true, that in describing the offence, the indictment must use all the words of the statute; so, on the other hand, it would seem to be equally true as a general rule, that the indictment is sufficient if it contain all the words of the statute. When the language of the statute is transferred to the indictment, the expressions must be taken to mean the same thing in each. There can be few instances in which the same words thus used, ought to or can be received in a different sense in the one instrument from that in the other. As it is certain that the indictment was intended to describe the offence which the statute describes, it follows, from the use of the very same language in both, that the one means what the other does, neither more nor less. It is true that some few exceptions from this rule have been established by adjudications, but they have not appeared to us to embrace the present case. Thus, a statute may be so inaccurately penned, that its language does not express the whole meaning the legislature had; and by construction, its sense is extended beyond its words. In such a case, the indictment must contain such averments of other facts, not expressly mentioned in the statute, as will bring the case within the true meaning of the statute; that is, the indictment must contain such words as ought to have been used in the statute, if the legislature had correctly expressed therein their precise meaning. In State *v.* Johnson, 1 Dev. 360, for example, it was held, that besides charging in the words of the act, that the prisoner, being on board the vessel, concealed the slave therein, the indictment should have charged a connexion between the prisoner and the vessel, as that he was a mariner belonging to her; because that was the true construction of the act. So, where a statute uses a generic term, it may be necessary to state in the indictment the particular species in respect to which the crime is charged. As, upon a statute for killing or stealing 'cattle,' an indictment using only that word, is not sufficient, but it ought to set forth the kind of cattle, as a horse or a cow; Rex. *v.* Chalkeley, R. & R. 258. But where a statute makes a particular act an offence, and sufficiently describes it by terms having a definite and specific meaning, without specifying the means of doing the act, it is enough to charge the act itself, without its attendant circumstances. Thus, upon a statute making it felony to endeavour to seduce a soldier from his duty, an indictment is good which charges such 'an endeavour,' without stating the mode adopted; Fuller's case, before cited. So, in the indictments founded on the words 'pronounce and publish,' in this same statute of Elizabeth, (which are not ours), the precedents uniformly charge 'the pronouncing and publishing of the forged instrument as true,' without stating the means by which, or the person to whom is was published. Upon the more modern English statutes against 'putting off or disposing of' forged or counterfeit money or bank notes, it is also held, that the circumstances need not be stated; Rex *v.* Holden *et al.*, 2 Taunt. 334. We do not perceive why the same principle does not apply to the other words 'show forth in evidence,' used in the act of Elizabeth, and in our act; and we are not aware of any disadvantage to the prisoner from the omission to set out in the indictment the particular proceeding in which the evidence was offered. We agree that such a judicial proceeding must be proved; and if it be not properly proved, the prisoner can put the matter on the record by an exception, and have the same benefit thereof on a motion to reverse the judgment, and for a *venire de novo*, that he could have from a motion in arrest of judgment.—Hence we hold the second count in this indictment to be good."

terfeited receipt is as follows, that is to say, "Received of J. S., thirty-five dollars and ninety-one cents, this 22d day of May, 1838, in part of the rent of the land that I rented to him for the year 1837. W. W." with intention to defraud the said W. W., he, the said J. S., at the time he so uttered and published, and showed forth in evidence the said last mentioned false, forged and counterfeited receipt as aforesaid, then and there well knowing the same to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forging a certificate of a public debt in Massachusetts.(*t*)

The jurors, &c., upon their oath present, that A. B., of, &c., on at did falsely make, forge and counterfeit, and did cause and procure to be falsely made, forged and counterfeited, and did willingly aid and assist in falsely making, forging and counterfeiting a certain note, (*or certificate or other bill of credit, as the case may be*), purporting to be a note which had been duly issued by the treasurer of the said commonwealth, thereto duly authorized for a debt of this commonwealth; which said false, forged and counterfeit note is of the purport and effect following, to wit, (*here insert an exact copy of the note or instrument in words and figures*); with intent the said commonwealth to injure and defraud, against, &c., and contrary, &c.(*u*) (*Conclude as in book* 1, *chap.* 3).

Forging a fieri facias at common law.(*v*)

That J. S., late, &c., on, &c., unlawfully and wickedly contriving to injure, oppress, impoverish and defraud one J. N. then and there unlawfully, knowingly and falsely did forge and counterfeit a certain writing on parchment, purporting to be a writ of our lady the queen of fieri facias, and to have sued out of the court of our said lady the queen of the bench at Westminster in the county aforesaid; which said false, forged and counterfeited writing is as follows, that is to say (*here set out the fieri facias verbatim*), with intent the said J. N. to injure, oppress, impoverish and defraud, to the great damage of the said J. N., to the evil example of all others in the like case offending, and against, &c., (*concluding as in book* 1, *chap.* 3). ("*This count*," *remarks Mr. Archbold*, "*appears to be sufficient, without stating that the writ was actually executed, or the prosecutor's goods seized under it.*" *However, it may be as well to add a second count similar to the above, to the end of the statement of the fi. fa., and then continue*): with intent the said J. N. to injure, oppress, impoverish and defraud. And

(*t*) Davis' Prec. 126.

(*u*) If the note or certificate was issued by a commissioner or commissioners, it is to be so alleged, instead of alleging them to be issued by the treasurer. See the words of the act.

This form may be used and adapted to all the cases of uttering and publishing forged instruments which may be prosecuted upon this section of the statute; Davis' Prec. 126.

In Com. v. Ross, 2 Mass. 373, it is said that it is not necessary, in an indictment for uttering a forged promissory note, to set forth the date of the note, nor the time when the money was made payable.

(*v*) Archbold's C. P. 5th Am. ed. 392.

the said J. S. afterwards and before the said last-mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, the said last-mentioned false, forged and counterfeited writing, knowingly, falsely and deceitfully, as a true writ of our said lady the queen of fieri facias, did cause to be delivered to the then sheriff of Middlesex for execution to be made thereof, and afterwards and before the last-mentioned pretended writ purported to be returnable, to wit, on the day and year aforesaid, in the parish aforesaid in the county aforesaid, did cause to be seized and taken, divers goods and chattels of the said J. N. to a large amount, by pretence of the said pretended writ, to the great damage of the said J. N., to the evil example of all others in the like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Uttering same.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, falsely and deceitfully did utter and publish as a true writ of our lady the queen of fieri facias, a certain other false, forged and counterfeited writing on parchment, purporting to be a writ of our lady the queen of fieri facias, and to have issued out of the court of our lady the queen of the bench at Westminster, in the county aforesaid; which said false, forged and counterfeited writing is as follows, that is to say (*here set out the writ verbatim*), with intent the said J. N. to injure, oppress, impoverish and defraud (he the said J. S. at the time he so uttered and published the said last-mentioned false, forged and counterfeited writing as aforesaid, then and there well knowing the same to be false, forged and counterfeited). And the said J. S. afterwards, and before the said last-mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, the last-mentioned false, forged and counterfeited writing, knowingly, falsely and deceitfully, as a true writ of our lady the queen of fieri facias, did cause to be delivered to the then sheriff of Middlesex, for execution to be made thereof; and afterwards, and before the said last-mentioned pretended writ purported to be returnable, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, did cause to be seized and taken divers goods and chattels of the said J. N. to a large amount, by pretence of the said pretended writ; to the great damage of the said J. W., to the evil example of all others in the like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add counts describing the instrument, &c., in such manner as would sustain an indictment for stealing the same*).

Forgery of a bond at common law.(*x*)

That D. M. G., &c., late of, &c., on, &c., with force and arms in, &c., of his own head and imagination, did wittingly and falsely make,

(*x*) State *v.* Gardiner, 1 Iredell 27. Ruffin C. J.: "As the grounds of the motion in ar-

forge and counterfeit, and did wittingly assent to the falsely making, forging and counterfeiting a certain bond and writing obligatory in the words, letters and figures, that is to say:

"Four months' after date, with interest from the date, we or either of us do promise to pay E. M. or order, the sum of twenty-four dollars and thirty-eight and three-quarter cents, for value received of him, as witness our hands and seals this 19th day of June, 1839.

"D. M'G., [Seal].
A. G., [Seal].
J. V. [Seal]."

with intent to defraud the said E. M., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

At common law, by separating from the back of a note an endorsement of part payment.(*y*)

That J. M'L., of, &c., on, &c., with force and arms, at, &c., did wittingly, falsely and deceitfully, forge and alter, and did procure to

rest of judgment are not stated in the record, and the court has not had the assistance of counsel for the prisoner, it is possible we may have overlooked some point on which the motion ought to have been allowed. If so, it will be a source of sincere regret, for in the absence of counsel of his own selection, the court has endeavoured to discharge for the prisoner that office which, as a public duty, is devolved on us. After a careful examination of the record, we are unable so to discover any reason why the sentence of the law should not follow the conviction.

"In considering the case, however, one or two points have suggested themselves, on which it may be supposed an objection might have been taken, and on which, therefore, the court may properly give an opinion.

"As the name of the prisoner and that of one of the supposed obligors in the forged instrument, appear to be the same, it may have been intended to present the question, whether the indictment can allege the forgery of the whole instrument by one of the parties to it. To that, we think, there would be several answers. One, that the objection ought to have been taken on the evidence, and cannot be taken in this manner, since it does not legally follow that the prisoner is the same person with the supposed obligor, although the names be the same. But admitting the identity of those persons, yet secondly, that it will not vitiate the indictment. The forgery may have consisted of alterations of a true instrument, as by making the sum mentioned in the bond more or less than it was at first, or by adding the names of the other two obligors without their knowledge or consent, and that of the obligee. Now, it is a settled rule, that in such cases the forgery may be charged specially, by alleging the alterations; or the forgery of the entire instrument may be charged; and this last will be supported by evidence of the alterations; Rex *v.* Ellsworth, 2 East P. C. 986, 988. After the alterations, the instrument as a whole, is a different instrument from what it was; and therefore, in its altered state, is a forgery for the whole. Possibly, the prisoner's counsel meant to object to the indictment, as a repugnancy, that it charges the forgery of a certain *bond;* whereas if it be a forgery, it is not a bond, but only purports to be such. But that objection too, would be untenable. The statute uses the same language: 'forge any deed, will, bond, &c.;' and while it is prudent, so it is generally safe, to follow in the indictment, the words of the statute. Besides, upon looking to the precedents, in books of criminal pleading, it is found, that in this respect the present indictment conforms to those long settled.

"Without further lights as to the points intended to be relied on for the prisoner, the court is therefore under the necessity of saying, that there is no error in the judgment, and directing the steps necessary to its execution."

(*y*) See State *v.* M'Lenan, 1 Aik. 312; where the form in this tenor was held good at common law. "The briefs and arguments on the part of the respondent," said the court, "aim to convince, that the act complained of in the several counts is not forgery within the statute, and of this opinion are the court. Nothing must be construed to be within a penal statute but what is fairly within it. The section of the statute which is relied upon for the support of this indictment is composed of particulars, in its description of the offence, and the case before us is not among those particulars. It is a case omitted. That which

be forged and altered, a certain promissory note, of the tenor following, that is to say:

"Barnet, August 21st, 1821.

"For value received, we jointly and severally promise to pay J. M'L., or his order, sixty dollars, to be paid in beef cattle, the 1st Oct. 1822, or grain, the 1st Jan. 1823, with interest.

E. C.
R. M."

"Attest, H. A. R.

On the back of which promissory note, was then and there endorsed twenty dollars, in part payment thereof. And the said J. M'L., said endorsement then and there being on the back of said note, and the balance of said note being then and there due, and no more, with force and arms, wittingly, falsely and deceitfully did alter said note, by then and there wittingly, falsely and deceitfully separating said endorsement from said note, with intent to defraud and deceive the said E. C. and R. M., to the great damage of the said C. and M., to the evil example of others in like cases offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forgery in altering a pedler's license, at common law.(z)

That G. K., late, &c., on, &c., having been recommended by the Court of General Quarter Sessions of the Peace and Gaol Delivery in and for the county of , as a proper person for the employment of a hawker or pedler, within this state, did obtain, receive and have a license for that purpose, from the supreme executive council of this commonwealth, under the hand of the honourable C. B. esquire, then and still being vice-president of the same council, and under the seal of the state, which license was in the words following, to wit, "By the Supreme Executive Council of the Commonwealth of Pennsylvania, whereas, O. K., the bearer hereof, intending to follow the business of a pedler, within this Commonwealth of Pennsylvania, hath been recommended to us as a proper person for that employment and requesting a license for the same, we do hereby license and allow the

is called a note, in the statute, can only mean all that which, connected together, composes the promise or liability from the payor to the payee; and the making or altering any material part of this is termed forgery by the statute. The words *assignment* or *endorsement* in the statute are used as synonymous, and mean a transfer. But if they meant an endorsement of payment, still it is the making or altering of them that constitutes forgery. So of the expressions *acquittance* or *receipt* for money or other things, if they would comprehend the endorsement of payment, still it is the making or altering the same that constitutes forgery. The severing such endorsement already made, is a different act. It leaves the endorsement legible, consisting of the same words and letters as before severed. In short, it is not one of those acts pointed out in the statute to be punished as forgery. But this same act is as great a crime against public justice, and the public peace, as those forgeries that are clearly within the statute. It is as great a crime *in foro conscientiæ*. It is an act *mala in se*. It is a crime at common law. The *contra formam statuti* may be treated as surplusage throughout the indictment, and it will remain a good indictment for a misdemeanor at common law. See 1 Chit. C. L. 238—290th marginal page. Were the act complained of an offence only as made such by statute, this indictment could not be supported upon the above principle. But this principle applies to all offences against government, against public justice, or acts of extortion," &c.

(z) Drawn in 1787 by Mr. Bradford, then attorney-general of Pennsylvania.

said G. K. to employ himself as a pedler and hawker within the said commonwealth, to travel with one horse, and to expose and sell divers goods, wares and merchandises, until, &c., provided he shall during the said term observe and keep all laws and ordinances of the said commonwealth, to the said employment relating. Given under the seal, &c. C. B., V. P."

"Attest, J. A., Secretary."

And that he the said G. K. so being in possession of the said license, afterwards, to wit, on, &c., at, &c., with force and arms, &c., falsely, fraudulently and deceitfully did alter, and cause to be altered, by falsely and deceitfully erasing the word *six* in the said license, and in the place thereof falsely and deceitfully did make, forge and add the word *seven*, whereby the said license so altered as aforesaid, purporting to be given, &c., with intent to defraud the said commonwealth and to deceive the citizens thereof, to the evil example of all others, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forgery of a note which cannot be particularly described in consequence of its being destroyed.(*a*)

That, &c., at, &c., on, &c., devising and intending to cheat and defraud one D. C. of his goods and moneys, did falsely and fraudulently forge and counterfeit, a certain negotiable promissory note for the payment of money, purporting to be made by the said D. C., payable to one A. S. B., which said false, forged and counterfeited negotiable promissory note, is to the purport following, that is to say:

"Ninety days' after date, I promise to pay to A. G. B., or order, fourteen hundred and twenty-eight dollars, value received. May, 1833. D. C., (endorsed), A. S. B.:" A more particular description of which is now here to the jurors unknown, said note being destroyed; with intent to cheat and defraud the said C. D., &c.

Forgery of a note whose tenor cannot be set out on account of its being in defendant's possession.

That A. B., &c., at, &c., falsely and fraudulently did forge and counterfeit a certain promissory note, for the payment of money, purporting to be made by one A. B., payable on demand, to one C. D., the tenor of which said note is to this inquest unknown, by reason that the said A. B., having the said libel in his possession and custody, hath altogether refused and still doth refuse to produce the same, and to permit the same to be inspected by this inquest, although thereto often requested, to wit, by the (attorney-general of the commonwealth), at and before the sitting of this inquisition, but which said note was in substance as follows, (*here set forth the substance of the note and conclude as in last precedent*).

(*a*) See People *v.* Badgeley, 16 Wend. 53; where the fact of the destruction of the note, as this set forth, was held to supersede the necessity of pleading it according to its precise form.

Forgery of bond when forged instrument is in defendant's possession.(*b*)

That, &c , on, &c., at, &c., did falsely and feloniously make, forge and counterfeit, and did then and there willingly and feloniously act and assist in the false making, forging and counterfeiting of a certain false, forged and counterfeited bond and writing obligatory for the payment of money, bearing date on some day and year to the jurors aforesaid unknown, in a penal sum to the jurors aforesaid unknown, with a condition thereunder written for the payment of a certain sum to the jurors aforesaid unknown, with interest thereon, to the said J. K. (the defendant), purporting to have been executed by one G. B., late of, &c., which said false, forged and counterfeited bond and writing obligatory for the payment of money, is in his the possession and custody of the said J. K., (the defendant,) with intent to defraud one J. C., against &c. (*Conclude as in book* 1, *chap.* 3).

Forgery at common law, in passing counterfeit bank notes.(*c*)

That the said J. S. on the same day and year aforesaid, at the county aforesaid, with force and arms, having in his custody and possession a certain other false, forged and counterfeited paper writing, partly written and partly printed, purporting to be a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America, and purporting to be signed by J. N., president, and also by the cashier of the said bank, the tenor of which said last mentioned false, forged and counterfeited paper writing, partly written and partly printed, purporting to be a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America, is as follows, that is to say:

"X. I promise to pay to D. C., or bearer, on demand, ten dollars. Philadelphia, 26th of February, 1808, n. 2467, e. 614. For the president, directors and company of the Bank of North America. 10"

"10 H. D., Jr., Cash. J. N., Prest. X"

falsely, illegally, knowingly, fraudulently and deceitfully, did utter and publish, as a true and genuine promissory note, for the payment of money, called a bank note of the Bank of North America, the said last mentioned false, forged and counterfeited paper writing, partly written and partly printed, purporting to be a true and genuine promissory note for the payment of money, called a bank note of the Bank of North America, he the said J. S., at the time of uttering and

(*b*) People *v.* Kingsley, 2 Cow. 522. The second count in this indictment charged the defendant with destroying the alleged forged bond on some day to the jurors unknown, and the third count was for uttering the same. Judgment was entered upon the verdict of the jury, the court adopting the principles of Com. *v.* Houghton, 8 Mass. 373.

(*c*) Com. *v.* Searle, 2 Binn. 332. The then Pennsylvania act of assembly making penal the passing of counterfeit bank notes used the expression "passing" alone, and consequently this count, independently of the want of the conclusion against the statute, was held not to comprehend the statutory misdemeanor. It was sustained, however, at common law, and it is on this principle that indictments in Pennsylvania at common law for forging and uttering counterfeit notes of foreign banks, rest. See next form.

publishing the same, then and there well knowing the same to be false, forged and counterfeited, with intent to defraud J. S., to the evil example of others in like case offending, and against, &c.

Forgery of the note of a foreign bank as a misdemeanor at common law.

That A. B., late of, &c., on, &c., with force and arms, did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, a certain note in imitation of, and purporting to be, a note issued by the order of the president, directors and company of (*stating the bank*), for the sum of dollars, purporting to be signed by president and cashier, payable to or bearer on demand, dated one thousand eight hundred and which said falsely made, forged and counterfeited note, partly written and partly printed, is in the words and figures following: (*setting forth the note*), with intent to defraud the said (*if there be proof of the incorporation of the bank, you can point the intent at it, if not, at the party to whom the note was probably meant to be passed; a general intent to defraud the people of the state or district will do when no particular intent can be shown*),(*d*) against, &c. (*Conclude as in book* 1, *chap.* 3).

And the inquest aforesaid, upon their respective oaths and affirmations aforesaid, do further present, that the said A. B. on the day and year aforesaid, at the county and within the jurisdiction aforesaid, with force and arms, then and there did pass, utter and publish, and attempt to pass, utter and publish, as true, a certain false, forged and counterfeit note, purporting to be a note issued by the said (*as in last count*), for the sum of dollars, signed by president, and cashier, payable to or bearer, on demand, and dated one thousand eight hundred and which said false, forged and counterfeit note, partly written and partly printed, is in the words and figures following, to wit, (*setting forth note*), the said A. B., then and there well knowing the said note to be as aforesaid false, forged and counterfeit, with intent to defraud (*the party on whom it was passed*), against, &c. (*Conclude as in book* 1, *chap.* 3).

Forging a bank-note, and uttering the same, under English statute.(*e*)

That J. B., late of, &c., labourer, heretofore, that is to say, on, &c., with force and arms, at, &c., feloniously did forge and counterfeit(*f*) a certain bank note,(*g*) the tenor(*h*) of which said forged and coun-

(*d*) See People *v.* Stearns, 21 Wend. 409. See next form for the general methods of stating intent in such cases. An intent to defraud A. and B. is sustained by proof of an intent to defraud A.; Veasie's case, 7 Greenl. 131.

(*e*) This form is found in Starkie's C. P. 452.

(*f*) These are the words of the statute, it is unnecessary to allege that he did falsely, forge and counterfeit. This count is framed upon the stat. 45 Geo. III. c. 89, s. 2.

(*g*) It is essential to show that the instrument forged is of the description prohibited by the statute; see *ante*, p. 130. As to the averments which are necessary, when the forged writing does not purport to be of the kind prohibited, see Stark. C. P. 113.

(*h*) As to the words by which the instrument is usually introduced, see *ante*, p. 110; Stark. C. P., 109; Lyon's case, Leach 696.

feited bank note is as followeth, that is to say (*the note is here set out verbatim*),(*i*) with intent(*j*) to defraud the governor and company of the Bank of England, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Putting away same.

That the said J. B. heretofore, that is to say, on, &c., with force and arms, at, &c., did dispose of and put away(*k*) a certain forged and counterfeited bank note, the tenor of which said last mentioned forged and counterfeited bank note is as followeth, that is to say,(*l*) with intent to defraud the governor and company of the Bank of England, he the said J. B., at the said time of his so disposing of and putting away the said last mentioned forged and counterfeited bank note, then and there, to wit, on, &c., at, &c., well knowing such last mentioned note to be forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Forging promissory note.

Feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting a certain promissory note for the payment of money, the tenor of which said last mentioned false, forged and counterfeited note is as followeth, that is to say (*note as before*), with intention to defraud the governor and company of the Bank of England, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Putting away same.

Feloniously did dispose of and put away a certain false, forged and counterfeited promissory note for the payment of money, the tenor of which said last mentioned false, forged and counterfeited note is as followeth, that is to say (*note, as before*), with intent to defraud the governor and company of the Bank of England, he the said J. B., at the said time of his so disposing of and putting away the said last mentioned false, forged and counterfeited note, then and there, to wit, on, &c., at, &c., well knowing the same last mentioned note to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count. Same as first, with intent to defraud J. S.

Feloniously did forge and counterfeit a certain other bank note, the tenor of which said last mentioned forged and counterfeit bank note is as followeth, that is to say (*note, as before*), with intent to defraud one J. S., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count. Putting away same.

Feloniously did dispose of and put away a certain forged and counterfeited bank note, the tenor of which said last mentioned forged and counterfeited bank note is as followeth, that is to say

(*i*) As to the accuracy with which the forged writing should be set out, see p. 131–2–3.

(*j*) See Stark. C. P. 121, 122, 199, as to the general necessity for averring an intent to defraud in case of perjury, the form of the averment, and the effects of variance.

(*k*) According to the words of the act 45 Geo. V. c. 89, s. 2.

(*l*) Setting out the note.

(*note, as before*), with intent to defraud the said J. S., he the said J. B., at the time of his so disposing of and putting away the said last mentioned forged and counterfeited bank note, then and there, to wit, on, &c., well knowing such last mentioned note to be forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Seventh count. Same as second, with intent to defraud J. S.

Feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting a certain other promissory note for the payment of money, the tenor of which said last mentioned forged and counterfeited note is as followeth, that is to say (*note, as before*), with intention to defraud the said J. S., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Eighth count. Putting away same.

Feloniously did dispose of and put away a certain other false, forged and counterfeited promissory note for payment of money, the tenor of which said last mentioned false, forged and counterfeited note is as followeth, that is to say (*note, as before*), with intention to defraud the said J. S., the said J. B., at the said time of his so disposing of and putting away the said last mentioned false, forged and counterfeited note, then and there, to wit, on, &c., well knowing the same last mentioned note to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forging a certificate granted by a collector of the customs.(*m*)

The jurors of the United States of America, within and for the circuit and district aforesaid, on their oath present, that late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms, at the City of New York, in the Southern District of New York aforesaid, and within the jurisdiction of this court, feloniously did falsely make, forge and counterfeit a certain official document, granted by a collector of customs by virtue of his office, to wit, an official document granted by the collector of the customs for the Port and District of the City of New York (*insert averment to the effect that the collector, as such, was charged with the duties of supervisor of the revenue*), which said false, forged and counterfeited official document is as follows, that is to say (*here insert the document as altered*), with intent to defraud one against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first count, substituting*): "with intent to defraud some

(*m*) This form was sustained by the District Court for the Southern District of New York, and was held bad in the Circuit Court, for want of an averment that the collector had been charged with the duties of supervisor of the revenue; see Schruyer's case, New York, 1847. By making the necessary averment, in conformity with the act of congress, the form in the text will probably be found correct.

person or persons to the jurors aforesaid unknown," *for* "with intent to defraud one ."]

Third count. Causing and procuring forgery, &c.

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms, at the City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly aid and assist in falsely making, forging and counterfeiting a certain official document, granted by a collector of customs by virtue of his office (*insert here averment in brackets, as in last count*), to wit, an official document granted by the collector of the customs for the Port and District of the City of New York, which said false, forged and counterfeited official document is as follows, that is to say (*as in first and second counts mentioned*), with intent to defraud one against, &c., and against. &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

(*Same as third count, substituting*): "with intent to defraud some person or persons to the said jurors unknown," *for* "with intent to defraud one ."

Fifth count. Altering, &c.

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms, at the City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did falsely alter a certain official document granted by a collector of the customs by virtue of his office, to wit, a certain official document granted by the collector of the customs for the Port and District of the City of New York (*insert here averment in brackets, as before*), which said falsely altered official document is in the words following, that is to say (*here repeat the document as altered, word for word*), with intent to defraud the United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count.

(*Same as fifth count, substituting*): "with intent to defraud one ," *for* "with intent to defraud the United States of America."

Seventh count.

(*Same as sixth count, substituting*): "with intent to defraud some person or persons to the jurors aforesaid as yet unknown," *for* "with intent to defraud one ."

Eighth count. Altering, &c., averring specially the alterations.

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., having in his possession a certain official document granted by a collector of the customs, by virtue of his office, (*insert averment in brackets in first count*), to wit, an official document granted by the collector of the customs for the Port and District of the City of New York, which

said official document granted as aforesaid, was when so granted, in the words and figures following, that is to say, (*here insert complete copy of original document, before any alterations were made in it*), he the said then and there, that is to say, on, &c., with force and arms, at, &c., and within the jurisdiction of this court, feloniously did falsely alter the said official document, by then and there falsely altering the figure before written, in the number in the said official document, and by falsely altering the figure before written in in the said official document, and by then and there falsely making, forging and counterfeiting upon the said official document in the place of the said figure before written in the said number in the said official document, the figure and by then and there falsely altering in the place of the said figure in before written in said in the said official document the figure by reason and by means of which said false alteration of the said figure and of the said figure and of falsely making, forging and counterfeiting upon the place of the said figure the figure and upon the place of the said figure the figure the said number before written in the said official document did become, import and signify and the said before written in the said official document, did become, import and signify (*or otherwise, according to the peculiarities of the document*), which said falsely altered official document is in the words and figures following, that is to say, (*here insert the document as altered*), with intent to defraud one against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Ninth count. Same in another shape.

And the jurors aforesaid, upon their oath aforesaid, do further present, that late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., having in his possession a certain official document granted by a collector of the customs by virtue of his office, to wit, an official document granted by the collector of the customs for the Port and District of the City of New York, (*insert here averment in brackets in first count*), which said official document, granted as aforesaid, was when so granted in the words and figures following, that is to say, (*insert document as in eighth count*), he the said then and there, that is to say, on, &c., aforesaid, with force and arms, at the City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did falsely alter the said official document by then and there falsely altering, &c., (*as in eighth count specified*), which said falsely altered official document is in the words and figures following, that is to say, (*here insert copy of document as altered*), with intent to defraud some person or persons to the jurors aforesaid unknown, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Tenth count. Uttering certificate as forged.

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms, at the City of New York, in the circuit and district

aforesaid, and within the jurisdiction of this court, feloniously did pass, utter and publish a certain false, forged and counterfeited official document, purporting to be granted by a collector of the customs by virtue of his office, to wit, an official document purporting to be granted by the collector of the customs for the Port and District of the City of New York, (*insert here averment in brackets in first count*), by virtue of his office, which said falsely altered official document is as follows, that is to say, (*here insert copy of document as altered*), with intent to defraud the United States, he the said at the time of his so passing, uttering and publishing the said last mentioned falsely altered official document, then and there, to wit, on, &c., at the said City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, well knowing such last mentioned official document to be falsely altered as aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Eleventh count.

(*Same as tenth count, substituting*): "with intent to defraud one ," *for* "with intent to defraud the United States."

Twelfth count.

(*Same as eleventh count, substituting*): "with intent to defraud some person or persons to the jurors aforesaid as yet unknown," *for* "with intent to defraud one ."

Thirteenth count. Uttering certificate as altered.

And the jurors aforesaid, on their oath aforesaid, do further present, that late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms, at the City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did attempt to pass, utter and publish a certain falsely altered official document, purporting to be granted by a collector of the customs by virtue of his office, to wit, purporting to be an official document granted by the collector of the customs for the Port and District of the City of New York, (*insert here averment in brackets in first count*), which said falsely altered official document is as follows, that is to say, (*here insert a copy of the document as altered*), with intent to defraud the United States of America, he the said at the said time of his so passing, uttering and publishing the said last mentioned falsely altered official document, then and there, to wit, on, &c., at the City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, well knowing such last mentioned official document to be falsely altered, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourteenth count.

(*Same as thirteenth count, substituting*): "with intent to defraud one ," *for* "with intent to defraud the United States of America."

Fifteenth count.

(*Same as fourteenth count, substituting*): "with intent to defraud some person or persons to the jurors aforesaid as yet unknown," *for* "with intent to defraud one ."

Forging a treasury note.

Southern District of New York, ss. The jurors of the United States of America, within and for the circuit and district aforesaid, on their oath present, that late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms at the City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did falsely make, forge and counterfeit a certain treasury note, which said false, forged and counterfeit treasury note is as follows, that is to say, (*here insert a perfect copy of the note as counterfeited*), on which said note was endorsed " " with intent to defraud the United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first count, substituting*): "with intent to defraud one ," *for* "with intent to defraud the United States of America."

Third count.

(*Same as second count, substituting*): "with intent to defraud some person or persons to the jurors aforesaid unknown, *for* "with intent to defraud one ."

Fourth count. Causing and procuring, &c.

And the jurors aforesaid on their oath aforesaid, do further present, that , late of the City and County of New York, in the circuit and district aforesaid, (*state occupation*), heretofore, to wit, on, &c., with force and arms, at the City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly aid and assist in falsely making, forging and counterfeiting, a certain instrument for the payment of money, called a treasury note, which said last mentioned false, forged and counterfeited instrument, for the payment of money, called a treasury note, is as follows, (*insert copy of note as in preceding counts*), on which said note was then and there endorsed " ," with intent to defraud the United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count. Altering, &c.

And the jurors aforesaid on their oath aforesaid, do further present, that , late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., having in his possession a certain treasury note, in the words, letters and figures following, that is to say (*insert copy of note as in preceding counts*), which said note was endorsed " ," he the said then and there, that is to say, on, &c., with force and arms at the City of New York in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did alter, forge and counterfeit the said treasury note, by then and there falsely obliterating and defacing the figures (*or otherwise*), before written in in the said treasury note, and by then and there falsely making, forging and counterfeiting upon the said treasury note, in the place of the said before written in in the said treasury note, the by reason

and by means of which said obliterating and defacing of the said in the said treasury note, and of falsely making, forging and counterfeiting upon the place of the said in said treasury note, the said before written in in said treasury note, did become, import and signify , which said altered, forged and counterfeited treasury note is as follows, that is to say, (*here insert a complete copy of the note, as in preceding counts*), on which said note was endorsed " ," with intent to defraud the United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count. Passing note, &c.

And the jurors aforesaid on their oath aforesaid, do further present, that , late of the City and County of New York, in the circuit and district aforesaid, , heretofore, to wit, on, &c., with force and arms at the City of New York in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did pass, utter and publish a certain false, forged and counterfeited treasury note, which said false, forged and counterfeited treasury note is as follows, that is to say, (*here insert copy of treasury note as in preceding counts*), on which said note was endorsed " ," with intent to defraud the United States of America, he the said at the time of his so passing, uttering and publishing the said last mentioned false, forged and counterfeited treasury note, then and there, to wit, on, &c., at the said City of New York in the circuit and district aforesaid, and within the jurisdiction of this court, well knowing such last mentioned treasury note, to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3.)

Seventh count.

(*Same as sixth count, substituting*): "with intent to defraud one ," *for* "with intent to defraud the United States of America."

Eighth count. Same as sixth, in another shape.

And the jurors aforesaid, on their oath aforesaid, do further present, that , late of the City and County of New York, in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms at the City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, feloniously did pass, utter and publish a certain false, forged and counterfeited treasury note of which the purport is as follows, that is to say, (*here insert a correct and complete copy of the treasury note as counterfeited*), which said note was then and there endorsed, " ," with intent to defraud some person or persons to the jurors aforesaid as yet unknown, he the said at the time of his so passing, uttering and publishing the said last mentioned false, forged and counterfeited treasury note, then and there, to wit, on, &c., at the said City of New York, in the circuit and district aforesaid, and within the jurisdiction of this court, well knowing such last mentioned treasury note to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present, that the Southern District of New York in the Second Circuit,

is the circuit and district in which the said was first apprehended for the said offence.(*mm*)

Feloniously altering a bank note.(*n*)

That A. B., &c., on, &c., at, &c., having in his possession a bank note, whose tenor follows, that is to say, (*set out the note*), feloniously did alter the said bank note by then and there falsely obliterating and defacing the letters *een* before printed in the word *fifteen* in the said bank note, and also the letters *een* before printed in the word *fifteen*, in white letters, on a black ground underneath the said bank note, and by then and there falsely making, forging and counterfeiting upon the said bank note, in the place of the first mentioned letters *een* before printed in the word *fifteen* in the said bank note, the letter *y*; and also by then and there falsely making, forging and counterfeiting upon the said bank note, in the place of the said letters *een*, before printed in the word *fifteen* in white letters on black ground underneath the said bank note, another letter *y*, by reason and means of which said obliterating and defacing the letters *een*, before printed in the said word *fifteen* in the said bank note, and also the letters *een*, being before printed in the said word *fifteen*, in white letters on a black ground underneath the said bank note, and of falsely making, forging and counterfeiting upon the place of the said letters *een*, before printed in the word *fifteen*, in the said bank note the letter *y*; the letters *fift*, so remaining of the said word *fifteen* before printed in the said bank note, with the said first mentioned letter *y*, so falsely made, forged and counterfeited as aforesaid, did become, import and signify *fifty*; and the letters *fift*, so remaining of the said *fifteen* before printed in white letters on a black ground underneath the said last mentioned bank note, with the said other *y*, so falsely made, forged and counterfeited as aforesaid, did become, import and signify *fifty*, which said altered bank note is in the words, letters and figures following, that is to say, (*set out the note as altered*), with intent to defraud, &c.(*o*)

Having in possession forged bank notes without lawful excuse, knowing the same to be forged.(*oo*)

That defendant feloniously, knowingly and wittingly, and without lawful excuse, had in his possession and custody divers forged and counterfeited bank notes, that is to say, one forged and counterfeited bank note, the tenor of which said forged and counterfeited bank note is as follows, that is to say, (*here the note is set out*), and one other forged and counterfeited bank note, the tenor of which said last mentioned forged and counterfeited bank note is as follows, that is to say, (*here the other note is set out*), he the said A. B. then and there,

(*mm*) See *ante*, p. 17, 97, 123.

(*n*) Stark. C. P. 458.

(*o*) Allege in one count an intention to defraud the governor and company of the Bank of England; in another, an intention to defraud the person to whom it is paid, &c.; add other count alleging the forgery of the bank note as altered, and for altering with intent to defraud, &c. See form, *ante*, p. 156–7.

(*oo*) Stark. C. P. 454.

to wit, on, &c., at, &c., well knowing the same notes to be forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

Feloniously, knowingly, wittingly and without lawful excuse, had in his possession and custody, a certain other forged and counterfeited bank note, the tenor of which said last mentioned forged and counterfeited bank note is as followeth, that is to say, (*the first note in the preceding count is here set out again*), he the said A. B. then and there, to wit, on, &c., at, &c., well knowing the same last mentioned note to be forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For being possessed of ten counterfeit bank bills at the same time, with intent to pass the same, in Massachusetts.(*p*)

The jurors, &c., upon their oath present, that A. B., of, &c., at, &c., had in his custody and possession (*at the same time more than*),(*q*) ten false, forged and counterfeit bank bills, purporting to be bank bills, payable to the bearers thereof, and to be signed in behalf of the President, Directors and Company of the (Boston) Bank, the same being a corporation by law, licensed and authorized as a bank within that commonwealth, which said bank bills are of the purport and effect following, to wit, one of said bank bills being of the following purport and effect, to wit,(*r*) (*here you must insert a true copy of all and each of the ten bills; after inserting a true copy of the first, go on to say, one other of said bills being of the following purport and effect, and so on with the whole of them*); and that he the said A. B. did then and there willingly aid and assist in rendering current as true, each of the false, forged and counterfeit bank bills aforesaid, knowing them and each of them to be false, forged and counterfeit as aforesaid, with intent to utter and pass the same, and thereby to injure and defraud the President, Directors and Company of the said (Boston) Bank; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Uttering and passing a counterfeit bank bill, under s. 4 *c.* 96 *of Revised Statutes of Vermont.*(*s*)

That A. B., &c., on, &c., at, &c., wittingly, deceitfully and unlawfully did utter, pass and give in payment to one E. W. F., of Mendon,

(*p*) Davis' Prec. 127.

(*q*) This averment, which in Mr. Davis' form is omitted, is made essential by Edwards *v.* Com., 19 Pick. 124.

Where the indictment charges the defendant, under Rev. Stat. c. 127, s. 5, and in the words of the text, with having "more than, &c.," forged notes, &c., it would seem that a conviction may be sustained on evidence of his having in possession one forged note, &c., and sentence imposed under Rev. Stat. c. 127, s. 8.

(*r*) See Brown *v.* Com., 8 Mass. R. 59; Com. *v.* Houghton, *ib.* 107.

(*s*) State *v.* Wilkins, 17 Verm. 151. On this indictment, on a demurrer in the County Court, there was a judgment for the state, and in this shape the case went up to the Supreme Court.

"The demurrant insists (said Bunet J., in delivering the opinion of that case), that the

in the State of Vermont, one certain false, forged and counterfeited bank note, which said note was made in imitation of, and did then

indictment is bad for sundry reasons. It is said, that there is no allegation in it of the existence of the bank. If this was so, the objection would have been well taken. The allegation is, that the respondent did pass, &c., one certain false, forged and counterfeit *bank note*, which said note was made in *imitation* of, and *did purport* to be, a *bank note*, issued by the President, Directors and Company of the Bank of Cumberland, by and under the authority of the legislature of the State of Maine, one of the United States of America. The statute of 1818, Slade's ed. 261, provides, that, if any person shall counterfeit, &c, any *bill* or *note*, issued by the President, Directors and Company of the Bank of the United States, or by the directors of any other bank, *by* or *under* the legislature of any of the United States of America, he shall, on conviction, be confined, &c. In the Rev. Stat. p. 434, the form of the expression is somewhat changed, and prohibits the counterfeiting any *bank bill* or *promissory* note, issued by any banking company, *incorporated* by the congress of the United States, or by the legislature of any state or territory of the United States. No doubt, under the Revised Statutes, the bank must be an incorporated institution, and it must, in substance, be so alleged in the indictment. So I conceive, that, under the statute of 1818, the bill must have been counterfeited upon an incorporated institution, and that the Revised Statutes were not designed to introduce any new rule. The expressions, a *bank note*, or *bill*, issued *by and under* the authority of the legislature of one of the United States of America, imply, by necessary implication, that it was issued by an incorporated institution, and consequently such an averment in an indictment must be held sufficient. This indictment is conformable to the precedent furnished by Judge Aikens, in his book of forms, as applicable to the statute of 1818, and which, I believe, was introduced into general use. If the Revised Statutes introduced, in this particular, no new rule of law, then an indictment under the old statute would be good under the Revised Statutes.

"It is said, that, as the indictment charges the offence to consist in uttering and giving in payment a certain counterfeit *bank note*, and as the statute creating the offence makes it to consist in uttering and giving in payment any counterfeit *bank bill* or *promissory note*, the offence in the statute is not well described in the indictment. The words of the statute, in the description of the subject matter of the offence, must be substantially followed, it is true, and the offence be brought within all the material words of it. We think that the words *bank bill* or *promissory note*, as used in the statute, are *synonymous*. The words used in the indictment, *bank note*, are also synonymous with *bank bill*. Bank note, bank bill and promissory note, issued by the directors of a bank incorporated by and under the legislature of this state, mean the same thing. The expression, *bank bill* or *promissory note*, in the statute, is an evident tautology; and had the term, or *bank note*, been also added, it would, none the less, have been a tautology. See Brown *v.* Com., 8 Mass. 59, and also Com. *v.* Carey, 2 Pick. 47.

"It is further objected to this indictment, that it is not alleged that the bill was passed as a *true bill*. In an indictment upon a penal statute the prosecutor must set forth every fact that is necessary to bring the case within the statute. The indictment in this case has four counts; the 1st and 3d are for *uttering*, *passing* and *giving in payment*. The 2d and 4th are for having in possession counterfeit bills with an intention to *utter*, *pass* and *give in payment*. The statute of 15 Geo. II. provided, that, if a person should *utter*, *or tender in payment*, any false or counterfeit money, knowing the same to be false or counterfeit, he should, on conviction, be subject to certain penalties. In the case of the King *v.* Franks, 2 Leach C. L. 644, the indictment charged the respondent simply with *uttering* a piece of *false* and *counterfeit* money; and it was held that the offence was complete, even though it was uttered as base coin. In that case the indictment did not state the *uttering* to have been in payment, *as* and for a piece of good money; and if it had, the evidence in the case would have rebutted the charge. It was considered, in that case, that, as the statute was in the disjunctive, the *uttering* and *tendering in payment* constituted two independent and distinct acts. So I think our statute, providing against *uttering*, *passing*, or *giving in payment* any false and counterfeit bill, makes the acts distinct and independent, and that either the *uttering*, *passing* or *giving in payment*, would constitute an offence against the statute, provided the respondent had a knowledge that the money was counterfeit.

"Whether, if this had been an indictment simply upon the last clause, that is, for giving in payment a false and counterfeit bank bill, it would have been necessary to have alleged that it was given in paymant, *as and for a true bill*, it is not now necessary to decide. In the case State *v.* Randal, 2 Aik. 89, we have the form of an indictment like the present, under the statute af 1818; and it was held sufficient. Neither in that statute, nor in the Revised Statutes, is it made a part of the description of the offence, that the counterfeit

and there purport to be, a bank note for the sum of five dollars, issued by the President, Directors and Company of the Bank of Cumberland, by and under the authority of the legislature of the State of Maine, one of the United States of America, made payable to S. B., or bearer, on demand, numbered two hundred and seventy-four, and dated the first day of September, in the year of our Lord one thousand eight hundred and thirty-five, with the name of S. E. C. thereto subscribed as president of said bank, and the name of C. C. T., countersigned thereon as cashier of said bank, and was in the words and figures following, that is to say:

"The State . No. 974 of Maine.

"The President, Directors and Company of the Bank of Cumberland promise to pay Five Dollars to S. B., or bearer, on demand.

Portland, 1st Sept. 1835.

"C. C. T., Cash'r. S. E. C., Pres't."

He, the said W., then and there well knowing the said note to be false, forged and counterfeited as aforesaid, with intent to defraud the said E. W. F., contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Uttering a forged note purporting to be issued by a bank in another state, under the Vermont statute.

That J. S., of, &c., in said County of Windsor, on, &c., with force and arms, at, &c., wittingly, falsely, deceitfully and unlawfully did utter, pass and give in payment to one A. L., of, &c., one certain false, forged and counterfeit bank note, which said note was made in imitation of, and did then and there purport to be a bank note for the sum of two dollars, issued by the President, Directors and Company of the Suffolk Bank, a banking company incorporated by and existing under the authority of the legislature of the State of Massachusetts, one of the United States, made payable to E. C., or bearer, on demand, numbered one thousand four hundred and ninety-one, and dated Boston, May third, one thousand eight hundred and forty-three, with the name of H. B. S. thereto subscribed as president of said bank, and the name of J. V. B. countersigned thereon as cashier of said bank, and was in the words and figures following, that is to say,

bill shall have been *uttered, passed* or *given in payment, as and for a true bill;* and it is unnecessary for us to decide what would have been necessary, if this had been a part of the description of the offence. The offence of disposing and putting away forged bank notes was held to be complete, though the person, to whom they were disposed of, was an agent for the bank to detect *utterers*, and applied to the prisoner to purchase forged bank notes, and had them delivered to him as forged notes, for the purpose of disposing of them; R. & R. 154.

"It is said, also, that the indictment is bad, because there is a repugnancy between the *purport* and *tenor* of the bill, as alleged in the indictment. We think there is no ground for this objection. The indictment set forth the counterfeit bills in their words and figures, as it was proper it should do; and the allegation, that the bill, charged to be forged in each count, was made in *imitation* of, and *did purport* to be, a bank note, issued by the Bank of Cumberland, is nothing more than an allegation that the bill was a fiction, and it is no attempt to set forth the forged bill according to *its purport*. It may be true, that, where the pleader first sets out the bill according to what he claims to be the legal *purport*, and afterwards sets it out according to its *tenor*, and there is a repugnancy, it may be fatal; but that principle does not apply to this indictment.

"The result to which the court have come, is that the indictment is sufficient."

(*here set forth the note*), he the said J. S. well knowing, then and there, the said note to be false, forged and counterfeited as aforesaid, with intent to defraud the said A. L., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Having in possession forged note of United States Bank, under the Vermont statute.(*t*)

That W. R., late of Franklin, in the County of Franklin aforesaid, heretofore, that is to say, on, &c., with force and arms, at Franklin aforesaid, in the County of Franklin aforesaid, feloniously and unlawfully did have in his possession, with an intention to utter, pass and give in payment, one certain false, forged and counterfeited bank note, which said note was made in imitation of, and did then and there purport to be, a bank note for the sum of ten dollars, issued by the President, Directors and Company of the Bank of United States, made payable at their office of discount and deposit in Charleston, to J. J., president thereof, or to the bearer, on demand, numbered three thousand and fourteen, and dated at Philadelphia the twentieth day of January, in the year of our Lord one thousand eight hundred and twenty-three, with the name of L. C. thereto subscribed, as president of said bank, and the name of T. W. countersigned thereon as cashier of said bank, and was in the words and figures following, that is to say, (*here the bill was set forth verbatim*). He the said W. R. then and there well knowing the said note to be false, forged and counterfeited as aforesaid, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forgery, &c., in New York. Having in possession a forged note of a corporation.(*u*)

That A. B., late of the Ward of the City of New York, in the County of New York aforesaid, on, &c., with force and arms, at the Ward of the City of New York, in the County of New York aforesaid, feloniously had in custody and possession, and did receive from some person or persons to the jurors aforesaid unknown, a certain forged and counterfeited negotiable promissory note, for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company called (*setting out the name*), duly authorized for that purpose by the laws of, &c., which said last mentioned false, forged, &c., and counterfeited negotiable promissory note for the payment of money, is as follows, that is to say, (*setting out the note*), with intention to

(*t*) State *v.* Randal, 2 Aik. 89. "In this case it was held that the offence of counterfeiting bills of the Bank of the United States, of passing, and of knowingly having in possession such counterfeits, with intent to pass them, are cognizable by the courts of this state, under the statute of this state against counterfeiting, notwithstanding the congress of the United States, in virtue of the eighth section of the first article of the constitution, have legislated on the subject, and given to the courts of the United States jurisdiction of the same offences.

"The jurisdiction of the United States courts under the acts of congress, and of the courts of this state, under the statute of Vermont, over those offences, are concurrent within this state."

(*u*) This is the ordinary blank in use in the City of New York.

utter and pass the same as true, and to permit, cause and procure the same to be so uttered and passed, with the intent to injure and defraud one (*setting out the party*), and divers other persons to the jurors aforesaid unknown, he the said then and there well knowing the said last mentioned false, forged and counterfeited promissory note, for the payment of money, to be false, forged, and counterfeited as aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Uttering the same.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., &c., afterwards, to wit, on the day and year last aforesaid, with force and arms, at the ward, city and county aforesaid, feloniously and falsely did utter and publish as true, with intent to injure and defraud the said C. D., &c., and divers other persons to the jurors aforesaid unknown, a certain other false, forged, and counterfeited negotiable promissory note for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company called (*giving name*), duly authorized for that purpose by the laws of which said last mentioned false, forged, and counterfeited negotiable promissory note for the payment of money is as follows, that is to say, (*setting forth note as above*), the said A. B., at the same time so uttered and published the said last mentioned false, forged, and counterfeited negotiable promissory note for the payment of money as aforesaid, then and there well knowing the same to be false, forged, and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forging an instrument for payment of money under the New York statute.(*v*)

That A. B., late of the Ward of the City of New York, in the County of New York aforesaid, &c., on, &c., with force and arms, at the Ward, City and County of New York aforesaid, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting a certain for payment of money which said false, forged and counterfeited for payment of money is as follows, that is to say, (*setting forth the instrument*), with intent to injure and defraud (*setting forth the persons to be defrauded*), and divers other persons to the jurors aforesaid unknown, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Uttering the same.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., &c., afterwards, to wit, on the day and year last aforesaid, with force and arms, at the ward, city and county aforesaid, feloniously and falsely did utter and publish as true, with intent to injure and defraud the said C. D., &c., and divers other per-

(*v*) This is the ordinary blank in use in the City of New York.

sons to the jurors aforesaid unknown, a certain false forged and counterfeited for payment of money, which said last mentioned false, forged, and counterfeited for payment of money, is as follows, that is to say, (*setting forth instrument as above*), the said A. B., &c., at the said time he so uttered and published the said last mentioned false, forged, and counterfeited for payment of money as aforesaid, then and there well knowing the same to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Having in possession forged notes, &c., with intent to defraud, under the New York statute.(*w*)

That, &c., on, &c., at, &c., feloniously had in his custody and possession, and did receive from some person or persons to the jurors aforesaid unknown, a certain false, forged and counterfeited negotiable promissory note for the payment of money, commonly called a bank note, purporting to have been issued by a certain corporation or company called the Morris Canal and Banking Company, duly authorized for that purpose by the laws of the State of New Jersey, which said last mentioned false, forged and counterfeited negotiable promissory note for the payment of money is as follows, (*setting forth note verbatim et literatim*), with intention to utter and pass the same to be true, and to permit, cause and procure the same to be so uttered and passed, with the intent to injure and defraud said Morris Canal and Banking Company, &c.; he the said S. D. then and there well knowing the said note to be false, forged and counterfeited, against, &c. (*Conclude as in book* 1, *chap.* 3).

Forgery of a note of a bank incorporated in Pennsylvania, under the Pennsylvania statute.(*x*)

That A. B., late of said county, on, &c., at the county aforesaid, and within the jurisdiction of this court, with force and arms, feloniously did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, a certain note in imitation of, and purporting to be, a note issued by the order of the president, directors and company of (*setting out the name of the bank*), for the sum of dollars, purporting to be signed by president and cashier, payable to or bearer on demand, dated one thousand eight hundred and the said bank, then and there being a bank within this commonwealth, incorporated in pursuance of an act of the general assembly, which said falsely made, forged and counterfeited note, partly written and partly printed, is in the words and figures following (*setting out the note*), with intent to defraud the said bank, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*w*) People *v.* Davis, 21 Wend. 309.

(*x*) For forging the notes of a foreign bank, the above form is good at common law, striking out the word "feloniously," the averment of the charter of the bank, and charging the intent to be to defraud the persons actually defrauded, or to defraud persons unknown. See for form of same, *ante*, p. 154.

Second count. Passing same.

That, &c., A. B., &c., on, &c., at, &c., feloniously did pass, utter and publish, and attempt to pass, utter and publish as true, a certain false, forged and counterfeit note, purporting to be a note issued by the said (*setting forth the bank as in first count*), for the sum of dollars, signed by president, and cashier, payable to or bearer on demand, and dated one thousand eight hundred and the said then and there, being a bank within this commonwealth, incorporated in pursuance of an act of the general assembly; which said false, forged and counterfeit note, partly written and partly printed, is in the words and figures following, to wit, (*setting out the note*), the said A. B. then and there well knowing the said note to be as aforesaid false, forged and counterfeit, with intent to defraud (*the party to whom the note was passed*), contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forgery of the note of a bank in another state, under the Virginia statute.(*y*)

That A. B. of the County of Cabell, a certain false, forged and counterfeit note, purporting to be a note of the Bank of Louisville, for five

(*y*) Com. *v.* Murray, 5 Leigh 720. In this case the prisoner made a motion in arrest of judgment, because the indictment did not allege that the bank is chartered, or that there was any such bank in existence, according to the provisions of the first section of the statute; and, because the offence as charged was not embraced by the provisions of the fourth section, under which, it was stated, the prisoner was indicted. The court below overruled the motion, and sentenced the prisoner to imprisonment.

May J., delivered the opinion of the court. "The writ of error was asked on the same grounds on which the motion in arrest of judgment was founded, and it is now further contended that the indictment cannot be sustained on the fourth section of the statute, because it does not charge the offence to have been committed, 'to the prejudice of another's rights,' and also because it is not alleged to have been done 'for his own benefit or for the benefit of another.' Whether the bank was chartered, no where appears; but it must be presumed that the prisoner was not prosecuted under the first section of the statute, because the minimum term of imprisonment therein, is *ten* years; the reasons in arrest of judgment state that the prosecution was founded on the fourth section, and the bank is no where alleged to have been chartered. We regard the indictment, therefore, as one on the fourth section, which prohibits the counterfeiting of various public certificates, warrants and other writings, particularly enumerated therein; and the uttering or publishing of such counterfeits as true. Among them we find any deed, bond, *writing* or *note*, any letter of credit, or other writing to the prejudice of another's right.

"In the latter part of the same section, it is provided, that if any person shall, with the like intent, (*to defraud, &c.*), utter or publish as true, or attempt, in any manner, to use or employ as true, for his own benefit or for the benefit of another, any false, forged, counterfeit, altered or erased paper or writing, as is aforesaid, knowing the same to be false, &c., he shall be guilty of felony, and there is an exception of 'the bank notes, bills, post notes and checks,' mentioned in the three preceding sections. If the note in question was the note of an *unchartered* bank, it is not embraced by either of those three first sections. And it has been said, that the legislature did not intend to prohibit the counterfeiting of the notes of such banks. At the revisal of 1819, the notes of every bank chartered by the United States, or either of the states, were, for the first time, placed on the same footing, as to this class of offences, with the notes of the banks of this state. Previously there was no express provision for the offence of counterfeiting the notes of any bank of another state, whether chartered or not, but there was one in relation to *notes* generally, similar to that in the fourth section of the present statute. And this court decided in Hensley's case, 2 Va. Cases 149, that the passing of a counterfeit note, purporting to be of a bank in another state (without inquiring whether it was chartered or not), was felony, because the words of the statute then in force comprehended *all notes*, and we are all of opinion, that the words *any notes*, in the present statute, in like manner, embrace the notes of *unchartered*

dollars, feloniously did pass as a true bank note for five dollars to one C., of the following tenor, (*setting forth note*), with intent to defraud the said C., and with intent also to defraud the corporation of the President, Directors and Company of the Bank of Louisville, he the said A. B., at the time of passing the said false, forged and counterfeit bank note, well knowing the same to be false, forged and counterfeited, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*Second count in like form, only charging the passing of a different counterfeit note of the same bank to C., with intent to defraud C*).

For making, forging and counterfeiting, &c., American coin, under act of congress.(*yy*)

That A. B., &c., on, &c., at, &c., feloniously did falsely make, forge and counterfeit pieces of coin, of and other mixed metals, (*or otherwise*), in the resemblance and similitude of coin, called a which said coin, called a had before the said, &c., of, &c., been coined at the mint of the United States, with intent to defraud some person or persons to the jurors aforesaid unknown, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same, averring time of coining.

That the said A. B. on, &c., at, &c., feloniously did falsely make, forge and counterfeit pieces of and other mixed metals, in the resemblance and similitude of coin, called which said coin, called after, &c., and before, &c., had been coined at the mint of the United States of America, with intent to defraud some person or persons to the jurors aforesaid unknown, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

banks. Although the legislature designed by another statute to suppress such banks in this state, we have no reason to believe that it intended to interfere with the policy of other states, which may permit them. And certainly, there is nothing in either statute from which we can infer that the legislature would tolerate the offence of forgery for the mere purpose of endeavouring to suppress unchartered banks. As to the objection, that the indictment does not charge the act to have been committed 'to the prejudice of another's right,' we are of opinion, that these words relate not to the different writings particularly mentioned in the previous part of the section, the counterfeiting of most of which had, long before, been made felony, but only to the words immediately connected with them, 'any other writing to the prejudice of another's right.' So too, in the last part of the section, the words, for his own benefit, or for the benefit of another, are not properly connected with the offence of uttering and publishing as true, any of the forged writing and papers therein stated, but only with that of *attempting* to use or employ them for his own benefit, or for the benefit of another. These terms were probably intended to apply to the various warrants, certificates and writings of public officers, which a person might attempt so to use or employ.

"On the whole, then, we are of opinion that the note of an *unchartered* bank, is not embraced by the first section of the statute, but is clearly embraced by the words *any note* in the fourth section, that the words 'to the prejudice of another's right,' relate only to the forging of *other writings*, not particularly named; and that the words 'for his own benefit, or for the benefit of another,' refer, not to the actual uttering and publishing as true, of counterfeit notes, &c., but to the mere *attempt* to use or employ them and the other writings mentioned."

(*yy*) This indictment, which is extremely special, is of the character in use in New York, in the United States court. The next two forms, which have been sustained by the Circuit Court in Philadelphia, are much more concise, and equally accurate.

Third count. Passing, &c.

That the said A. B. on, &c., at, &c., feloniously did pass, utter and publish as true, pieces of false, forged and counterfeited coin, of metal in the resemblance and similitude of coin, called a which after, &c., and before, &c., had been coined at the mint of the United States of America, with intent to defraud some person or persons to the jurors aforesaid unknown, he the said , at the time he so passed, uttered and published as true, the said last mentioned false, forged and counterfeited well knowing the same to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Same in another shape.

That the said A. B. on, &c., at, &c., feloniously did pass, utter, publish and sell as true, pieces of false, forged and counterfeited coin, in the resemblance and similitude of coin, called a , which said coin, called had before, &c., been coined at the mint of the United States of America, intending by such passing, uttering, publishing and selling as true, the said pieces of false, forged and counterfeited coin, to defraud some person or persons to the jurors aforesaid unknown, he the said at the time he so passed, uttered, published and sold as true, the said last mentioned false, forged and counterfeited pieces of coin, then and there well knowing the same to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count. Same, specifying party to be defrauded.

That the said A. B. on, &c., at, &c., feloniously did pass, utter and publish as true, pieces of false, forged and counterfeited coin, of metal in the resemblance and similitude of coin, called a which after, &c., and before, &c., had been coined at the mint of the United States of America, with intent to defraud one he the said at the time he so passed, uttered and published as true, the said last mentioned false, forged and counterfeited well knowing the same to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count.

That the said A. B. on, &c., at, &c., feloniously did pass, utter, publish and sell as true, pieces of false, forged and counterfeited coin, in the resemblance and similitude of the coin of the United States of America, called which said coin, called had before, &c., been coined at the mint of the United States, with intent to defraud one he the said at the time he so passed, uttered, published and sold as true, the said last mentioned false, forged and counterfeited pieces of coin, then and there well knowing the same to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Seventh count.

(*Same as sixth count, except instead of*): "did pass, utter, publish and sell as true," *insert* "did attempt to pass, utter, publish and

sell as true," *and for* "with intent to defraud one ," *insert* "with intent to defraud some person or persons to the jurors aforesaid unknown."

Eighth count.

(*Same as seventh count, except instead of*): "had before, &c., been coined, &c.," *insert* "had after, &c., and before, &c., been coined," &c.

Ninth count.

That the said A. B. on, &c., at, &c., other pieces of coin, resembling and intended to resemble, and pass for the coin of the United States of America, commonly known by the name of, and called of the value of feloniously did attempt to pass, utter and publish, which said coin, called after, &c., and before, &c., had been coined at the mint of the United States of America, with the intent to defraud one he the said at the time he so attempted to pass, utter and publish the said last mentioned false, forged and counterfeited pieces of coin, then and there well knowing the same to be false, forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Last count.

(*Same as ninth count, except that instead of*): "after, &c., and before, &c.," *insert* "before, &c."

(*For final count, see ante, p.* 17, 97 *n*, 123 *n*).

Counterfeiting half dollars under act of congress.(z)

That A. B., &c., late, &c., on, &c., with force and arms unlawfully and feloniously did falsely make and counterfeit and cause and procure to be falsely made, forged and counterfeited, and willingly aid and assist in falsely making, forging and counterfeiting, one coin in the resemblance and similitude of the silver coin which has been coined at the mint of the United States, called a half dollar, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Passing counterfeit half dollars, with intent to defraud an unknown person, under act of congress.(a)

That A. B., &c., late, &c., on, &c., with force and arms unlawfully and feloniously did pass, utter and publish, and attempt to pass, utter and publish as true, a certain false, forged and counterfeited coin in the resemblance and similitude of the silver coin which has been coined at the mint of the United States, called a half dollar, he the said then and there knowing the same to be false, forged and counterfeited, with intent to defraud a certain person to

(z) See act of Cong. April 21, 1806; 2 St. L. 404. Act of Cong. March 3, 1825; 4 St. L. 121, sect. 20, &c.

(a) Act of Cong. April 21, 1806; 2 St. L. 414. Act of Cong. March 3, 1825; 20th sect. St. L. 121.

the grand inquest aforesaid unknown, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same, with intent to defraud R. K.

That the said A. B. on, &c., at, &c., with force and arms unlawfully and feloniously did pass, utter and publsh, and attempt to pass, utter and publish as true, a certain other false, forged and counterfeited coin, in the resemblance and similitude of the silver coin which has been coined at the mint of the United States, called a half dollar, he the said then and there knowing the same to be false, forged and counterfeited, with intent to defraud one R. K., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see ante, p.* 17, 97 *n*, 123 *n*).

Having coining tools in possession, at common law.(*b*)

That A. B., late of the county aforesaid, yeoman, being a person of ill name and fame, and of dishonest life and conversation, and intending the faithful citizens of this commonwealth to cheat, deceive and defraud, the day, &c., at stamps, (*made of wood, iron, or whatever it be*), upon which was then and there made and impressed the figure, resemblance and similitude of a good and genuine bill of credit, emitted and made current by the resolves of the honourable continental congress, and which same stamp would then make and impress the figure, resemblance and similitude of a good and genuine bill of credit, aforesaid, without any lawful authority or excuse for that purpose, knowingly and unlawfully had in his custody and possession with an intent to impress, forge and counterfeit the bills of credit aforesaid, and to pass, utter and pay such forged and counterfeit bills of credit to the faithful subjects of this commonwealth and the United States of America, to the evil example of all others in like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Making, forging and counterfeiting, &c., foreign coin, quarter dollar, under act of congress.(*c*)

That A. B., &c., on, &c., at, &c., pieces of false, forged and counterfeited coin, each piece thereof resembling and intended to resemble and pass, for a quarter of a Spanish milled dollar (*or otherwise*), (the quarter of a Spanish milled dollar then and there being a foreign silver coin, in actual use and circulation as money within the said United States), feloniously did falsely make, forge and counterfeit, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Procuring forgery.

That the said A. B., heretofore, on, &c., at, &c., pieces of false, forged and counterfeited coin, each piece thereof resembling and intended to resemble and pass for a quarter of a Spanish milled dollar. (the quarter of a Spanish milled dollar then and there being a foreign silver coin, in actual use and circulation as money within the said United States), feloniously did cause and procure to be falsely made,

(*b*) Drawn by Mr. Bradford.
(*c*) The defendant in this case pleaded guilty.

forged and counterfeited, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

(*Same as second count, except instead of*): "feloniously did cause and procure to be falsely made, forged and counterfeited," *insert* "feloniously did willingly aid and assist in falsely making, forging and counterfeiting."

Fourth count.

(*Same as third count, except instead of*): "feloniously did willingly aid and assist in falsely making, forging and counterfeiting," *insert* "feloniously did utter as true, for the payment of money, with intent to defraud some person or persons to the jurors aforesaid as yet unknown, he the said then and there knowing the said last mentioned pieces of coin to be false, forged and counterfeited."

Fifth count.

(*Same as fourth count, substituting*): "with intent to defraud one ," *for* "with intent to defraud some person or persons to the jurors aforesaid as yet unknown."

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Passing, uttering and publishing counterfeit coin of a foreign country, under act of congress, specifying party to be defrauded.

That A. B., &c., on, &c., at, &c., did feloniously pass, utter and publish as true, pieces of false, forged and counterfeited coin, in the resemblance and similitude of the coin called the dollar of Mexico (*or otherwise*), which, before the said on, &c., had been by law made current in the said United States, he the said knowing at the time he so passed, uttered and published the said pieces of false, forged and counterfeited coin, that the same were false, forged and counterfeited, and intending by such passing, uttering and publishing, to defraud one of the said City of New York, in the circuit and district aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said A. B., &c., on, &c., at, &c., other pieces of false, forged and counterfeited coin, in the resemblance and similitude of the foreign coin (*if such is the case*), called the of which, before the said on, &c., had been by law made current in the said United States, feloniously did pass, utter and publish as true, he the said knowing at the time he so passed, uttered and published as true, the said pieces of false, forged and counterfeited coin last aforesaid, that the same were false, forged and counterfeited, and intending by such passing, uttering and publishing, to defraud some person or persons to the said jurors unknown, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

(*Same as second count, substituting*): "and intending by such passing, uttering and publishing, to defraud one of the City of New York, in the circuit and district aforesaid" (*or otherwise*), *for*

"and intending by such passing, uttering and publishing, to defraud some person or persons to the said jurors unknown."

Fourth count.

That the said A. B., on, &c., at, &c., other pieces of false, forged and counterfeited coin in the resemblance and similitude of the coin called the of a foreign coin which, before the said on, &c., by an act of the congress of the United States of America, entitled, "An Act regulating the currency of foreign gold and silver coin in the United States," approved on the third day of March in the year of our Lord one thousand eight hundred and forty-three, had been made current in the said United States, feloniously did pass, utter and publish as true, he the said knowing at the time he so passed, uttered and published as true the said pieces of false, forged and counterfeited coin, that the same were false, forged and counterfeited, and intending by such passing, uttering and publishing, to defraud one of the City and County of New York, in the circuit and district aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Last count.

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Debasing the coin of the United States, by an officer employed at the mint, under act of congress.(*d*)

That A. B., &c., on, &c., at, &c., being then and there a person and officer employed at the mint of the United States, at aforesaid, did debase and make worse certain pieces, to wit, ten pieces of gold coin called eagles, (which had been struck and coined at the said mint of the United States), as to the proportion of fine gold therein contained, and which were then and there by the said A. B., he being such person and officer employed in the said mint of the said United States as aforesaid, made of less weight and value than the same ought to be by the provisions of the several acts and laws of the said United States relative thereto, through the default and connivance of the said A. B., he being then and there such person and officer employed as aforesaid in the said mint, for the purpose of unlawful profit and gain, and with an unlawful and fraudulent intent to debase, make worse and render of no value the aforesaid ten pieces of gold coin, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Fraudulently diminishing the coin of the United States, under act of congress.(*e*)

That A. B., &c., on, &c., at, &c., did unlawfully, fraudulently and for gain's sake, impair, diminish, falsify, scale and lighten certain pieces, to wit, ten pieces of gold coin called eagles, which had been coined at the mint of the United States, with intent to defraud some

(*d*) Davis' Prec. 138.

(*e*) Davis' Prec. 138. Act of 21st April, 1806, s. 3; Gordon's Dig. art. 3631, p. 711.

person to the said jurors unknown, against, &c., and contrary, &c.(*f*) (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97, 123).

Uttering a counterfeit half-guinea, at common law.(*g*)

That defendant, on, &c., at, &c., one piece of false money made of base metals, and coloured with a certain wash producing the colour of gold, to the likeness and similitude of a piece of good, lawful and current gold money and coin of this realm, called a half-guinea, unlawfully, unjustly and deceitfully did utter and pay to one C. D., for and as a piece of good and lawful gold money and coin of this realm called half a guinea, he the said A. B. then and there well knowing the said piece to be false and counterfeit as aforesaid, to the great damage of the said C. D., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Passing counterfeit coin similar to a French coin, at common law.

That M. B., late of, &c., on, &c., at, &c., one false, forged and counterfeited piece of pewter, lead and other base and mixed metals composed in form, similitude and likeness of a silver French crown, made (the same silver French crown then, and still being, a silver French coin current and passing in circulation in this state), for and as a good, true and genuine French silver crown, to a certain J. J., then and there did pass, pay away, utter and tender in payment, he the said M., then and there well knowing the same piece to be so as aforesaid false, forged and counterfeited, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Counterfeiting United States coin, under the Vermont statute.(*h*)

That the respondent, at Weybridge, "with intent the good people of this state and of the United States to deceive and defraud, with force and arms, on the tenth day of April, A. D. 1845, ten pieces of

(*f*) If the coin debased was foreign gold or silver, then say "which said gold coin were ten pieces of foreign gold coin, which were by the laws of the United States made current, and were in actual use and circulation as money, within the said United States."

(*g*) Stark. C. P. 447.

(*h*) State *v.* Griffin, 18 Verm. 198. "The statute," it was said, "on which the third count rested, is intended to reach every part of the apparatus of coining, however much more might be necessary to make that effective, and that, therefore, if it be shown that the respondent had in his possession one half of a mould, it is sufficient, without proof that he also had the other half.

"The allegation, in the indictment, that the respondent, 'ten pieces of false, forged and counterfeit coin and money,' &c., 'unlawfully and feloniously did forge, make and counterfeit,' &c., was held sufficient. The ambiguity, it was said, arises only from the different sense in which the word 'counterfeit' is used."

An indictment for having in possession counterfeit coin, it was ruled, need not aver that the denomination of coin which was counterfeited, was "current by law, or usage, in this state," it being averred, that the coin was one of the current silver coins of the United States. The court will take judicial notice, that the current coins of the United States are current also in this state.

In such indictment it is not necessary to aver of what materials the counterfeit coin was made; and if averred, it need not be proved.

false, forged and counterfeit coin and money, of pewter, lead, tin and zinc, and other mixed metals, in the similitude of the good, legal and current money and silver coins of the United States, which are current by law and usage in this state, called 'half dollars,' then and there unlawfully and feloniously did forge, make and counterfeit, contrary," &c. (*Conclude as in book* 1, *chap.* 3). (*The second count was for having in possession counterfeit coin, with intent to pass the same. The third count was for having in possession divers moulds and patterns, adapted and designed for making counterfeit coin, with intent to use the same in coining counterfeit half dollars*).

Having in possession coining instruments, under the Rev. Stat. of Massachusetts, c. 127, *s.* 18.(*i*)

That A. B., at, &c., on, &c., did knowingly have in his possession a certain mould, pattern, die, puncheon, tool and instrument adapted and designed for coining and making one side of a counterfeit coin, in the similitude of one side or half part of a certain silver coin, called a half dollar, to wit, that side or half part thereof, which represents a spread-eagle, and has the words, "United States of America—Half Dollar;" said coin, called a half dollar, being current by law and usage in this state and commonwealth aforesaid, with intent to use and employ the said mould, pattern, die, puncheon, tool and instrument, and cause and permit the same to be used and employed, in coining and making such false and counterfeit coin as aforesaid, &c.

Counterfeiting coin under Rev. Stat. of Massachusetts, c. 127, *s.* 15.(*j*)

That, &c., at, &c., on, &c., had in his custody and possession, at the same time, ten similar pieces of false and counterfeit coin, of the likeness and similitude of the silver coin current within this commonwealth, by the laws and usages thereof, called Mexican dollars, with intent then and there the said pieces of false and counterfeit coin to utter and pass as true, he the said D. R. F. then and there well knowing the same to be false and counterfeited, against, &c. (*Conclude as in book* 1, *chap.* 3).

Having in custody counterfeit coin, under the Rev. Stat. of Massachusetts.(*k*)

That A. B., on, &c., at, &c., "had in his custody and possession, a

(*i*) Com. *v.* Kent, 6 Met. 221. In this case it was held that under the Rev. Stat. c. 127, s. 18, providing for the punishment of a person who shall knowingly have in his possession any instrument adapted and designed for coining or making counterfeit coin, with intent to use the same, or cause or permit the same to be used, in coining or making such coin, a person is punishable for so having in his possession, with such intent, an instrument adapted and designed to make one side only of a counterfeit coin.

On the trial of a party who is indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit coin, with intent to use it, or cause or permit it to be used in coining or making such coin, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made.

(*j*) Com. *v.* Fuller, 8 Met. 313, where the exceptions to this form were overruled.

(*k*) Com. *v.* Stearns, 10 Met. 256. Dewey J.: "The objection of variance between

certain piece of false and counterfeit coin, counterfeited in the likeness and similitude of the good and legal silver coin current within said commonwealth, by the laws and usages thereof called a dollar, with intent then and there to pass the same as true; he the said A. B. then and there well knowing the same to be false and counterfeit," &c.

For uttering and passing counterfeit coin, under the Massachusetts statute, &c.(l)

That A. B., &c., on, &c., at, &c., had in his custody and possession a certain piece of false money and coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin, current within this commonwealth by the laws and usages thereof, called a dollar; and that he the said A. B., the aforesaid piece of forged and counterfeit coin did then and there utter, pass and tender in payment as true, with intent one C. D. then and there to injure and defraud; he the said A. B. then and there well knowing the aforesaid piece of coin to be false, forged and counterfeit, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

the proof offered and the offence charged, is not sustained. The crime charged in the indictment is the having in possession, &c., a certain counterfeit coin, in the likeness of a silver coin called a dollar. The evidence shows this coin to have been in the likeness and similitude of a Mexican dollar. But a Mexican dollar is not the less a dollar, nor is it inappropriately described as a dollar. The term 'dollar' does not import a coin coined at the mint of the United States. The United States statute of 1792, c. 16, legalized the dollar of the United States coinage, and the statute of 1834, c. 71, legalized the dollar of Mexico. Both are adopted by us, and both are coins current, by law and usage, in this commonwealth; and the having in possession of counterfeits of either, with the criminal intent described in the Rev. Stat. c. 127, ss. 15, 16, constitutes the statutory offence.

"The only question, in the present case, that can require much consideration, is that which arises upon the motion in arrest of judgment for supposed deficiency in the allegations in the indictment. As to the first of these reasons, viz. that the indictment is insufficient, inasmuch as the term 'dollar,' therein used, may denote a coin, the counterfeiting whereof is not criminal by the laws of this commonwealth, it seems to be answered by the very language of the indictment. The dollar therein set forth is alleged to be 'in the similitude of the legal silver coin current, by law and usage, in this commonwealth.' And this is a substantial allegation, that must be proved. Hence, no dollar that is not of the similitude of the legal silver coin of this commonwealth, will correspond with that set forth in the indictment, and furnish the proof requisite to a conviction.

"The remaining inquiry is whether the indictment is bad for uncertainty, in not specifying, with greater particularity, the descriptive character of the counterfeit dollar, as of the coinage of the Mexican government and in the similitude of a Mexican dollar. It is true that the indictment must particularly set forth the *kind* of coin alleged to be counterfeit, &c., as is stated in 2 Hale's P. C. 187, and 2 Chit. C. L. 105, note *d*. But that rule does not affect the present question, nor present any objection to this indictment. The kind of coin to be set forth and described, is the denomination or name of the coin; as the dollar, the half dollar, or the dime, as the case may be. And if this indictment had merely described the alleged counterfeit coin to be in the likeness of silver coin current in this commonwealth, by the laws and usages thereof, it would have presented a case liable to the objection of a want of particularity of description. But such is not the case here. The coin is described under its appropriate denomination, and that is sufficient, without adding, as a further description, the place of coinage. The place of coinage of a dollar is no necessary part of the description which is required to be given of a coin in an indictment. The recital of the various inscriptions and devices borne on it, and particularly the date of its issue, would seem to be quite as material as the place of coinage; but these are not required to be specified. The court are of opinion that this objection is not sustained either by authority or sound principle."

(*l*) Davis' Prec. 132.

For making or being possessed of any tool, &c., to be used in counterfeiting coin, under the Massachusetts statute.(*m*)

That A. B., &c., on, &c., at, &c., intending the citizens of this commonwealth to injure, deceive and defraud, did cast, stamp, engrave, form and make, and did then and there knowingly have and possess a certain tool and instrument, devised, adapted and designed for the coining and making of false and counterfeit money and coin, in the similitude of the silver money and coin current within this commonwealth by the laws and usages thereof, called a die; with the intent to use and employ the same, and to cause and permit the same to be used and employed in coining and making the false money and coin aforesaid; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Having in possession an instrument to be used for forgery, &c. On Rev. Stat. of Massachusetts, c. 127, *s.* 18.(*n*)

That, &c., on, &c., did knowingly have in his possession a certain mould, pattern, die, puncheon, tool and instrument, adapted and designed for coining and making one side or half part of a certain silver coin, called a half dollar, to wit, that side or part thereof which represents a spread-eagle, and has the words "United States of America"—"Half Dollar;" said coin, called a half dollar, being current by law and usage in this state and commonwealth aforesaid, with intent to use and employ the same mould, pattern, die, puncheon, tool and instrument, and cause and permit the same to be used and employed in coining and making such false and counterfeit coin as aforesaid, against, &c. (*Conclude as in book* 1, *chap.* 3).

Coining, &c., under the North Carolina Statute.(*o*)

That the defendant, on, &c., with force and arms, in the county aforesaid, one pair of dies, upon which then and there were made

(*m*) Davis' Prec. 133.

(*n*) In Com. *v.* Kent, 6 Met. 221, the precedent in the text was approved.

(*o*) State *v.* Haddock, 2 Hawks 462. Taylor C. J.: "It does not admit of any reasonable doubt, that a pair of dies is an instrument or instruments, within the 4th sect. of the act of 1811, c. 814, upon which the first count is framed; and being more generally used in coinage than any other instrument, is one upon which the act would be most likely to operate frequently. It may be said, that as the dies are described as having impressed upon them only the likeness, similitude, figure and resemblance of the sides of a Spanish milled dollar, and not the edges, that they cannot answer the purpose described in the act, of making a counterfeit similitude or likeness of a Spanish milled dollar. But it is for the jury to consider, whether the dies be calculated to impress the counterfeit similitude or likeness of a dollar; for these words in the act extend the offence beyond an exact imitation of the figures and marks of the coin. For if the instrument, in point of fact, will impose on the world, in general it is sufficient whether the imitation be exact or not. And this is the construction, upon those highly penal acts, relative to the coin, in England. Thus, having knowingly in possession a puncheon for the purpose of coining, is within the stat. of 8 and 9 Wm. III., though that alone, without the counter puncheon, will not make the figure; and though such puncheon had not the letters, yet it was held sufficiently described in the indictment as a puncheon, which would impress the resemblance of the head side of a shilling; 1 East P. C. 171. But if the parts of this indictment which are employed in a description of the dies were altogether omitted, the charge would be within the act, for it would then read, that the defendants had in their possession a pair of dies,

and impressed the likeness, similitude, figure and resemblance of the sides of a lawful Spanish milled dollar, without any lawful authority, then and there feloniously had in possession, &c., for the purpose of then and there making and counterfeiting money, in the likeness and similitude of Spanish milled silver dollars, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER II.

BURGLARY.

General frame of indictment for burglary and larceny at common law.(*a*)

That A. B., late of, &c., in, &c., labourer, on, &c., about the hour of one of the night,(*b*) of the same day, with force and arms, at the parish(*c*) aforesaid, in the county aforesaid, the dwelling house(*d*) of one C. D.(*e*) there situate, feloniously(*f*) and burglariously did break

for the purpose of making counterfeit dollars, which is the crime in substance created by the act. As I do not perceive any ground for any other objection arising from the record, the case having been submitted without argument, my opinion is, that the reasons in arrest be overruled." And in this opinion the rest of the court concurred.

(*a*) This form is drawn from Stark. C. P. 435.

(*b*) It is necessary to allege a particular hour; State *v.* G. S., 1 Tyler 295; and to state it to be in the night of the preceding day, though after twelve o'clock. If the *noctanter* be omitted in the common form averring larceny, the indictment will be turned into one for larceny; Thompson *v.* Com., 4 Leigh 652. It is certainly bad to aver the offence to have been committed "between the hours of twelve at night and nine in the next morning;" State *v.* Mather, Chip. 32; though the day and hour themselves are not material to be proved as laid; see *ante*, p. 9.

(*c*) The place should be correctly stated.

(*d*) The house must be described as the dwelling house of the real tenant; Stark. C. P. 79; and this is the proper description, though part only of the house be separately occupied. The particular interest of the alleged owner is insufficient. It is enough if the house be his; People *v.* Van Blarcum, 2 Johns. 105. Burglary may also be committed in a church or chapel. If the offence be committed in an out-house within the curtilage, it should be laid to have been committed in the dwelling house or in a stable, &c., being part of the dwelling house; Dobbs' case, East P. C. 513; Garland's case, *ib.* 493.

(*e*) It should be alleged or implied that some one resided in the house; Forsyth *v.* State, 6 Ham. 22. If a mere intent to steal be alleged, the ownership should still be correctly averred; Stark. C. P. 215.

(*f*) These words are essential; Lewis' C. L. 139; Hale's P. C. (by Stokes & Ing.) 549; Wh. C. L. 367; and so are the words "dwelling house" and "in the night." The means of breaking and entering are immaterial.

and enter,(*g*) with intent(*h*) the goods and chattels of the said C. D. in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away; and one gold watch of the value of thirty dollars,(*i*) of the goods and chattels of the said C. D.,(*j*) in the said dwelling house then and there being found, then and there feloniously and burglariously did steal, take and carry away, against, &c. (*Conclude as in book* 1, *chap.* 3).

Burglary and larceny at common law. Another form.(*k*)

That J. B., late, &c., on, &c., about the hour of eleven in the night of the same day, at, &c., the dwelling house of I. H. Jr., there situate, feloniously and burglariously did break and enter, (and the goods and chattels, moneys and property of the said I. H. Jr., in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away), and then and there in the said dwelling house, &c., twenty eight yards of Scotch ingrain carpet, of dark colours, of the value of thirty dollars, &c., of the goods and chattels, moneys and property of the said I. H. Jr., in the said dwelling house then and there being found, then and there feloniously and burglariously did steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Receiving stolen goods.

That the said J. B., afterwards, to wit, on, &c., at, &c., the goods and chattels, moneys and property aforesaid, by some ill-disposed person to the jurors aforesaid yet unknown, then lately before feloniously and burglariously stolen, taken and carried away, unlawfully, unjustly and for the sake of wicked gain, did receive and have (the said J. B. then and there well knowing the goods and chattels, moneys and property last mentioned to have been feloniously and burgla-

(*g*) The intention is included in the words "feloniously and burglariously," &c., but it must be further shown that the breaking and entry was done to commit a felony, which felony should be specified. But an averment that he did then and there commit a specific felony is a sufficient averment of the intention; Com. *v.* Brown, 3 Rawle 207. A statutable felony will support the indictment; 1 Hawk. c. 38, s. 38; R. *v.* Knight and Roffrey, East P. C. 510.

(*h*) Unless the commission of a felony be actually laid, this is essential; R. *v.* Lyon, Leach 221, 3d ed.

(*i*) Describe the character and value of each article according to the fact, as in larceny; see *post*, p. 191.

(*j*) The ownership must be correctly stated; *ante*, p. 10; *post*, p. 192; Stark. C. P. 210, 215.

(*k*) Com. *v.* Brown, 3 Rawle 207. Sentence was passed on this indictment in the Supreme Court. "The motion in arrest of judgment," said Gibson C. J., "is founded on the absence of a direct averment that the breaking and entering was with a felonious intent, and although a larceny is charged to have been committed afterwards, it is argued with much theoretic plausibility, that this may have been in pursuance of a design subsequently hatched. It is certain that all material facts must be positively charged instead of being collected by inferences; but in this particular this indictment is found to be in strict accordance with the most approved precedents (Cro. Cir. Comp. 203), and for that reason this motion, also, must be overruled." In Cro. C. C. 203, the passage in brackets in the text, which is plainly surplusage, is omitted; see also 3 Chit. C. L. 203. The disadvantage of this form is that in case the stealing is left unproved, the defendant must be acquitted *in toto*; 1 Leach 708; 3 Chit. C. L. 1114. On this account Ld. Hale recommends the form first given, p. 180, on which the defendant may be convicted of either burglary or larceny, or both; 1 Hale P. C. (ed. Stokes & Ing.) 559.

riously stolen, taken and carried away), contrary, &c., and against. &c. (*Conclude as in book* 1, *chap.* 3).(*kk*)

Burglary at common law with no larceny.

That A. B., late, &c., on, &c., about the hour of eleven in the night of the same day, at, &c., the dwelling house of one C. D., there situate, feloniously and burglariously did break and enter, with intent the goods and chattels, moneys and property of the said C. D., in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Breaking into a shop not adjoining dwelling house in night time, with intent to steal, under Massachusetts statute, 1839, *c.* 31.

That T. K. on, &c., at, &c., the shop of A. B., there situate, adjoining to (and occupied with the dwelling house of said A. B.).(*l*) there situate, in the night time did break and enter, with intent the goods and chattels of said A. B., then and there, in said shop being found, feloniously to steal, take and carry away, against, &c., and contrary, &c.(*m*) (*Conclude as in book* 1, *chap.* 3).

Breaking into dwelling house, not being armed, with intent to commit larceny, under Massachusetts statute.

That J. T., &c., on, &c., at, &c., in the night time of said day, with intent to commit the crime of larceny, did break and enter the dwelling house of one C. E., there situate, said J. T. not being armed, nor arming himself in said house with a dangerous weapon, nor making any assault upon any person then being lawfully therein, against, &c., and contrary, &c.(*n*) (*Conclude as in book* 1, *chap.* 3).

General frame of indictment in New York.

That A. B., late of, &c., on, &c., with force and arms about the hour of eleven, in the night of the same day, at, &c., (*setting forth the object of the burglary*), of one C. D., there situate, feloniously and burglariously did break and enter, &c., with intent the goods and chattels of the said C. D., in the said then and there being, then and there feloniously and burglariously to steal, take and carry away, and (*setting forth the articles taken*), of the goods, chattels and property of the said C. D., in the said then and there being, then

(*kk*) As to the joinder of these counts, see *ante*, p. 13; *post*, p. 196.

(*l*) Or "a certain dwelling house," as in Joselyn *v.* Com., 6 Met. 236, leaving out the phrase, "and occupied with," as well as the averment of ownership.

(*m*) This count was approved in Joselyn *v.* Com., 6 Met. 236, where it was said that with it might be coupled a count charging the same facts with the actual larceny in addition, though the court waived deciding whether there might not be cases where the prosecution, under such a joinder, might not be put to an election.

(*n*) This indictment appears in Tully *v.* Com., 4 Met. 357, where the only error assigned by the learned and acute counsel who conducted the offence, was that the word "burglariously" was omitted. This the court, however, deemed unnecessary.

and there feloniously and burglariously did steal, take and carry away, to the great damage of the said C. D., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a person for attempting to break and enter a dwelling house at night, at common law.(*o*)

That J. O'B., late of, &c., on, &c., at, &c., the dwelling house of W. H., there situate, about the hour of twelve in the night time of the same, unlawfully and wickedly did attempt and endeavour to break and enter, with an intent the goods and chattels of the said W. in the same dwelling house, then and there being, feloniously and burglariously to steal, take and carry away, to the evil example of all others in the like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Breaking a store house with intent to enter and steal, at common law.(*p*)

That T. H., late of, &c., on, &c., about the hour of twelve in the night time of the same day, at, &c., the store house of C. B., there situate, unlawfully and wickedly did break, with an intent the same store house to enter, and the goods and chattels of the same C. B., in the same store house then and there being, then and there feloniously to steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER III.

ARSON.

General frame of an indictment for arson at common law.(*a*)

That A. B., late, &c., a certain house(*b*) of one C. D.,(*c*) feloniously, wilfully and maliciously did set fire to, and the same house then and

(*o*) Drawn in 1787 by Mr. Bradford, then attorney-general of Pennsylvania. (*p*) *Ib.*

(*a*) This form, with a portion of the notes to it, is drawn from Stark. C. P. 437.

(*b*) Arson might at common law be committed, not only by burning the dwelling house, but also the out-houses, which were parcel of the dwelling house; Wh. C. L. 377; 1 Hale 570; 3 Inst. 67, 69; 1 Hawk. c. 39, s. 1, 2; and it is not necessary to allege the burning of the dwelling house, but only of the house simply; 1 Hale 567, 570; 3 Inst. 67; 1 Hawk. c. 39, s. 1. In Glandfield's case, East P. C. 1034, it was holden, that out-houses generally was a sufficient description under 9 Geo. I. c. 22; without showing of what kind.

(*c*) The allegation of ownership is material, for it must appear that the offence was committed against the property of another, and this allegation must be distinctly proved; Com. *v.* Wade, 17 Pick. 395; Pedley's case, Leach 277; Breeme's case, Leach 261; Spalding's case, Leach 251; Holmes' case, Cro. Car. 376; 3 Inst. 66. In the case of the Rick-

there, by such firing as aforesaid, feloniously, wilfully and maliciously did burn, against, &c. (*Conclude as in book* 1, *chap.* 3).

mans, East P. C. 1034, the defendants were charged with the arson of a certain house, situate in the parish of Ellingham, &c., and after conviction, all the judges held, that the conviction was wrong, because the indictment did not state the ownership. It appeared in that case that the house belonged to the parish, and that they suffered one Thomas Early to live in it, but in whom the legal estate was vested was unknown, and the judges held that it might have been laid to be the property of the overseers, or of persons unknown. Where there is a doubt in which of several persons the property vests, it should be differently described in different counts, in order to obviate any objection on the score of variance. If the occupation be merely permissive, as by a pauper, of a house belonging to the parish, the property cannot be laid in him; *vide supra*, Rickman's case; and if such pauper or mere servant, burn the house which he inhabits, even exclusively, he is guilty of arson; Gowen's case, East P. C. 1027. Otherwise, if the defendant has possession under a lease for years; Holmes' case, Cro. Car. 376; 3 Inst. 66; 1 Hale 568; Breeme's case, Leach 261; Pedley's case, Leach 277; or as mortgagor, Spalding's case, Leach 258. But it seems that if the mere reversion be in the defendant, who has not possession, he may be guilty of the offence, by burning the house; Harris' case, Fost. 113; East P. C. 1023. In Spaulding's, Breeme's and Pedley's cases, it was holden, that in respect of the property against which the offence was committed, the statute 9 Geo. I. c. 22, did not alter the common law. The offence is against the possessions, and the house, &c., should be described as belonging to the person who has possession coupled with an interest; for if the occupation be merely permissive, the house ought not to be described as the occupyer's. See Rickman's and Cowen's cases, *supra*. In Glandfield's case, East P. C. 1034, it appeared that the out-houses burnt, including the brew house, were the property of Blanche Silk, widow, as also was the dwelling house in which she lived with her son J. S.; that the son alone occupied the out-houses, with the exception of the brew house, on his own account, but without any particular agreement with his mother; that she repaired the dwelling house and out-houses, and that they jointly contributed to the ingredients for the beer, which was brewed in the brew house, and which was used in the family. Mr. J. Heath held, that the brew house ought to be laid as in their joint occupation, but the other out-houses as in the occupation of the son; and upon the indictment so drawn, the prisoner was convicted and executed.

On an indictment for setting fire to a barn in the night time, whereby a dwelling house was burned, charging the barn to be the property of G. and N., it appeared that G. was the general owner of the barn, and that part of it was in the occupancy of N., and a part of it used for the purposes of a stage company, who had hired it from G. by parol agreement, for no specified time, G. himself being a member and agent of the company, and exercising no different control over this part of the premises than he exercised over the other way stations of the company. It was held that the company, and not G., was the occupant of this part of the barn; and that the allegation of the indictment that the property was N. and G.'s, was not supported by the proof; Com. *v.* Wade, 17 Pick. 395.

A room in a large building, which room was separately leased by the owner of the building to a merchant who occupied it as a store, and having no direct communication with the other parts of the building, is properly laid in an indictment for arson as the property of the lessee; State *v.* Sandy, (a slave), 3 Iredell 570.

If a man, by setting fire to his own house, endanger others which are contiguous, he may be indicted for the misdemeanor, and it is unnecessary in such case to aver an intention to burn the contiguous houses; 1 Hale 568; Cro. Car. 377; Scholfield's case, Cald. 397. But if the defendant set fire to his own house with intent to defraud the insurers, and the house of his neighbour be burnt in consequence, the offence will amount to arson; per Grose J., in giving judgment in Probert's case; East P. C. 1030.

"And in Isaac's case, East P. C. 1031, where the offence committed under such circumstances, was laid as a misdemeanor, Buller J., directed an acquittal on the ground that the misdemeanor merged in the felony. And if the defendant set fire to his own house with intent to burn his neighbour's house, and the latter be burnt in consequence, the offence is as much arson as if the defendant had immediately set fire to his neighbour's house; therefore if A. intending to burn B.'s house set fire to his own, and B.'s is burnt in consequence, the indictment may charge A. directly with the wilful and malicious burning of B.'s house; 1 Hale 569; East P. C. 1034. The words maliciously and wilfully are descriptive of the offence as ousted of clergy by the statute 4 and 5 P. and M. c. 4; but they are no part of the description under the statute 9 Geo. I. 22; though under the latter statute to oust the offender of clergy, it must appear that the act was wilful and malicious, and it seems to be safer so to aver it. See 1 Hale 567, 569; 3 Inst. 67; East P. C. 1033, 1021, Minton's case." Starkie's C. P. 438.

Burning unfinished dwelling house, under Mass. Rev. Stat.(*d*)

That on, &c., at, &c., about the hour of twelve o'clock in the night time of the same day, a building of one P. U., of, &c., there situate, erected by the said P. U. for a dwelling house, and not completed or inhabited, feloniously, wilfully and maliciously did set fire to, and the same building, so erected for a dwelling house, then and there, by the setting and kindling of such fire, did unlawfully, wilfully and maliciously burn and consume, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Setting fire to a building, whereby a dwelling house was burnt in the night time, under Mass. Rev. Stat.

That A. B., of, &c., in, &c., on, &c., about the hour of two in the night of the same day, at, &c., a certain building of one C. D.(*e*) there also situate, called a barn, feloniously, wilfully and maliciously did set fire to and burn, and that by the kindling of said fire, and by the burning of said barn, the dwelling house of one E. F., there also situate, was then and there, in the night time, feloniously, wilfully and maliciously burnt and consumed, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Burning an incomplete, &c., dwelling house, under Mass. Rev. Stat.(*f*)

That A. B., on, &c., about the hour of twelve o'clock in the night time of the same day, a building of one P. U., of, &c., there situate,

(*d*) Com. *v.* Squire, 1 Met. 258. This was objected to, because there was no averment that the building alleged to have been burnt was other than that mentioned in Rev. Stat. c. 126, s. 5. The court held, however, that this was not necessary, and further that there was no insensibility in "a building erected" being unfinished. The word "feloniously," which was part of the indictment, but which is omitted in the text, was rejected as surplusage.

(*e*) In Com. *v.* Wade, 17 Pick. 395, it was queried whether the averment of property was here necessary; but it was said that when made it must be strictly proved. The best course is to charge the offence in two counts, one with and the other without the averment.

(*f*) Com. *v.* Squire, 1 Met. 258. Under this indictment the court said: "The only remaining question to be considered is, whether the offence is so charged in this indictment, that after a conviction or acquittal thereon it will protect the defendant against a second indictment for the same act, supposing the facts would have warranted originally an indictment for the offence of the higher degree, embraced in the third section. The difficulty here supposed also arises from not stating in the indictment the exception contained in the fifth section. It does not seem to us, that the security of the party against being again charged for the same act, necessarily requires the form of the indictment to be such as is suggested by the defendant's counsel. Upon this point also, some aid may be derived from considering the course of proceeding in prosecutions for larcenies. Larcenies, by our statute, are of various grades, and are punished with greater or less severity, according to the aggravation of the offence; and these different grades of offence are punished under the provisions contained in different and distinct sections of the statute. But we know very well that in larcenies, indictments are often found, charging the inferior grade of crimes, and omitting the circumstances of aggravation, when all the facts existing in the case would, if disclosed to the jury, bring the case within the higher grade of larcenies. Would it be a defence to such indictment, on the trial before the petit jury, that the defendant had committed the offence charged, but with certain aggravating circumstances not charged. It seems to us not; and that when the offence charged in the indictment, and the offence actually committed, are both merely larcenies, the greater offence includes

erected by the said P. U. for a dwelling house, and not completed or inhabited, feloniously, wilfully and maliciously did set fire to, and the same building, so erected for a dwelling house, then and there, by the setting and kindling of such fire, did feloniously, wilfully and maliciously burn and consume, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Burning a meeting house, under the Vermont statute.(*g*)

That J. R., of, &c., on, &c., at, &c., a certain meeting house, then and there situated, belonging to the First Calvinistic Congregational Society in Burlington aforesaid, erected for public use, to wit, for the public worship of Almighty God, did then and there wilfully, maliciously and feloniously set fire to and burn, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

the less, and evidence proving the greater offence will support an indictment for the smaller offence. Such being the case, it would seem necessarily to follow, that the conviction or acquittal of a party thus charged with the minor larceny, must be a bar to a subsequent indictment charging the same larceny with aggravating circumstances. The same rule would seem properly to apply to the different gradations of offences, of maliciously burning buildings, as provided for in the third and fifth sections of the Rev. Stat. c. 126, which is also the same statute in which there are created four distinct grades of larcenies, with different punishments annexed to them. The offences made punishable by the third and fifth sections are both only misdemeanors, and the same courts have jurisdiction of each. There would be but one criminal act in the malicious burning of a building, whether that building alone was consumed, or it occasioned the burning of any building described in the third section. Taking the case under those limitations, we think if the government proceed by an indictment for the smaller offence, and on trial thereof there be a judgment of conviction or acquittal, such judgment would be a legal bar to a second indictment charging the same offence with aggravation; State *v.* Cooper, 1 Green 362. Upon the whole matter we are therefore brought to the conclusion, that this indictment does set forth the burning of such a building as is described in the statute; that as the facts stated in the indictment constitute a misdemeanor and not a felony, the offence is well charged in the indictment as a misdemeanor, if the word feloniously be rejected as surplusage, as we think it may be, that the indictment is sufficiently particular in its form of charging the offence to be punished; and finally, that a conviction or acquittal on this indictment would be a good bar to a second indictment for the same act, alleging it with the aggravating circumstances described in the third section of the statute. The result therefore is, that the motion in arrest of judgment must be overruled, and the punishment awarded against the defendant which is prescribed by law in such cases."

(*g*) State *v.* Roe, 12 Verm. 93. Collamer J.: "The indictment charged that the church or meeting house belonged to 'the First Calvinistic Congregational Society in Burlington.' The proof of this allegation consisted in the paper presented and parol proof, that, from 1810, the society has been known by the name of the First Calvinistic Congregational Society, in the town of Burlington; and that they built, and have ever occupied the house. Was this sufficient? The existence of a society or corporation, *de facto*, is sufficient, and that is always shown by parol. Even had it been shown that, in point of fact, the society never were organized and never were a corporation, it was of no importance. The burning of the meeting house would be arson within our statute, though it did not belong to a corporation.

"But, it is said, there is a variance in the name. They take no name in the writing. They might have many names by reputation, and they are not, in the indictment, attempted to be described by name, but by general character or tenet; and the words, as to location, in the town of Burlington, and in Burlington, are in substance the same. This whole allegation and its materiality, will come again under consideration on the motion in arrest."

For burning one's own house with intent to defraud the insurers.(*h*)

That A. B., &c., on, &c., at, &c., feloniously, wilfully, maliciously and unlawfully did set fire to a certain house being in the possession of him the said A. B., with intent thereby to injure and defraud the London Assurance, of houses or goods from fire, (then and there being a body corporate), against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Burning a barrack of hay, under Pennsylvania statute.(*i*)

That H. C., late, &c., on, &c., at, &c., feloniously, unlawfully, wilfully and maliciously did set fire to a certain barrack of hay of A. B., there situate, with intent to destroy the same, to the great damage of the said A. B., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Burning stable, under same.

That the said H. C., at the county aforesaid, on the day and year aforesaid, and within the jurisdiction of this court, with force and arms, feloniously, wilfully and maliciously did set fire to and burn a certain stable of the aforesaid A. B., there situate, to the evil example of all others in like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Attempting to set fire to and break in a house, under Mass. statute.(*j*)

That A. B., at, &c., on, &c., about the hour of nine in the night

(*h*) This form was prepared under the English statute, but it is probable that it would be good at common law, leaving out the "feloniously;" see *ante*, p. 184.

(*i*) This form, with the necessary alterations, is based on Chapman *v.* Com., 5 Wh. 427. *Per curiam*: "The word 'maliciously' in the first count, may pass as an equivalent for the word 'wilfully;' but the words 'barrack, rick or stack of hay, grain or bark,' as much import a barrack of hay or grain, as they do a rick or stack of hay or grain. They were used elliptically in the context, to avoid repetition. The statute is an amplification of the act of 1767, under a mitigated punishment; and it is to be remarked, that it was not indictable on that act, though it is so now, to burn a barn 'unless it had hay or corn therein.' It is not credible, therefore, that the legislature did not formerly extend as much protection to a barn as they subsequently intended to extend to a barrack, which, in Pennsylvania, is an erection of upright posts supporting a sliding roof usually of thatch; for of all the buildings on a farm, it is the cheapest, and that which, independently of the property housed by it, offers the least incitement to malicious mischief. It is not generally, if at all, used by the tanner to cover his bark; but containing that material, its contents would be within the words of the statute, and the protection intended to be given by it.

"The second count is for feloniously burning a stable, which is undoubtedly a subject of the statutory offence, independent of its contents; but as it does not conclude against the form of the statute, and there is no such felony at the common law, there is no count in the indictment on which the judgment can be rested."—The form in the text is modified to meet the opinions of the court. See count for same on next page.

(*j*) Com. *v.* Harney, 10 Met. 422, 425. "Dewey J.: The counts in this indictment are not bad for duplicity. It is true that they set forth a breaking and entering in the night time, of a certain building therein described; but that allegation is only introduced as a part of the various acts charged to have been committed by the defendant, all which combined, authorize the charge of the specific offence made punishable by Rev. Statutes c. 133, s. 12. It is not unusual to find in a count properly framed, all the essential elements of a count for a minor offence, and presenting the objection of duplicity quite as strongly as the present case. Thus, in an indictment for murder or manslaughter, there is a full and technical charge of an assault and battery. In burglary, when an actual lar-

time of the same day, did attempt wilfully and maliciously to set fire to and burn, in the night time, a certain dwelling house there situate, of one C. D., and in such attempt did then and there break and enter a certain out-house, then and there situated, of the said C. D., and within the curtilage of said dwelling house, and did then and there procure and collect together certain shavings and combustible substances, and did then and there, in said out-house, set fire to, kindle and burn said shavings and combustible substances, with the intent then and there to set fire to and burn, in the night time, the dwelling house aforesaid, and towards the commission of such offence, but was then and there intercepted and prevented in the execution of the same, &c.

[*The second count alleged that the defendant, at the time and place mentioned in the first count, attempted to set fire to and burn, in the night time, a certain shop of said C. D., within the curtilage of his dwelling house, and in such attempt broke and entered said shop, and there procured and collected shavings, &c., and set fire to, kindled and burned them in said shop, with intent, in the night time, to set fire to and burn said shop, but was intercepted and prevented.*

The third count was like the second, except that the wood building was substituted for shop, and it was not alleged that said building was within the curtilage of said C. D.'s dwelling house].

Burning a stable.(*k*)

That W. D., late, &c., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on, &c., at the county aforesaid, a certain stable of one T. F., containing then and there one ton of hay there situate, feloniously, maliciously and voluntarily did set fire to, and the said stable and the hay therein contained as aforesaid, did then and there feloniously, maliciously and voluntarily burn and consume, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

ceny is alleged as perpetrated after entry, there is a technical charge of larceny; but if connected with the actual breaking and entering, and set forth in the same count, the count is not bad for duplicity. In an indictment for a battery, an assault preceding the battery, is alleged, and in sufficiently technical terms, but the count is good for a battery, and not objectionable for duplicity. In the present case, the propriety of setting forth the various acts of the defendant, connected with the attempt to set fire to the building, is quite obvious; the statute itself making the crime to consist in attempting to commit an offence prohibited by law, and in such attempt doing any act towards the commission of such offence; Rev. Stats. *ubi sup.* The various acts of the defendant done in the attempt to set fire to the building, were properly set forth in this indictment, and the objection of duplicity is not well sustained.

"The next objection relied upon is that of a variance between the proof and the indictment, in the matter of the ownership of the building attempted to be set on fire. The indictment alleged the same to be in one Bernard Walmire. The proof was, that said Walmire was joint lessee with another person. This might have been a fatal variance, but for the provision in the Rev. Stat. c. 133, s. 11. This entirely obviates the objection.

"The provision is, that in the prosecution of any offence affecting any real estate, it shall be a sufficient allegation, and not deemed a variance, if it be proved on the trial that any part of such estate was in the person alleged in the indictment to be the owner thereof."

(*k*) This count was framed in 1791, by Jared Ingersoll Esq., at the time attorney-general of Pennsylvania. See count next but one preceding.

CHAPTER IV.

ROBBERY.

General frame of indictment at common law.(*a*)

That A. B., &c., in the highway there, in and upon one E. F. there being,(*b*) feloniously did make an assault, and him the said E. F., in bodily fear(*c*) and danger of his life in the highway aforesaid, then and there feloniously did put, and one gold watch of the value of (*insert goods taken as in larceny*), of the goods and chattels of the said E. F. from the person, and against the will of the said E. F. in the highway aforesaid, then and there feloniously and violently did seize, take and carry away, against, &c. (*Conclude as in book* 1, *chap.* 3).

For a capital robbery, the prisoner being armed with a dangerous weapon, and actually striking and wounding the person assaulted and robbed; on the latter clause of the first section of Mass. statute of 1818, *c.* 124.

That T. G. and J. B., of, &c., on, &c., at, &c., in and upon one C. C. feloniously did make an assault, and sundry bank bills, &c., of the value of dollars, of the moneys and property of him the said C. C., from the person and against the will of him the said C. C., then and there feloniously and by force and violence, did rob, steal, take and carry away, and that they the said T. G. and J. B., at the time of committing the assault and robbery aforesaid, were then and there armed with a certain dangerous weapon, made of iron, to wit, a pistol, and being then and there so as aforesaid armed, they the said T. G. and J. B. with the dangerous weapon aforesaid, him the said C. C., in and upon the face and head of him the said C. C., then and there feloniously did actually strike and wound, and with force and violence did then and there feloniously throw him on the ground, against, &c., and contrary, &c.(*d*) (*Conclude as in book* 1, *chap.* 3).

(*a*) For this form, see Stark. C. P. 441.

(*b*) It is essential to aver, that the assault be laid as feloniously made; Wh. C. L. 101; Stark. C. P. 99.

(*c*) It is necessary to aver, that the property was taken with violence from the person, and against the will of the party; Fost. 128; 1 Hale 534; Leach 229. "The allegation that the party was put in fear is of modern introduction; and in Donally's case, Leach 229, it was observed by the judges, that no technical description was necessary, provided it appeared on the whole, that the offence had been committed with violence, and against the will of the party. And in Smith's case, East P. C. 783, the prisoner was charged with assaulting the prosecutor with force and arms, and putting him in corporal fear, and taking a sum of money from his person, against his will; it was objected that the taking ought to have been alleged to have been done violently, but all the judges agreed, that a robbery was sufficiently described, and that Lord Hale (1 Hale 534), was inaccurate in his expression;" Stark. C. P. 442.

(*d*) This form, to which no exception was found in Com. v. Gallagher, 6 Met. 565, is but little varied from that given by Mr. Davis, p. 151. The allegation in brackets is perhaps surplusage, and in the last named case it was held that the general averment of wounding in the indictment was not sustained by evidence of a slight scratch given, nor that of striking by evidence of a pulling down by the action of the hands round the prosecutor's neck.

CHAPTER V.

LARCENY.

General frame of indictment at common law.

THAT A. B., one hat,(*a*) of the value of one dollar,(*b*) of the goods and chattels of C. D.,(*c*) then and there being found, feloniously did steal, take and carry away.(*d*) (*Conclude as in book* 1, *chap.* 3).

(*a*) The articles alleged to be stolen should be described specifically by the names by which they are commonly known; and their number, quantity and value set forth; Wh. C. L. 89. A lumping description will not do; but each individual article must be individually set forth; thus, "twenty wethers and ewes" would be bad for uncertainty; the actual number of each should be stated; 2 Hale 183; Archbold's C. P. 9th ed. 45. But when the articles are of the same kind they can be joined numeratively, as "six pair of shoes of the value, &c., one hat of the value, &c.; Wh. C. L. 89. "Six handkerchiefs," is good though the handkerchiefs were in one piece, the pattern designating each; 6 Term R. 267; 1 Ld. Raym. 149. It has been held enough to say, "one hide of the value," &c.; State *v.* Dowell, 3 Gill & J. 310; "one book," &c., without describing its name; State *v.* Logan, 1 Mo. 377; "one shovel plough;" State *v.* Sansom, 3 Brevard 5; "and a parcel of oats;" State *v.* Brown, 1 Dev. 137. The proof as to the description of articles must correspond with the allegation; but, as to the number, quantity or value, a variance between the statement and proof as will be seen, is wholly immaterial; R. *v.* Johnson, 3 M. & S. 148, 539. If a statute makes a *distinction* between things belonging to the same class, or commonly comprehended within one general term, it is essentially necessary to indicate the particular thing, and the general term will not be sufficient; R. *v.* M'Dermott, R. & R. 356; R. *v.* Duffin, *ib.* 365.

Where a statute, 15 Geo. II. c. 34, specified "lambs" as well as "sheep," and the indictment was for stealing sheep, evidence of stealing lambs was held not to support it; R. *v.* Loom and others, 1 Mood. C. C. 160; R. *v.* Cook, 2 East P. C. 616. A charge of stealing "one sheep" is not supported by proof of stealing an animal under a year old, called a "lambteg;" it should have been laid "one lamb;" R. *v.* Birkett, *supra;* though in Delaware a contrary ruling was had; State *v.* Tootle, 2 Harringt. 541. (A charge of stealing lambs is supported by proof of finding the carcasses in the owner's ground, and only the skins carried away; R. *v.* Rawlins, 2 East P. C. 617). It was long held in 7 and 8 Geo. IV. c. 29, s. 25, that an indictment for stealing a sheep would not be supported by proof of stealing a ewe, because that statute specifies "ewe, ram and lamb," as well as "sheep;" R. *v.* Puddifoot, *ib.* 247; and "sheep" in that act means "wether" only; R. *v.* Birkett, 1 C. & P. 216. But a "rig sheep" was held well described as "one sheep; R. *v.* Stroud, 6 C. & P. 535, Alderson B.; and now by a later decision, where the sex of the stolen animal could not be ascertained from inspecting those parts of the skin and flesh which remained, an indictment charging the stealing of a sheep was held sufficient, even assuming that the sheep stolen was not a wether, but "a ram, ewe or lamb;" for those words may be rejected, the word "sheep" in the act being a generic term; R. *v.* M'Culley, 2 Mood. C. C. 34. Under the Tennessee statute, in which "gelding" and "horse" are distinguished, evidence of stealing the former, will not support an indictment for stealing the latter; Tulley *v.* State, 3 Humph. 323; though it would seem that "*equus*" in the Latin pleadings in trover was satisfied by proof of *a gelding;* Gravely *v.* Ford, Ld. Raym. 1209. Where the larceny of dead animals is charged, if the animal has another appellation when living from when dead, or if it is governed by a different law of property, it must be laid as dead, otherwise it will have been presumed to have been alive, and the variance will be fatal; R. *v.* Puckering, 1 Mood. C. C. 242; Wh. C. L. 91.

The principle is familiar, that no matter how many distinct articles are contained in the indictment, the proof of the stealing of the one only will be enough to support a conviction; Wh. C. L. 91; Dick. Q. S. 6th ed. 222; *post*, p. 193, n. *f.*

Larceny does not lie for a thing which is not the subject of determinate property, as

waifs, treasure trove, &c., Wh. C. L. 391; though deerskins, hung up in an Indian camp, Pa. *v.* Becomb, Add. 386; and clothing, found on a dead body, on shore, from a wreck, are not subject to this rule; Wenson *v.* Sayward, 13 Pick. 402.

The goods must be personal goods, and of intrinsic value in which some one has a property, and they must not be connected with lands or buildings at the time of taking. *They must be things of intrinsic value;* and, therefore, if they are valuable only as evidence of claims or demands, or title to land, as notes, orders, bills, or deeds, they are not at common law, the subject of larceny, although protected by statute, Arch. C. P. 9th ed. 165; Wh. C. L. 392; State *v.* Tillery, 1 N. & M'C. 9; Cress *v.* State, 1 Port. 83; State *v.* Wilson, 2 Tr. Con. S. C. R. 49; State *v.* Holbrook, 13 Johns. 90; R. *v.* Westbeer, Stra. 1133; East P. C. 596. In the last case the writing stolen concerned the realty; but stealing the parchment on which a record, &c., of a court of justice *not* concerning the realty is written, is now indictable in England as a misdemeanor by the enactments of 7 and 8 Geo. IV. c. 29, s. 21, (see R. *v.* Walker, 1 Mood. C. C. 155), and was previously indictable as a larceny at common law if stated as so much parchment; *ib.* It seems that where the evidence fails to support a verdict in a count charging the larceny of the instrument under its technical description, there may be a conviction on a count charging the larceny of a piece of paper; R. *v.* Perry, 1 C. & K. 725. So it is no larceny to take animals which are regarded as of a base nature, as dogs, cats, foxes, monkeys and ferrets, although domesticated, which do not directly or indirectly serve for food, and the value of which is merely accidental or imaginary; Hawk. b. 1, c. 33, s. 36; and, accordingly, it has been held, that an indictment for stealing "five live tame ferrets confined in a hutch," could not be supported, although it was proved that the animals were tame, and had been sold by the prisoner for nine shillings; R. *v.* Searing, R. & R. 350. Dogs, however, when taxed, are subject in Pennsylvania to a different rule; Wh. C. L. 388. Bees, which when confined in a hive are protected, cease to be so when unreclaimed, though they may happen to be confined in a tree by the owner of it; Waleis *v.* Mease, 3 Binn. 546.

They must be things in which some one has a property; and, therefore, animals *feræ naturæ and unreclaimed*, as deer in a forest, conies in a warren, a marten when caught in a trap in the woods, Norton *v.* Ladd, 5 N. Hamp. 203, fish in the sea or in rivers, game and wild fowl, unless domesticated, are not the subjects of larceny; 1 Hale 510. A reclaimed hawk is the subject of larceny, if known to be so; 1 Hale 512. So are swans, though at large in a public river, if lawfully marked, or whether marked or not, if in a private water, Dalt. c. 156. But when appropriated and confined, *e. g.* fish in a trunk or net, partridges or pheasants in a meadow, deer so enclosed in a park as to be taken out at pleasure; 1 Hale 511; 1 Hawk. c. 33, s. 39; or so tamed as to be habituated to return to a place provided by the owner, these animals being "under propriety," become the subject of larceny, as for instance a dove, when in its master's dove cote; Com. *v.* Chace, 9 Pick. 15; R. *v.* Brooks, 4 C. & P. 131. When killed, their flesh and skin are, in like manner, the property of the lawful possessor. On the same principle a man may be indicted for stealing ice when stowed away in an ice house for domestic use; Ward *v.* People, 3 Hill N. & R. 395; 6 *ib.* 144.

They must be things unconnected with land or buildings at the time of the taking, or no larceny will be committed at common law by their being severed and immediately removed. Thus it was no larceny to dig and carry away minerals from the earth, to pull down and carry away any part of a building; to cut, gather and take corn and fruit, or to fell trees; 1 Hale 509, 510. But if any of these things be at one time severed by the offender from the land, and removed by him at another time, though the severance was by the offender himself, so that the severance and the removal cannot be regarded as one continued act, the removal will be a larceny. Thus, if coal, &c., be raised from a mine in day time, and laid on the surface of the ground at the mouth of the pit, and carried away at night by the same party, or if corn be cut, or fruit gathered, or timber felled, at one time, and after an interval be carried away, without such a continued presence of the thief as to make the taking and carrying away one continued act; 1 Hale 510; or if copper be severed from the brickwork in which it is set during the day time, and carried off at night by the same party; Lee *v.* Risdon, 7 Taunt. 191, these will be larcenies; Dickinson's Q. S. 6th ed. 238.

(*b*) Some value must be attached to the article stolen, or the indictment will be bad; Wh. C. L. 90, 405; Rosc. Cr. Ev. 512; People *v.* Payne, 6 Johns. 103; State *v.* Tillery, 1 N. & M'C. 9; People *v.* Wiley, 3 Hill N. Y. R. 194; State *v.* Wilson, 1 Port. 110; State *v.* Bryant, 2 Car. L. R. 269; State *v.* Thomas, 2 M'C. 527. Thus indictments charging the defendant with stealing a thing destitute of value, or to which no value is assigned, will be quashed; State *v.* Bryant, 2 Car. L. R. 617; Wilson *v.* State, 1 Port. 118. It is best to give a separate value to each distinct article included in an indictment, as otherwise the offence must be made out as to all the articles, as the grand jury has ascribed a

value to all of them collectively; R. *v.* Forsyth, R. & R. 274. If value be given to some of the articles introduced, and not to the remainder, judgment will be arrested as to the part to which no value is given; Com. *v.* Smith, 1 Mass. 245; People *v.* Wiley, 3 Hill N. Y. R. 194. As has just been noticed, where there is a difficulty in the description of a note or other instrument stolen, it is advisable to insert a count for the larceny of "one piece of paper of the value of one penny," and it would seem that this assignment of value is sufficient, (*see last note*). In those states where the distinction between grand and petty larceny is abolished, it is immaterial whether the goods be proved to be of the value laid in the indictment or not; Arch. C. P. 10th ed. 49, 101, 211.

(*c*) As has been already observed, it is of necessary importance that the name of the party whose goods are alleged to have been stolen, should be given correctly; see *ante*, p. 10; Arch. C. P. 10th ed. 176. In applying this principle, there are one or two points which it is essential to keep in mind in determining the question of property in each particular case.

1. Where goods are stolen out of the possession of a bailee, they may be described in the indictment as the property of either bailor or bailee; Wh. C. L. 404; Arch. C. P. 10th ed. 212; State *v.* Somerville, 21 Maine 586; State v. Grant, 22 Maine 171. The cases usually given as an illustration of this rule are those of goods left at an inn; R. *v.* Todd, 2 East P. C. 658; cloth given to a tailor to manufacture and linen to a laundress to wash; R. *v.* Packer, 2 East P. C. 658; chattels entrusted to a person for safe-keeping; R. *v.* Taylor, 1 Leach 356; R. *v.* Slatham, *ib.*; see R. *v.* Ashley, 1 C. & K. 198; goods levied on by a constable and in his custody; People *v.* Palmer, 10 Wend. 165; in each of these cases the property may be laid as the goods and chattels of the bailee or of the owner, at the option of the prosecutor; see 2 Hale 181; 1 *ib.* 613; 1 Hawk. c. 33, s. 47; R. *v.* Bird, 9 C. & P. 44. But the bailee of a bailee has no such special property as would authorize the goods being laid as his. Thus an indictment will be vicious which lays the property of goods taken in execution in the bailee or *receipter* of the sheriff; Com. *v.* Morse, 14 Mass. 217; Norton *v.* People, 8 Cow. 137. The property also cannot be laid in one who has neither had the actual nor constructive possession of the goods, and thus where the person named as owner was merely servant to the real owner, or where the property was laid in the master who actually had never seen or received the goods, and where in fact the servant had been specially entrusted with them, the ownership was held to be wrongly laid; R. *v.* Hutchinson, R. & R. 412; R. *v.* Ruddick, 8 C. & C. 237.

2. Goods stolen from a dead person, such as the coffin or shroud, must be laid in the executors and administrators, if there be such, and if not, in the person who defrayed the expenses of the funeral; Wh. C. L. 404.

3. Goods stolen from a married woman must be invariably laid as the property of her husband, even though she lives in separation from him, with an income vested in trustees for her private use; Wh. C. L. 404; Arch. C. P. 10th ed. 213. But where goods were stolen from a singlewoman, who afterwards before indictment married, it was held that the property was rightly laid in her by her maiden name; R. *v.* Turner, 1 Leach 536.

4. At common law where the owners form an unincorporated partnership, the names of all of them must be correctly stated; Wh. C. L. 405; and even where the property was temporarily vested in one of them, the names of all the members of the firm must be set out; Hogg *v.* State, 3 Blackf. 326; R. *v.* Shovington, 1 Leach 513; R. *v.* Beacall, 1 Mood. C. C. 15. But if the goods of a corporation are stolen, the property must be charged to be in the corporation in its corporate name, and not in the individuals who comprise it; R. *v.* Patrick, 2 East P. C. 1059; 1 Leach 253; Arch. C. P. 10th ed. 214. It is not necessary, it seems, to aver the political existence of the corporation, as that is a matter for evidence, and after verdict it may be inferred from the corporate name; Lithgow *v.* Com., 2 Va. Cases 296.

5. Necessaries furnished by a parent to a child, may be laid as the property of either parent or child; Arch. C. P. 10th ed. 213; 2 East P. C. 654; though it is safer to allege them to be the property of the child; R. *v.* Forsgate, 1 Leach 463; R. *v.* Hughes, C. & M. 593.

6. Where the owner is unknown it is to be so stated; Com. *v.* Morse, 14 Mass. 217; Com. *v.* Manley, 12 Pick. 173; 1 Hale 512; Wh. C. L. 71, 403; though if the names of the owners appear on the trial to have been capable of ascertainment at the finding of the indictment, the defendant must be acquitted; R. *v.* Walker, 3 Camp. 264; R. *v.* Robenson, Holt. C. N. P. 595.

(*d*) Where the subject of the larceny is live cattle, "steal, take and *lead* away," may be substituted. "*Take*," however, is essential; 2 Hale 184.

Stealing the property of different persons.

That defendant, on &c., at, &c., one(*e*) silver watch of the value of forty shillings, of the goods and chattels of E. T., two hats of the value of twenty shillings, and two(*f*) waistcoats of the value of six shillings, of the goods and chattels of(*g*) one G. H., then and there being found, feloniously did steal, take and carry away,(*h*) against, &c. (*Conclude as in book* 1, *chap.* 3).

Larceny at a navy yard of the United States.

That A. B., &c., on, &c., at, &c., and within the navy yard adjoining the City of Brooklyn, in the County of Kings, in the Southern District of New York aforesaid, the site of which said navy yard had been before the said day of in the year last aforesaid, ceded to the said United States, and was on the said last mentioned day, then and there under the sole and exclusive jurisdiction of the said United States, feloniously did take and carry away with intent to steal and purloin, (*state definitely the things taken, and the value of each separately*), said (*as before*), then and there being the property of one against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Like first count, substituting*): "then and there being of the personal goods of one ," *for* "then and there the property of one ."

Third count.

(*Like second count, substituting*): "being then and there the personal goods of some person or persons to the said jurors unknown," *for* "then and there being of the personal goods of one ."

(*For final count, see ante, p.* 17, 97 *n*, 123 *n*).

Larceny on the high seas.

That A. B., &c., on, &c., at, &c., in and on board of a certain American vessel, being a called the belonging in whole

(*e*) As to the description of the property stolen, its value and ownership, see *ante*, p. 191, Stark. C. P. 213. The owner of goods stolen, is not in strictness entitled to the restitution of any which are not specified in the indictment; East P. C. 288. If a thief sell the goods the prosecutor is entitled to the money; Hanberrie's case, Cro. Eliz. 661; 1 Hale 542.

(*f*) Although in general, the value of each different individual article stolen, should be specified, p. 190, 2 Hale 183, yet where several articles of property of the same nature and kind are stolen at the same time, as several sheep or handkerchiefs, it is the common practice to allege their value cumulatively, as ten handkerchiefs of the value of twenty shillings. And unless the defendant be convicted of stealing part only, no uncertainty can arise, but if the jury find that he stole one only, then it may be doubtful whether the offence be grand or petit larceny, since they were not alleged to be of the value of two shillings each, but in such case the difficulty might perhaps be obviated by finding the value specially.

(*g*) Where the felonies are completely distinct, they ought not to be joined in the same indictment; see p. 12; but where the transaction is the same, as where the property of different persons is taken at the same time, there seems to be no objection to the joinder.

(*h*) These words are essential, *ante*, p. 192; an I, in an indictment of this nature, it is unnecessary further to specify the means of gaining possession of the property; Stark. C. P. 191; Leach 273, 305, 730.

An indictment for petit larceny differs from one for grand larceny in no other respect than in laying the value at one shilling or under.

or in part to a certain person or persons, then and still being a citizen or citizens of the United States of America, whose name or names are to the said jurors unknown, on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, feloniously did take and carry away (*state the nature of the things taken, their particular name and value*), with intent to steal or purloin the same, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Like first count, inserting after the specification of the articles taken, and before*): "with intent to steal or purloin the same," "of the personal goods of some person or persons to the said jurors unknown."

Third count.

(*Like second count, substituting*): "of the personal goods of one ," *for* "of the personal goods of some person or persons to the said jurors unknown."

(*For final count, see ante, p.* 17, 97 *n*, 123 *n*).

Larceny on the high seas. Another form.

That A. B., &c., on, &c., at, &c., in and on board of a certain vessel being a called the belonging and appertaining, in whole or in part, to a certain person or persons then and still being a citizen or citizens of the United States of America, whose names are to the said jurors unknown, on the high seas, out of the jurisdiction of any particular state of the said United States, within the admiralty and maritime jurisdiction of the said United States of America, and of this court, feloniously did take and carry away, with intent to steal and purloin (*here state particularly each article, and the value of each separately*), of the personal goods of some person or persons to the jurors aforesaid as yet unknown, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first count, substituting*): "belonging and appertaining in whole or in part to one then and still being a citizen of the United States of America," *for* "belonging and appertaining in whole or in part to a certain person or persons then and still being a citizen or citizens of the United States of America, whose names are to the said jurors unknown."

Third count.

(*Like first count, substituting*): "of the personal goods of one ," *for* "of the personal goods of some person or persons to the jurors aforesaid as yet unknown."

Fourth count.

(*Like second count, substituting*): "of the personal goods of one ," *for* "of the personal goods of some person or persons to the jurors aforesaid as yet unknown."

(*For final count, see ante, p.* 17, 97 *n*, 123 *n*).

Larceny in an American ship at the Bahama islands.

That, &c., on board of a certain vessel, to wit, a sloop, called the C. W., then and there belonging to S. P. W., J. C. B. and N. F., citizens of the United States, while lying in a place, to wit, Great Harbour in Long Island, one of the Bahama islands, within the jurisdiction of a certain foreign sovereign, to wit, the king of the united kingdom of Great Britain and Ireland, a certain J. P. M., otherwise called J. M., otherwise called P. M., late of the district aforesaid, mariner, then and there being a person belonging to the company of the said vessel, did take and carry away with an intent to steal and purloin certain personal goods of the said S. P. W., to wit, one quadrant of the value of twenty dollars, one reflecting semicircle of the value of twenty dollars, twenty-four lunar tables of the value of twenty-four dollars, one shaving box and glass of the value of five dollars, one chart of the value of one dollar, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Receiving, &c.

That, &c., on board of a certain vessel, to wit, a sloop called the C. W., then and there belonging to S. P. W., J. C. B. and N. F., citizens of the United States, while lying in a place, to wit, Great Harbour in Long Island, one of the Bahama islands, within the jurisdiction of a certain foreign sovereign, to wit, the king of the united kingdom of Great Britain and Ireland, the said J. P. M., otherwise called J. M., otherwise called P. M., then and there being a person belonging to the company of the said vessel, did then and there receive and buy certain goods and chattels that had been feloniously taken and stolen from a certain other person, to wit, the said S. P. W., at the district aforesaid, to wit, one quadrant of the value of twenty dollars, one reflecting semicircle of the value of twenty dollars, twenty-four lunar tables of the value of twenty-four dollars, one shaving box and glass of the value of five dollars, and one chart of the value of one dollar, he the said J. P. M., otherwise called J. M., otherwise called P. M., then and there knowing the same to be stolen, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see ante, p.* 19, 97 *n*, 123 *n*).

Larceny. Form in use in New York.

That A. B., &c., on, &c., at, &c., one leathern bucket of the value of three dollars, of the goods, chattels and property of one J. B., then and there being found, feloniously did steal, take and carry away, to the great damage of the said J. B., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in Pennsylvania.(*j*)

That A. M., late, &c., on, &c., one mare of the value of one hun-

(*j*) Com. *v.* M'Mickle, Sup. Ct. Pa., July T. 1828, No. 48. This case went up to the Supreme Court, after conviction in the Quarter Sessions of Delaware County, apparently for the purpose of testing the propriety of joining a count for the felony of larceny, with a

dred dollars, of the goods and chattels and property of J. C., then and there being found, then and there feloniously did steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Receiving stolen goods.

That the said A. M., on, &c., at, &c., the goods and chattels and property aforesaid, by some ill-disposed persons (to the jurors aforesaid yet unknown), then lately before feloniously stolen, taken and carried away, unlawfully, unjustly and for the sake of wicked gain, did receive and have, the said A. M. then and there well knowing the goods and chattels, moneys and property last mentioned, to have been feloniously stolen, taken and carried away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in New Jersey.

That A. B., &c., on, &c., at, &c., one hat of the value of one dollar, then and there being found, unlawfully did steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in South Carolina.

That A. B., on, &c., at, &c., one woollen jacket of the value of two dollars, of the proper goods and chattels of J. K., then and there being found, feloniously did steal, take and carry away, against, &c., (*Conclude as in book* 1, *chap.* 3.)

Second count.

That the said A. B., on, &c., at, &c., one other woollen jacket of the value of two dollars, of the goods and chattels of a certain person to the jurors aforesaid unknown, then and there being found, feloniously did steal, take and carry away, against, &c., (*Conclude as in book* 1, *chap.* 3).

Same in Michigan.

That J. K., &c., on, &c., at, &c., one gelding of the value of one hundred and twenty-five dollars, of the goods and chattels of one J. B., then and there being, feloniously did steal, take and lead away; against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Bank note in North Carolina.(*k*)

That T. B., &c., on, &c., at, &c., one twenty dollar bank note on the State Bank of North Carolina,(*l*) of the value of twenty dollars, of the goods and chattels, moneys and property of A. B., then and

count for the misdemeanor of receiving stolen goods. The judgment on the verdict was sustained. The form in the text is the one ordinarily used in practice in Pennsylvania. See also Com. *v.* Vandyke, March Term, 1828, No. 32, where the same point was ruled.

(*k*) This form seems required by the court; State *v.* Rout, 3 Hawks 618.

(*l*) Or in another case, "a certain twenty dollar bank note, issued by the President and Directors of the Bank of Newbern;" State *v.* Williamson, 3 Murph. 216.

there being found, then and there feloniously did steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Bank note in Pennsylvania.(*m*)

That T. B., &c., on, &c., at, &c., one promissory note for the payment of money, commonly called a bank note, purporting to be issued by the (*president and directors of the bank of*, &c., *as the case may be*), for the payment of five dollars, being still due and unpaid, of the value of five dollars of the goods and chattels, moneys and property of A. B. then and there being found, then and there feloniously did steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Bank note in Connecticut.(*n*)

That T. B., &c., on, &c., at, &c., thirteen bills against the Hartford Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank in this state, of the value of one hundred and thirty dollars, of the goods and chattels, moneys and property of A. B. then and there being found, then and there feloniously did steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Bank note in Tennessee.(*o*)

That defendant on, &c., at, &c., one bank note of the Planters' Bank of Tennessee, payable on demand at the Mechanics' and Traders' Bank at New Orleans, of the value and denomination of five dollars, the bank note, personal goods and chattels of J. B., then and there being, feloniously did steal, take and carry away, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

An account book in Massachusetts.(*p*)

That defendant, at, &c., on, &c., one certain original book of accounts concerning money due, of the value of twenty dollars, one receipt, release of defeasance, containing an acquittance of money due, of the value of six dollars, and sundry bank bills, amounting together to the sum of eleven dollars, and of the value of eleven dollars, of the goods and chattels of one A. B., in the dwelling house of

(*m*) This form is the one usually employed, and is in conformity with the views of the Supreme Court; M'Laughlin *v.* Com., 4 R. 464; Com. *v.* M'Dowell, 1 Browne 359; Stewart *v.* Com., 4 S. & R. 194; Spangler *v.* Com., 3 Binn. 533.

(*n*) This form was sanctioned in Salisbury *v.* State, 6 Conn. 101.

(*o*) State *v.* Hite, 9 Yerg. 358.

(*p*) Com. *v.* Williams, 9 Met. 273. In this case it was held, that a memorandum book, kept by a person who works for a tailor by the piece and in which entries are made of the names of the persons owning the garments worked upon, and the prices of the work, is a "book of accounts for or concerning money or goods due, or to become due, or to be delivered," within the Revised Statutes, c. 126, s. 17, and is the subject of larceny. And such book, given by a tailor to the person who works for him, for the purpose of such entries being made therein, is the property of such person, and not the tailor.

one C. D. there situate, in her the said A. B.'s possession then and there being, did then and there, in said dwelling house, in the day time, feloniously steal, take and carry away.

Breaking and entering a vessel in the night time and committing a larceny therein, under the Massachusetts Revised Statutes.(q)

That C. D., &c., on, &c., at, &c., a certain vessel of one A. B., called the Sally of Boston, within the body of the said county of S., then and there lying and being, in the night time, did break and enter, and one trunk of the value of five dollars, and (*here state the kind and value of each article*), of the goods and chattels of one E. F., in the trunk aforesaid then and there contained, and in the vessel aforesaid then and there being found, feloniously did steal, take and carry away in the vessel aforesaid, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Breaking and entering into a dwelling house in the day time, not being armed, &c., under the Massachusetts Revised Statutes.(r)

That A. B., &c., on, &c., at, &c., the of one there situate, in the time of said day, did break and enter with intent then and therein to commit the crime of larceny by then and there feloniously stealing, taking and carrying away the goods, chattels and personal property of the said therein then and there found, the said then and there not being armed, nor arming himself in said with a dangerous weapon, nor making any assault upon any person then being lawfully therein, the owner, nor any other person lawfully therein not being put in fear, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Breaking and entering a shop in the night and committing a larceny therein, on the fourth section of the statute.(s)

That C. D., &c., on, &c., at, &c., the shop of one A. B., there situate, (not adjoining to, and occupied with a dwelling house), in the night time did break and enter, and sundry bank bills, amounting together to the sum of one hundred dollars, and of the value of one hundred dollars, and (*here insert all the articles stolen, alleging the kind, number and value of each*), of the goods and chattels of the said A. B., then and there in the shop aforesaid being found, feloniously did steal, take and carry away in the shop aforesaid, against, &c. (*Conclude as in book* 1, *chap.* 3).

(q) Davis' Prec. 143.

(r) This is the form in use in the County of Suffolk.

(s) See Davis' Prec. 142. The coupling in this form of the "breaking and entering" with the larceny, is not duplicity; Com. *v.* Tuck, 20 Pick. 356. It was first held essential, however, that the averment in brackets, which was omitted by Mr. Davis, should be inserted, *ib.*; but the court since appears to have settled into a contrary doctrine; Devoe *v.* Com., 3 Met. 316; Phillips *v.* Com., *ib.* 588. This indictment, it is intimated in the latter case, would be good under Revised Statutes, c. 126, s. 11.

For committing a larceny in the day time in a dwelling house, on the sixth section of the statute.(*t*)

That C. D., &c., on, &c., at, &c., two sheets of the value of six dollars, one surtout coat of the value of ten dollars, and one hat of the value of five dollars, of the goods and chattels of one A. B., then and there in the dwelling house of him the said A. B.(*u*) being found, feloniously did steal, take and carry away in the dwelling house aforesaid, against, &c. (*Conclude as in book* 1, *chap.* 3).

Larceny and embezzlement of public property, on the statute of the United States of the 30*th April,* 1790, *s.* 26.(*w*)

That A. B., &c., on, &c., at, &c., being a person having the charge and custody of certain arms and other ordnance and munitions of war belonging to the United States, certain arms, to wit, ten muskets,(*x*) of the value of one hundred dollars, of the property, goods and chattels of the said United States, in the charge and custody of the said A. B. then and there being, wittingly, advisedly and of purpose to hinder and impede the service of the said United States, and for lucre and gain, did embezzle, steal,(*y*) purloin and convey away, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Against an assistant postmaster for stealing money which came into his hands as assistant postmaster, on the act of 3*d March,* 1825, *s.* 21.(*z*) *See Gordon's Digest, art.* 3611, *p.* 704.

That A. M., &c., on, &c., at, &c., he the said A. M. being then and there a person employed in one of the departments of the post-office establishment of the United States of America, to wit, as an assistant of the deputy postmaster of the post-office, legally established and appointed by the postmaster-general of the United States, within the said town of Granby, feloniously did steal, take and carry away sundry bank notes, amounting together to the sum of two hundred and seventy dollars, and of the value of two hundred and seventy dollars, of the goods, chattels and property of one N. P. and one A. M.; which said bank notes were then and there feloniously taken and stolen as aforesaid by the said A. M. out of a certain letter, which

(*t*) Davis' Prec. 142.

Similar forms are to be adopted for breaking and entering in the day time the other buildings, ships or vessels, mentioned in this section, following the description of the buildings or vessels as in the statute.

(*u*) If the goods stolen belong to one person, and the dwelling house in which they are stolen belongs to another person, it must be so alleged in the indictment. The same form as the last is to be adopted for larcenies in the other buildings, ships or vessels mentioned in this section, the allegation in the indictment being made conformable to the fact. *Ib.*

(*w*) Davis' Prec. 149. Gordon's Digest, art. 3641, p. 714. See *post*, "Embezzlement."

(*x*) The same form is to be adopted as to all the other articles and property enumerated in the statute.

(*y*) This section of the statute is drawn in a very incorrect manner. The word *purloin* is used in the former part of it, and the word *stolen* in the latter part for the same purpose.

(*z*) This indictment is given by Mr. Davis in his Precedents, p. 149, and was drawn by Professor Ashmun of the law school in Cambridge. The case was twice tried without obtaining a verdict.

came to the hands and possession of him the said A. M. in his said capacity and employment as such assistant postmaster as aforesaid, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Larceny of a slave in Missouri.(*zz*)

That J. K., on, &c., at, &c., one negro boy, slave for life, named J., aged about twenty years, did steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in Alabama.(*a*)

That defendants did unlawfully and feloniously inveigle, steal, carry and entice away two negro slaves, the property of F. M. B, with a view, then and there, feloniously and unlawfully to convert the said slaves to the use of them the said H. B., J. M'K. and J. *alias* J. M.(*b*)

Same in North Carolina.(*c*)

That J. C. H., &c., on, &c., at, &c., one negro man, slave, by the name of E., then and there being the property of N. D., of the value of fifty dollars, feloniously did steal, take and carry, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Seducing a slave with intent to sell, under the North Carolina act of 1779.

That the said J. C. H., &c., on, &c., at, &c., one other man slave named E., then and there being the property of, &c., and then and there in the possession of, &c., feloniously by seduction, violence and other means, him the said man E., slave as aforesaid, against the will and consent of her, &c., did take and convey away from the possession of her the said owner, with an intention the said slave to sell, dispose of and convert to his own use, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*zz*) Kirk *v.* State, 6 Mo. 471.

(*a*) State *v.* Mooney, 8 Ala. 328. Upon this indictment it was held that the words inveigle, entice, steal and carry away in the penal code, (Clay's Dig. 419, s. 18), denote offences of precisely the same grade, and may be included in the same count of the indictment; and that upon proving either, the state was entitled to a conviction.

The offence of inveigling or enticing away a slave, is consummated, it was said, when the slave, by promises or persuasions, is induced to quit his master's service, with intent to escape from bondage as a slave, whether the person so operating on the mind and will of the slave, is, or is not present when the determination to escape is manifested by the act of leaving the master's service, or whether he is or is not sufficiently near to aid in the escape if necessary.

(*b*) The prisoner demurred to the indictment, and his demurrer being overruled, pleaded not guilty.

(*c*) State *v.* Haney, 2 Dev. & Bat. 390. "An indictment," it was ruled in this case, "under the act of 1779, (Rev. c. 142), which charges the seduction of a slave to be with an intent 'to sell, dispose of and to convert to his own use,' is sufficient. For the felony created by the act, is sufficiently described by charging the seduction to be with an intent 'to sell;' and the words, 'dispose of and appropriate to his own use,' do not extend the intention imputed, beyond that of an intention to sell, and at the worst, are only redundant. And charging the taking to be 'by violence, seduction and other means,' is not repugnant, as both violence and seduction may have been used; but if it were double, it is aided by a verdict finding the taking to be by a seduction only. The words 'other means,' if used alone would be too indefinite; but taken in connexion with the other words, 'by violence and seduction,' they are merely superfluous." A count on the act of 1779, for the seduction of a slave, need not charge him to be of any value.

CHAPTER VI.

RECEIVING STOLEN GOODS.

General frame of indictment.(a)

That A. B., in the county aforesaid, one silver tankard of the value of two pounds, of the goods and chattels(b) of one J. M., before then feloniously stolen,(c) taken and carried away, (feloniously)(d) did receive and have, (he the said A. B. then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away), against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For form in U. S. courts, see ante, p.* 195).

Receiving goods stolen by a slave.(e)

That a certain negro A., the slave of S. C., late of Philadelphia County, spinster, the tenth day of May, A. D. 1769, at the county aforesaid, and within the jurisdiction of this court, with force and arms, had feloniously stolen, taken and carried away, one black velvet cloak of the value of forty shillings, of the goods and chattels of the said S. C., against, &c. And that M. M., late of Philadelphia

(a) This offence, so far as it may be considered as a corollary of larceny, is treated of in chapter v., *ante*. The form in the text, with the accompanying notes, though based on the English statute, is useful for reference generally; that statute having been substantially re-enacted throughout the union.

(b) A variance in this particular will be fatal; People *v.* Wiley, 3 Hill N. Y. R. 194. If, however, as in larceny, the crime be established in respect to only a single article, though the indictment describe several, the defendant may be convicted. Thus where, on the trial of an indictment which mis-described a part of the goods, but contained a sufficient description of the residue, the jury were instructed by the court below, that there was no mis-description whatever, and a general verdict of guilty was rendered. It was held on review that the erroneous instruction constituted no ground for a new trial, inasmuch as it appeared by the bill of exceptions that the question of the defendant's guilt was identical in respect to the whole of the goods, he having received them, if at all, from the same person by a single act; People *v.* Wiley, 3 Hill N. Y. R. 194.

When the indictment states the larceny to have been committed by some persons to the jurors unknown, it is no objection that the grand jury at the same assizes find a bill for the principal felony, against J. S.; R. *v.* Bush, R. & R. 372.

(c) An indictment under the Tennessee statute, against receiving property knowing the same to be stolen, need not give the name of the principal felon; Swaggerty *v.* State, 9 Yerg. 338; and the same rule exists in England; Rex *v.* Jervis, 6 C. & P. 156. It is not essential in such case, to aver that the principal felon or thief had been convicted; *ib.* An indictment charging that a certain evil disposed person feloniously stole certain goods, and that C. D. and E. F. feloniously received the said goods knowing them to be stolen, was holden good against the receivers, as for a substantive felony; R. *v.* Caspar, 2 Mood. C. C. 101; 9 C. & P. 289.

The time and place, when and where the goods were stolen, need not be stated in the indictment; State *v.* Holford, 2 Blackf. 103; 1 Leach 109, 477.

(d) Of course where the offence is a misdemeanor, as in Pennsylvania, the word "feloniously" must be omitted.

(e) Drawn by Mr. Chew in 1769, attorney general of Pennsylvania, and sustained according to Mr. Bradford's memoranda, by the provincial Supreme Court.

County, and well knowing that the said negro A., the felony aforesaid, in form aforesaid had committed, afterwards, to wit, on the eleventh day of May, in the same year aforesaid, at the county aforesaid, and within the jurisdiction of this court, with force and arms, &c., the black velvet cloak aforesaid of the value of forty shillings, feloniously of and from the said negro A. did take and receive, against, &c. (*Conclude as in book* 1, *chap.* 3).

Form in use in Massachusetts against receiver of stolen goods.

That A. T., &c., on, &c., at, &c., one hat of the value of five dollars of the goods and chattels of C. D. then and there in the possession of the said C. D. being found, feloniously did steal, take and carry away, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That T. A., on, &c., at, &c., did abet and maintain him the said A. T. in committing and perpetrating the said felony and theft, and there, after the said goods and chattels were stolen, as aforesaid, knowingly did receive all the same goods and chattels of him the said A. T., knowing the same to have been stolen, taken and carried away as aforesaid, against, &c.(*f*) (*Conclude as in book* 1, *chap.* 3).

Same in New York.

That O. M. H., &c., at, &c., on, &c., one mare of the value of eighty dollars, of the goods and chattels of one B. M. by a certain ill-disposed person, feloniously did receive and have, he the said O. M. H. then and there well knowing the said goods and chattels to have been feloniously stolen, taken, carried and led away, to the great damage, &c.(*g*) (*Conclude as in book* 1, *chap.* 3).

Same in Pennsylvania.

That A. B., &c., on, &c., at, &c., one hat of the value of five dollars, of the goods and chattels, moneys and property of E. F., by C. D. then lately before feloniously stolen, taken and carried away, unlawfully, unjustly and for the sake of wicked gain did receive and

(*f*) This form is copied from the indictment in Com. *v.* Andrews, 2 Mass. 14. The goods happened to have been stolen in New Hampshire, and then to have been brought to Massachusetts, where the receiving took place. The only ground on which the conviction could be supported was that the carrying the goods into Massachusetts was one continuous larceny; and that the retention of possession when in the latter state, by being tacked on to the assumption of it in New Hampshire, was infected with the original felony. The conviction was supported by Mr. Sullivan, the attorney-general, solely on this reasoning; and was attacked by Mr. Otis with great vivacity and force, on the ground that the doctrine of asportation could not be applied to sovereign states. The court sustained the verdict, and its course was followed in Connecticut; State *v.* Ellis, 3 Conn. 185; Vermont, State *v.* Bartlett, 11 Verm. 650; Maryland, Cummins *v.* State, 1 Har. & J. 340; and North Carolina, State *v.* Brown, 1 Hay. 100. In Pennsylvania the rule is the contrary; Simmons *v.* Com., 5 Binn. 618; and so it was in New York before the revised statutes adopted the rules as laid down in Massachusetts. This, and the question, how far a conviction in one state makes a witness infamous in another, are the chief points in which the peculiarities of the federal system enter into the criminal law of the union.

(*g*) Hopkins *v.* People, 12 Wend. 76. It is not necessary to allege that any consideration passed between the receiver and the thief.

have (the said A. B. then and there well knowing the goods and chattels, moneys and property aforesaid, to have been feloniously stolen, taken and carried away), contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Receiving stolen goods from some unknown person, in Pennsylvania.(*h*)

That M. J., late of the said county, spinster, being a person of evil name and fame and of dishonest conversation, and a common buyer and receiver of stolen goods, on, &c., at, &c., one hundred yards of fine thread lace of the value of twenty-five pounds, of the goods and chattels of J. S. by a certain ill-disposed person to the jurors aforesaid yet unknown, then lately before feloniously stolen of the same ill-disposed person, unlawfully, unjustly and for the sake of wicked gain, did receive and have, she the said M. J. then and there well knowing the said goods and chattels to have been feloniously stolen, to the great damage of the said J. S., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in South Carolina.

That A. B., &c., on, &c., at, &c., one tin kettle of the value of one dollar, of the proper goods and chattels of E. F., by C. D. then lately before feloniously stolen, taken and carried away, of and from the said C. D., unlawfully, unjustly and for the sake of wicked gain, did buy and receive, the said A. B. then and there well knowing the aforesaid goods and chattels to have been feloniously stolen, taken and carried away; against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said A. B. on, &c., at, &c., one other tin kettle of the value of one dollar, of the proper goods and chattels of the said E. F. by a certain evil-disposed person, to the jurors aforesaid unknown, then lately before feloniously stolen, taken and carried away, of and from the said evil-disposed person, unlawfully, unjustly and for the sake of wicked gain, did buy and receive, the said A. B. then and there well knowing the aforesaid goods and chattels to have been feloniously stolen, taken and carried away; against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in Tennessee.(*i*)

That S. D. S., &c., on, &c., at, &c., two sides of upper leather, of the value of five dollars, of the goods and chattels of one M. H. B., then lately before feloniously and fraudulently stolen, did then and there receive and have, he the said S. then and there well knowing the said goods and chattels to have been feloniously and fraudulently stolen, taken and carried away, with intent to deprive the true owner thereof,(*j*) contrary, &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

(*h*) Drawn by Wm. Bradford Esq., at the time attorney-general of the commonwealth.
(*i*) This form was held good in Swaggerty *v.* State, 9 Yerg. 338.
(*j*) This allegation is vital; Hurell *v.* State, 5 Humph. 68.

Soliciting a servant to steal, and receiving the stolen goods.(*k*)

That E. D., &c., on, &c., at, &c., falsely, subtilly and unlawfully did solicit, entice and persuade one M. P., servant of W. S., of the same county, yeoman, secretly and clandestinely to take and embezzle divers goods and chattels of the said W. S., and to give and deliver such goods and chattels to her the said E., and that the said E. afterwards, the said third day of May, in the year aforesaid, at the county aforesaid, two pounds of coffee, one quarter of a pound of candles, one pound of soap, ten pounds of flour, one pound of bread, half a pint of rum, of the value of six shillings and six pence, lawful money of Pennsylvania, of the goods and chattels of the said W. S. by the said M., then lately before on the same day and year above mentioned, by the solicitation, incitement and persuasion of the said E., taken and embezzled, then and there falsely, knowingly, subtilly and unlawfully did receive, obtain and have, of and from the said M., to the great damage of the same W. S., to the evil example of all others in the like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER VII.

EMBEZZLEMENT.(*a*)

Against officer of the U. S. mint, for embezzling money entrusted to him.

That R. H., &c., on, &c., at, &c., then and there being an officer of the United States * charged with the safe-keeping, transfer and disbursement of public moneys, unlawfully and feloniously did convert to his own use, and embezzle a portion of the said public moneys entrusted to him the said R. H. for safe-keeping, transfer and disbursement, to wit, † the following coins of gold which had been struck and coined at the mint of the United States (*stating the coins*), altogether of the value of twenty-three thousand two hundred and thirty-eight dollars and sixty-one cents, the said coins of gold and the said

(*k*) See Index, tit. "Attempts to Commit Offences."

(*a*) (*Embezzlement at common law*). In general an indictment for a mere breach of trust, not amounting to larceny, will not lie at common law. But where this breach of trust is committed by a public officer misapplying the funds with which he is entrusted for the benefit of the public, he may be indicted for a misdemeanor in respect of his public duty. Thus an indictment will lie at common law against overseers for embezzlement, giving false accounts, or not accounting (see forms in 3 Chit. C. L. 701, *et seq.*), and against surveyors of highways for embezzlement of gravel.

coins of silver and the said coins of copper, being at the time of the committing of the felony aforesaid, the property of the United States of America, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first, except inserting at* * *the averment*): "to wit, a clerk of the mint of the United States, for the treasurer of said mint."

Third count.

That the said R. H. on, &c., at, &c., then and there being an officer of the United States, having the safe-keeping and disbursement of the ordinary fund for paying the expenses of the mint of the United States, and charged with the safe-keeping, transfer and disbursement of public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the public money entrusted to him the said R. H. for safe-keeping, transfer and disbursement, to wit, the following other coins of gold, which had been struck and coined at the mint of the United States, (*stating coins and concluding as in first count*).

Fourth count.

That the said R. H. on, &c., at, &c., then and there being an agent of the United States charged with the safe-keeping, transfer and disbursement of public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the public moneys entrusted to him the said R. H. for safe-keeping, transfer and disbursement, to wit, (*proceeding as in first count from* †).

Fifth count.

That the said R. H. on, &c., at, &c., then and there being an agent of the United States, to wit, a clerk of the mint of the United States for the treasurer of the said mint, charged with the safe-keeping, transfer and disbursement of public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the public moneys entrusted to him the said R. H., for safe-keeping, transfer and disbursement, to wit, the following other coins of gold which had been struck and coined at the mint of the United States, (*stating coins and concluding as in first count*).

Sixth count.

That the said R. H. on, &c., then and there being an agent of the United States, having the safe-keeping and disbursement of the ordinary fund for paying the expenses of the mint of the United States, and charged with the safe-keeping, transfer and disbursement of public moneys, unlawfully and feloniously did convert to his own use and embezzle a portion of the public moneys entrusted to him the said R. H. for safe-keeping, transfer and disbursement, to wit, the following other coins of gold, which had been struck and coined at the mint of the United States, (*stating coins, and concluding as in first count*).

Seventh count.

That the said R. H. on, &c., at, &c., then and there being a person charged by a law with the safe-keeping, transfer and disbursement of the public moneys, unlawfully and feloniously did convert to

his own use and embezzle a portion of the public moneys entrusted to him the said R. H. for safe-keeping, transfer and disbursement, to wit, the following other coins of gold which had been struck and coined at the mint of the United States, (*stating coins, and concluding as in first count*).(*b*)

(*For final count, see ante, p.* 17, 97 *n*, 123 *n*).

(*b*) U. S. *v.* Hutchinson, reported in Pa. L. J. for June, 1848. The prisoner having been convicted, a new trial was granted on grounds which, as will be seen, do not affect the character of the indictment. Kane J.: "By the act of congress of 18th January, 1837, it is enacted that 'the officers of the mint of the United States shall be a director, a treasurer, a melter and refiner, a chief coiner and an engraver,' and these are to be appointed by the president with the advice and consent of the senate. Of the treasurer so appointed, it is required among other things, s. 2, that 'he shall receive and safely keep all moneys which shall be for the use and support of the mint; shall keep all the current accounts of the mint, and pay all moneys due from the mint, on warrants from the director.' The act then provides for the appointment of assistants to certain of the officers, and of clerks for the director and for the treasurer, in case they shall be needed; they are to be appointed by the director of the mint, with the approbation of the president of the United States, the assistants 'to aid their principals,' and the clerks to 'perform such duties as shall be prescribed for them by the director;' s. 3.

"The prisoner was appointed under this act in the year 1840, to be a clerk for the treasurer of the mint, and among the duties prescribed for him by the director, was the charge of the *ordinary or contingent fund*, by which name the moneys for the ordinary uses of the mint were designated. In this capacity he received the moneys of that fund as they were remitted or transferred to the treasurer of the mint by the orders of the treasury department, and paid them out as warrants were drawn upon the treasurer of the mint by the director, making the proper entries of such receipts and payments in the books of account of the mint. He had the key of a closet in which the moneys of this fund were kept, but the outer key of the vault, of which the closet formed part, was in the charge of another person. The books of account were, all of them, kept in the name and on behalf of the treasurer; the acknowledgments for all moneys received were made by the treasurer personally, and the charges for such moneys were entered against him, and all vouchers for payments were taken in the treasurer's name, and he received credit for such payment. The name or intervention of the clerk did not appear in any of the books, vouchers or accounts, either in the mint or in the accounting department at Washington, with which it corresponded.

"At the end of the year 1847, it was ascertained that a large sum of money was missing from the contingent fund; and the prisoner having been arrested, was indicted for embezzlement under the acts of congress of 13th August, 1841, and 7th August, 1846. He was tried in the district court and found guilty.

"I had serious doubts while the case was before the jury, whether it fell properly within the provisions of the acts of congress; and as the question was of the first importance, I was desirous that it should be discussed more fully than it could be at bar. I therefore charged against the prisoner upon the several points of law, announcing my purpose, as the case was one in which the circuit and district court have concurrent jurisdiction, to solicit the advice and aid of Judge Grier upon the hearing of a rule for new trial, if the verdict should make such a rule proper.

"He acceded to my wish, and the whole subject has been revised before us by the district attorney and the counsel for the prisoner in the most ample manner. The result is an unhesitating concurrence of opinion between my learned brother and myself, that the verdict cannot stand. We regard the history and spirit of these acts of congress, as well as their phraseology, altogether conclusive upon the question.

"At the common law, the party who by the confidence of another is entrusted with the possession of his property, cannot commit the crime of larceny by appropriating it to his own use. The fiduciary character of the delinquent forms his defence, for the criminal law, until it was modified by statute, took no cognizance of breaches of trust.

"At the same time, it distinguished between the *legal possession* of property, such as the very existence of a trust implies, and that mere *charge or supervision*, which is devolved on a servant or clerk. The servant having *a bare charge*, to use the words of the law, became guilty of theft by a fraudulent conversion.

"Thus, on the one hand, a butler who had charge of his master's plate, the shepherd

Against same person for same, charging him with being a person employed at the mint.

That R. H., &c., on, &c., at, &c., then and there being a person employed at the mint of the United States, with force and arms, un-

who watched over his sheep, and the shop-boy who attended behind his counter, might be convicted of larceny, if they converted to their own use their master's property. While, on the other hand, the attorney who pillaged his principal, the guardian who defrauded his ward, and the officer who embezzled public moneys which the law had confided to him, were not answerable as for crime. (*See the cases in Wh. C. L.* 405–6.)

"The United States courts have no common law jurisdiction, that is to say, they derive their only power to try, convict or punish, from the constitution, and the laws made in pursuance of it. The jurisdiction of offences which are cognizable at common law reside in the state courts alone, even though the general government may be the party immediately aggrieved by the misdeed complained of.

"Until the year 1840, the congress of the United States seems to have been, in general, content with the protection which the laws of the several states gave to the public property within their limits. The integrity of subordinates, who were not themselves entrusted with public money, though they might from their position have a certain charge or custody of it, was guarded of course by the common law and the local statutes, as administered by the state courts. Under these, such a subordinate, whether called by the name of watchman, servant, clerk or assistant, might be punished criminally for a fraudulent conversion to his own use of the moneys of the general government. But the higher officers, the heads of departments, the treasurers of the United States and of the mint, the collectors of customs, land officers and others, depositaries of important public trusts, though required in some instances to give security for their official fidelity, were punishable only by impeachment before the Senate of the United States.

"Several very large defaults having occurred, however, on the part of important public officers of the revenue, it was thought necessary to protect the treasury by additional safeguards. On the 4th of July, 1840, an act of congress was passed 'to provide for the collection, safe-keeping, transfer and disbursement of the public revenue.' This act created and defined the crime of embezzlement, and made it applicable to all those officers who were charged by the provisions of the act itself with the 'safe-keeping, transfer or disbursement of public moneys.' As to all others, officers as well as servants or clerks, except those connected with the post-office (to whom it was specially extended), it left the law unchanged.

"The act of 1840 was repealed on the 13th of August of the following year, but the provisions respecting embezzlements were re-enacted in a slightly modified form, so as to include among those who might become subject to its penalties, all '*officers charged* with the safe-keeping, transfer or disbursement of the public moneys, or connected with the post-office department.' But as to all but *officers* so charged, it left the law as it stood before the year 1840.

"The act of 1846 followed. This substantially reconstituted the treasury system which had been rescinded in 1841, but made further provision also for the punishment of embezzling. Its terms are somewhat broader, perhaps, than those of the two preceding acts, for they apply to 'all officers and other persons *charged* by this act or any other act with the safe-keeping, transfer and disbursement of public moneys.' But its spirit and objects are the same; and the detailed provisions of its several sections have obvious reference to persons entrusted by some act of congress with the legal possession of public money, not to those subordinates, who, not having been entrusted with such possession, could be punished for a fraudulent conversion, as felons, without any congressional legislation. The act throughout applies not to clerks, workmen or other servants, but to the legally authorized *custodiers* of public moneys, the '*fiscal agents*' recognized as such at the treasury of the United States, charged there with receipts, and credited with disbursements, in a word, to officers or agents 'entrusted' by law or under law with the possession of public money, and bound to account for it.

"The duties which it enjoins, the safeguards and checks which it creates, the direct accountability which it prescribes and enforces, the evidence it appeals to as establishing the fact of delinquency—even the allowance it makes for certain official expenses—all together stamp on it this limited character. Thus, it requires of the officer that he shall keep an accurate entry of each sum that he receives, and each payment or transfer that he makes;

lawfully and feloniously did embezzle certain coins of gold which had been struck and coined at the said mint, to wit (*stating the coins*), * the said coins of gold and the said coins of silver and the said coins of copper, being at the time of the committing of the felony aforesaid the property of the United States of America, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That, &c., the said R. H., then and there being a person employed at the mint of the United States, to wit, a clerk of the said mint for the treasurer of the said mint, with force and arms, unlawfully and feloniously did embezzle, certain other coins of gold struck and coined at the said mint, to wit (*stating the coins, and concluding as in first count from* *).

(*For final count, see ante, p.* 19, 97 *n*, 123 *n*).

obviously with reference to the account he is to render of his receipts and disbursements at the treasury department; it makes him punishable if he transmits to the treasurer a false voucher, or a voucher that does not truly represent a payment actually made; a transcript from the treasury books showing a balance against him is made sufficient evidence of his indebtedness; 'a draft, warrant or order, drawn by the treasury department upon him,' and not paid, is the primary proof of his embezzlement; and provision is made for the necessary clerk hire, and other expenses of a large class, at least of the officers included within its terms.

"It needs no argument to show, that these enactments are without just application to a person who is merely a clerk himself, who is unknown to the treasury department, who is neither charged nor credited with public moneys there or elsewhere, who transmits no vouchers, because he renders no account, against whom therefore no treasury transcript can ever be produced, on whom no treasury draft, warrant or order can be drawn under any circumstances, and to whom neither the act of 1846 nor any other act has ever entrusted public moneys, either personally or by official designation.

"The prisoner was such a person. In point of fact, he was never in legal possession of the moneys he has abstracted. They were moneys of the United States, in which he had no special or qualified property, which had been entrusted to the safe-keeping of the treasurer of the mint by the express language of an act of congress, and which could not be withdrawn from his legal custody and charge except by warrant of an appropriate officer in the form designated by law.

"We do not understand that the prescription of the clerk's duties by the director, was intended, or supposed to interfere with this official charge of the treasurer. Had it been so, there would have been some record, some book entry, some memorandum at least in the mint, showing the character if not the amount of liabilities, from which the treasurer could claim to be relieved by the clerk's assumption of them. There would have been some recognition of the fact at the treasury in Washington, if the clerk had been constituted a receiving, safe-keeping or disbursing officer; he would have been called on, as by law all such officers are called on, to render his accounts, to declare from time to time what moneys he had received, to exhibit vouchers for his disbursements, and thus to define the extent of his liabilities to the United States.

"But whatever may have been the terms, or the usage, or the understanding which proposed to set forth the prisoner's duties as a clerk, they could not absolve the treasurer from that legal custody with which the act of congress and his commission had invested him. The clerk's possession, whatever it was, was in law the possession of the treasurer; and the clerk's liabilities, therefore, upon the facts found by the jury, are those of a servant merely, not of a person either 'charged' or 'entrusted by law' with the safe-keeping, transfer or disbursement of the public moneys.

"The case is one to which the statute does not extend, and the rule must therefore be made absolute."

The indictments in the text were prepared by Mr. Pettit, the learned and experienced district attorney in Philadelphia.

Embezzlement under the Mass. Rev. Stat.(c)

That T. S., &c., on, &c., at, &c., solicited employment as an auctioneer of and for E. G. of said Boston, merchant, and in consideration that said G. would employ him as his agent for the sale of cotton goods, undertook and engaged to serve said G. as his agent in that employment, and stipulated to pay over to said G. promptly and without delay the cash proceeds of said cotton goods at eight cents per yard which said S. should sell for him at public auction; and afterwards, at said Boston, said G. delivered to and entrusted to said S., in said employment as his agent, sundry, to wit, four bales of cotton goods to be sold as aforesaid, and the cash proceeds thereof at eight cents for each yard to be promptly paid by said S. to said G., and within three days after the sale of each of said bales of goods and by virtue of said employment, and as agent of said G. as aforesaid, said S. took and received said goods and sold the same for cash, and received in payment therefor the money and price and proceeds

(c) Com. *v.* Stearns, 2 Met. 343. Dewey J.: "The questions raised in the present case require a construction of the Rev. Stats. c. 126, s. 29, and are of no inconsiderable importance in their consequences, in marking the distinction between those acts which are to be denominated as felonies punishable by ignominious, and those defaults in the payment of money or in the discharge of contracts, for which, however unjustifiable, the law authorizes no other mode of redress than a civil action by the party aggrieved.

"The principles of the common law not being found adequate to protect general owners against the fraudulent conversion of property by persons standing in a certain fiduciary relation to those who were the subjects of their peculations, certain statutes have been enacted, as well in England as in this commonwealth, creating new criminal offences and annexing to them their proper punishments. The consequence is, therefore, that many acts which formerly were denominated mere breaches of trust, and subjected the party to a civil action only, have now become cognizable before our criminal courts, as offences against the commonwealth. The statutes necessarily require a careful discrimination in their application to the various cases that may arise, and it may be found somewhat difficult to mark out, with entire precision, the line of discrimination between the acts punishable as crimes under these statutes, and those that may not be embraced by them, while they may yet present strong cases of breach of good faith and violation of the confidence reposed in the party guilty of the breach of trust.

"The court have, therefore, very carefully considered the facts disclosed in the case now before us, and the result to which we have arrived will be stated, after disposing of a preliminary objection that was suggested by the counsel for the defendant, though apparently not much relied on.

"This objection was, that it is necessary, in order to bring the offence within the Rev. Stats. c. 126, s. 29, that the property embezzled should belong to some other person than the master or principal, whose servant or agent is charged with the embezzlement; inasmuch as the statute provides that 'if any clerk, agent or servant, &c., shall embezzle or fraudulently convert to his own use, without the consent of his employer or master, *any money or property* of another,' &c.

"A similar objection appears to have been overruled by the Supreme Court of the State of New York, in an indictment on the Revised Statutes of that state, vol. 2, p. 678, s. 59; a statute from which ours seems substantially to have been framed. The words there used are, 'belonging to any other person;' but the court held that these words, as used in the statute, meant any other person than he who is guilty of embezzlement; People *v.* Hennessey, 15 Wend. 147. A different construction from this would be inconsistent with the earlier course of legislation on this subject, (see stat. 1834, c. 186), and would leave unprovided for, all cases of embezzlement, by servants or agents, of the property of their masters or their principals. We are of opinion that that offence, made punishable by the Revised Statutes of this commonwealth, c. 126, s. 29, was not intended to be restricted in the manner suggested by the counsel for the defendant, but may properly be held to embrace cases of embezzlement, by servants or agents, of the property of their masters or principals."

thereof, to wit, the sum of two hundred and seventy-two dollars, which money and proceeds of said goods came into the hands and possession of said S. by virtue of said employment, and as the agent and servant of said G., under the trust and agreement aforesaid; and the jurors, &c., on their oaths aforesaid, do further present, that the said T. S., afterwards, to wit, on, &c., at, &c., then and there having in his possession the said money and proceeds of said goods sold by him for said G., the same money and proceeds being the property and money of said G., in the hands of said S. as his agent and servant as aforesaid, and which same money and proceeds came into the hands and possession of said S. by virtue of his employment as agent of said G., and of the trust aforesaid, to wit, the sum of two hundred and seventy-two dollars, he the said S. then and there unlawfully and fraudulently embezzled and converted the same to his own use, and took and secreted the same with intent to embezzle and convert the same to his own use, without consent of said G., his said employer, the same being the money and property of said G., which came to the possession of said S., and was under his care by virtue of said employment, and by said embezzlement, conversion and secreting of the same money and property as aforesaid, and by force of the statute in such case made and provided, said S. is deemed to have committed the crime of simple larceny.

Second count. Larceny.

That said S., on, &c., at, &c., the same money and proceeds aforesaid of the proper money and property of said G., in his possession as aforesaid, feloniously did steal, take and carry away, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

[*For indictment against factor for converting principal's fund to his own use, &c., under Pennsylvania statute, see Index, tit.* "*Factor*"].

General form of indictment in New York.

That A. B., &c., on, &c., at, &c., was employed in the capacity of a clerk and servant to one C. D., and as such clerk and servant was entrusted to receive, &c. (*stating the nature of the trust*), and being so employed and entrusted as aforesaid, the said A. B., by virtue of such employment, then and there did receive and take into his possession (*stating the subject of the embezzlement*), for and on account of, &c., his said master and employer; and that the said A. B., on the day and year last aforesaid, with force and arms, at the ward, city and county aforesaid, fraudulently and feloniously did take, make way with and secrete, and did embezzle and convert to his own use, without the assent of the said C. D. his master and employer, the said, &c., of the goods, chattels, personal property and money of the said C. D., which said goods, chattels, personal property and money had come into his possession and under his care, by virtue of his being such clerk and servant as aforesaid, to the great damage of the said C. D., &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Larceny.

That the said A. B., on, &c., at, &c., of the goods, chattels and per-

sonal property of one C. D., then and there being found, feloniously did steal, take and carry away, to the great damage of the said C. D., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Embezzlement by clerk or servant.(*d*)

That J. S., &c., on, &c., at, &c., being then and there employed as clerk ("clerk or servant, or any person employed for that purpose, or in the capacity of a clerk or servant"), to J. N., did by virtue of his said employment, then and there, and whilst he was so employed as aforesaid, receive and take into his possession certain money ("chattel, money or valuable security"),(*e*) to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his master, and the said money then and there fraudulently and feloniously did embezzle; and so the jurors, &c., do say, that the said J. S., on, &c., at, &c., then and there in manner and form aforesaid, the said money, the property of the said J. N. his said master, from the said J. N. feloniously did steal, take and carry away, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*If the prisoner has been guilty of other acts of embezzlement within the period of six months, add the following*):

That the said J. S., on, &c., at, &c., afterwards and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the day of in the year aforesaid, at the parish aforesaid, in the county aforesaid, being then and there employed as clerk to the said J. N., did by virtue of such last mentioned employment, then and there, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his said master, and the said last mentioned money then and there within the said six calendar months, fraudulently and feloniously did embezzle, and so, &c., (*as in the first count to the end*).

(*d*) Archbold's C. P. 5th Am. ed. 329.

This form is drawn upon the statutes 7 and 8 Geo. IV. c. 29, s. 47; which, for the punishment of embezzlements committed by clerks or servants, declares and enacts, that if any clerk or servant, or any person employed for the purpose, or in the capacity of a clerk or servant shall, by virtue of such employment receive, or take into his possession any chattel, money or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant or other person so employed; and every such offender, being convicted thereof, shall be liable at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

(*e*) See 7 and 8 Geo. IV. c. 29, s. 5.

CHAPTER VIII.

MALICIOUS MISCHIEF.

[*For several forms of indictments which might be classed under this head, see "Breaches of the Peace," "Assaults," &c.*]

Maliciously wounding a cow.(*a*)

That A. B., &c., on, &c., at, &c., one cow,(*b*) of the price of seven pounds, of the goods and chattels of C. D.,(*c*) then and there being, unlawfully, wilfully and maliciously did wound,(*d*) to the great damage of the said C. D., against, &c. (*Conclude as in book* 1, *chap.* 3).

Giving cantharides to prosecutors.(*e*)

That A. B., &c., on, &c., at, &c., unlawfully did assault M. A. W. and M. C., and then and there unlawfully, knowingly, wickedly and maliciously did administer to and cause to be administered to and taken by the said M. A. W. and M. C., a large quantity, that is to say, two scruples of cantharides, the same then and there being a deleterious and destructive drug, with intent thereby to injure the health of the said M. A. W. and M. C., and the said M. A. W. and M. C. thereby then and there became sick, sore, diseased and disordered in their bodies, insomuch that their lives were despaired of, to the great damage, &c.

Tearing up a promissory note.(*ee*)

That, &c., on, &c., at, &c., a certain promissory note for the payment of money, commonly called a due bill, made and drawn by the said W., in favour of one A. R. C., and dated for the sum and of the value of five dollars, of the property of the said A., the said note and due bill being then and there due and unpaid by him the said W., did wilfully, maliciously and fraudulently tear and

(*a*) Stark. C. P. 463. As to the validity of this indictment at common law, see Com. *v.* Leach, 1 Mass. 59; People *v.* Smith, 5 Cow. 258; Res. *v.* Teischer, 1 Dall. 335; State *v.* Council, Tenn. 305; Loomis *v.* Edgerton, 19 Wend. 419; State *v.* Wheeler, 3 Verm. 344.

(*b*) This is a sufficient description; State *v.* Pearce, Peck 66. The same precision should be used as in larceny. See *ante*, p. 190.

(*c*) Any mistake in the name of the owner will be fatal; Haworth *v.* State, Peck 89. Observe the same particularity as in larceny. See *ante*, p. 199.

(*d*) It is not necessary at common law, separately to charge malice against the owner. State *v.* Scott, 2 Dev. & Bat. 35.

(*e*) R. *v.* Button, 8 C. & P. 660.

This count, which in this country would be classed under the head of malicious mischief, appears to have been treated as an indictment for an assault at common law, and to have been sustained as such. Whatever may be its nature, it is important as a precedent.

(*ee*) For this form I am indebted to Mr. David Webster, the efficient and intelligent assistant of the attorney-general of Pennsylvania.

destroy, with the intent then and there, and thereby to cheat and defraud the said A., to the great damage of the said A., to the evil example of all others in like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Cutting down trees, &c.(*f*)

That A. B., &c., on, &c., at, &c., wilfully and maliciously did cut down and destroy ten ash trees, planted in a certain avenue to the dwelling house of one M. N., and then growing for ornament there, (he the said M. N. then and there being the owner of the said trees), to the great damage of the said M. N., against, &c. (*Conclude as in book* 1, *chap.* 3).

Killing a steer at common law.(*g*)

That D. S., &c., on, &c., at, &c., one steer of the value of five dollars, of the goods and chattels of one L. M'C., then and there being, then and there unlawfully, wantonly, maliciously and mischievously

(*f*) See Stark. C. P. 463. I apprehend this form would be good at common law; Com. *v.* Eckert, 2 Browne 251; Loomis *v.* Edgerton, 19 Wend. 420; though see Brown's case, 3 Greenl. 177.

(*g*) State *v.* Scott, 2 Dev. & Bat. 35.

Daniel J., after stating the substance of the case as above, proceeded:—"We see no ground for a new trial in this case. The evidence objected to was admitted—and, as we think, correctly—to repel an allegation made by the defendant, of an *alibi*. And after the evidence was admitted by the court, the weight and effect of it was matter for the jury only; and it seems to us, that there was nothing left for the court to remark upon, especially, as no particular charge concerning this evidence was prayed by the defendant. We have examined the reasons in arrest, and concur in opinion with the judge who pronounced the judgment. 1st. The two detached pieces of paper writing purporting to be a transcript of the record, contained every thing necessary to give Buncombe Superior Court jurisdiction; it contained the indictment, plea and order of removal. In that shape it was entered on the state docket, and the defendant went to trial. From great caution, the judge suspended judgment at the trial term, and sent a *certiorari* for such a record as could not be cavilled about. At the term judgment was rendered, the record was unexceptionable, and showed that the two pieces of paper which had been received as the record of the case, and on which the defendant had been tried, contained a true and complete transcript of the record when it was removed from Rutherford. So, when judgment was pronounced, the record showed that the case had been properly removed, and that Buncombe Superior Court had jurisdiction of the case, at the term the trial took place. The record being unexceptionable when judgment was prayed, there was nothing to restrain the judge from pronouncing it.

"2dly. This court decided, in the case of the State *v.* Simpson, 2 Hawks 460, that an indictment for malicious mischief, which concluded at common law, was good.

"That decision was made in the year 1823, and since that time many convictions on indictments for malicious mischief, at common law, have taken place in the circuits of this state. In the year 1826, the legislature indirectly approved of the decision; for in the act limiting the time that indictments for misdemeanors should be brought, it is declared, that in all trespasses and other misdemeanors, except the offences of perjury, forgery, malicious mischief and deceit, the prosecution shall commence within three years after the commission of the offence. After what has taken place, we think the period too late for us now to examine further into the question.

"3dly. The objection is, that the indictment does not charge malice against the owner of the property. We have looked into the books of forms and precedents, and find that the form of this indictment corresponds with the forms prescribed in the books. What evidence the state must produce to support such an indictment as this, we are not called on to decide. We think there is no ground for a new trial or arrest of judgment; and this opinion will be certified to the Superior Court of Law for the County of Buncombe, that it may proceed to final judgment in the case."

did kill, to the great damage of the said L. M'C., and against, &c. (*Conclude as in book* 1, *chap.* 3).

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

That J. D., &c., on, &c., at, &c., feloniously and knowingly did

(*h*) State *v.* Davis, 2 Iredell 153.

Gaston J.: "We are of opinion that the appellant has not shown any error in the instructions to the jury, nor sufficient reasons to arrest the judgment.

"The indictment is founded on the act of 1822, c. 1155, re-enacted in the Revised Stat. c. 34, s. 55, whereby it is declared, 'that if any person shall knowingly alter or deface the mark or brand of any person's neat cattle, sheep or hog, shall knowingly mismark or brand any unbranded or unmarked neat cattle, sheep or hog, not properly his own, with intent to defraud any other person, he shall, on conviction in a court of record, be liable to corporal punishment in the same manner as on a conviction of petit larceny.' The manifest purpose of the legislature is to punish the act of changing or defacing these marks or brands, which are the ordinary indications of ownership in property of this description, and also the act of putting false marks or brands thereon, with intent to injure the owner by either depriving him of the property or rendering his title thereto more difficult of proof. Now, when the act of wilfully changing or defacing the mark is fixed upon the person accused, and no explanation is given of the act to render it consistent with an honest purpose, the conclusion follows irresistibly that it was done with intent to effect the injury which is the ordinary and necessary consequence of the act. Such intention is directed against the owner, whoever he may be, and the charge that the act was done with intent to injure any individual named, is made out, when it is shown that *he* was the owner at the time when the act was committed.

"It has been contended by the counsel for the appellant that the offence created by the statute and charged in the indictment could not have been committed, because at the time when the act was done, the animal had strayed from the possession of the owner, and the statute by declaring that the offender shall be liable to corporal punishment in the same manner as on a conviction of petit larceny, must be understood as applying to those cases only wherein the offender, by a felonious appropriation of the animal, would have committed the crime of petit larceny. He further urges that this construction of the statute is strengthened by the circumstance, that a special provision is made by the statute for improper interference with strays, in c. 112, s. 8. We do not concur in this construction of the statute. In the description of the offence thereby created, no reference is made to the crime of larceny. The offence consists in knowingly altering or defacing the mark of, or in knowingly mis-marking an animal, the property of another, with intent to defraud. The mere straying of the animal from the owner's premises makes no change of property. The animal still remains his, and the wrongful act is not less calculated, but in fact more likely, to do him an injury, than it would be if done to an animal in his immediate possession. The reference in the statute to the punishment in cases of petit larceny does not affect the description of the offence, more than it would have affected that description, if the reference had been to the punishment in cases of perjury or forgery, or of any other crime. It only denounces against the offence previously described, the same penalty by which, the existing law is inflicted upon a conviction of petit larceny. The construction contended for is not unwarranted by the language of the statute, but would render the statute itself inoperative in the case, which mainly rendered it necessary. Nor does the section referred to in c. 112, provide for an offence of this description in cases of strays. The object of the legislature in that chapter is to point out a mode of proceeding in those cases, whereby the owner may be enabled to regain the possession of his property or to get the value thereof, and a proper compensation may be made to those, who shall render him the assistance for this purpose; and, in furtherance of this object, the eighth section imposes a pecuniary mulct on those, who may take up or use the stray, otherwise than in the mode therein directed.

"The motion in arrest of judgment rests on two grounds. The first is, for that the offence is not described in the language of the statute. This objection applies only to the first count of the indictment, and as to that is well taken. The first count charges that the accused did alter the *make* of the sheep. No doubt the word 'make' was intended to be written 'mark,' but it is a different word, having a different signification, and cannot be brought within the exception of *idem sonans*. But this mistake is not in the second count, which charges that he defaced the mark of the sheep; and a general verdict of guilty having been rendered, judgment will not be arrested, if either count be sufficient to warrant it."

alter the *make*(*i*) of one sheep, the property of W. M'C., knowingly, with an intent to defraud the said W. M'C., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Defacing mark.

That J. D., &c., on, &c., at, &c., knowingly did deface the mark of a sheep, the property of one W. M'C., then and there, with an intent to defraud the said W. M'C., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Entering the premises of another and pulling down a fence.(*j*)

That T. C., &c., on, &c., at, &c., into a certain close of a certain A. M., situate in the township and county aforesaid, in and upon the possession thereof of the said A., into which the said T. had not legal right of entry, did enter, and ten panel of fence of the said A., then and there standing and being, then and there did pull down, take and carry away, to the great damage of the said A., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Destroying two lobster cars under the Mass. statute.(*k*)

That A. B., &c., on, &c., at, &c., did wilfully, maliciously and secretly, in the night time, destroy and injure two lobster cars, two brass locks attached to said cars, and two cables, by which said cars were moored and fastened, and three hundred lobsters contained in the cars aforesaid, all being the property of one F. W., &c.

Removing a land-mark under the Penn. statute.(*l*)

That L. S., &c., on, &c., at &c., one bounded growing oak tree, being one of the land-marks of a tract of plantable land, whereof J. B. was then and there seized in his demesne as of fee, at township aforesaid, and within, &c., secretly, unjustly and without the consent or knowledge of the said J. B., did cut down and remove, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

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

That H. C., &c., on, &c., at, &c., unlawfully and maliciously did fell timber in the channel of Hogan's creek in the County of Caswell, aforesaid, and did then and there, by such felling of timber aforesaid, on

(*i*) See *ante*, note at foot of p. 214.

(*j*) This indictment was drawn in 1779, by Mr. John D. Sergeant, then attorney-general of Pennsylvania; see "Forcible Entry and Detainer," *post.*

(*k*) On this count, framed upon the Rev. Stats. c. 126, s. 39, alleging that the defendant wilfully destroyed and injured a cable by which a fish car was moored and fastened, proof that he wilfully, &c., cut off such cable a few feet from one end thereof, was held sufficient to warrant his conviction; Com. *v.* Soule, 2 Met. 21.

(*l*) This indictment is taken from Reed's Digest, and is drawn on the provincial act of 1700; 1 Smith's Laws 4.

(*m*) State *v.* Cobb, 1 Dev. & Bat. 115.

the twentieth day of February aforesaid, obstruct the channel of the creek aforesaid, in the County of Caswell aforesaid, to the great damage of the owners of the land on said creek, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Breaking into house and frightening a pregnant woman.(*n*)

That A. B., &c., on, &c., at, &c., about the hour of ten of the clock in the night of the same day, with force and arms at Lurgan township in the county aforesaid, the dwelling house of J. S. there situate, unlawfully, maliciously and secretly did break and enter, with intent to disturb the peace of the commonwealth; and so being in the said dwelling house, unlawfully, vehemently and turbulently did make a great noise, in disturbance of the peace of the commonwealth, and greatly misbehave himself in the said dwelling house, and E. S. the wife of the said J. greatly did frighten and alarm, by means of which said fright and alarm, she the said E., being then and there pregnant, did on the seventh day of September, in the year aforesaid, at the county aforesaid, miscarry, and other wrongs to the said E. then and there did, to the evil example, &c.

Cutting ropes across the ferry.(*o*)

That H. K., &c., on, &c., at, &c., did maliciously and wantonly cut two ropes stretched across the river Schuylkill by C. P., the occu-

(*n*) Com. *v.* Taylor, 5 Binn. 277. "But supposing," said Tighlman C. J., "the indictment not to be good for a forcible entry, may it not be supported on other grounds? In the case of the Com. *v.* Teischer, 1 Dall. 335, judgment was given against the defendant for '*maliciously, wilfully and wickedly killing a horse.*' These are the words of the indictment, and it seems to have been conceded by Mr. Sergeant, the counsel for the defendant, that if it had been laid to be done *secretly*, the indictment would have been good. Here the entering of the house is laid to be done '*secretly, maliciously, and with an attempt to disturb the peace of the commonwealth.*' I do not find any precise line by which indictments for malicious mischief are separated from actions of trespass. But whether the malice, the mischief, or the evil example is considered, the case before us seems full as strong as Teischer's case. There is another principle however, upon which it appears to me that the indictment may be supported. It is not necessary that there should be actual force or violence to constitute an indictable offence. Acts injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society, are themselves indictable. To send a challenge to fight a duel is indictable, because it tends directly towards a breach of the peace. Libels fall within the same reason. A libel even of a *deceased person*, is an offence against the public, because it may stir up the passions of the living and produce acts of revenge. Now what could be more likely to produce violent passion and a disturbance of the peace of society, than the conduct of the defendant. He enters *secretly after night* into a private dwelling house, with an intent to disturb the family, and after entering makes such a noise as to terrify the mistress of the house to such a degree as to cause a miscarriage. Was not this enough to produce some act of desperate violence on the part of the master or servants of the family? It is objected that the kind of noise is not described; no matter, it is said to have been made *vehemently* and *turbulently*, and its effects on the pregnant woman are described. In the case of the King *v.* Hood (Sayer's Rep. in K. B. 161), the court refused to quash an indictment for disturbing a family by violently kicking at the front door of the house for the space of two hours. It is impossible to find precedents for all offences. The malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbours. To this invention must be opposed general principles, calculated to meet and punish them. I am of opinion that the conduct of the defendant falls within the range of established principles, and that the judgment of the court below should be reversed."

(*o*) Drawn and prosecuted in 1773, by Mr. Andrew Allen, then attorney-general of Pennsylvania.

piers of the ferry over Schuylkill, commonly called the upper ferry, and that the said ropes are used in drawing boats and carrying travellers over the same river and ferry, to the great damage of the said C. P., and against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Burning a record.(*p*)

That H. E., &c., L. K., &c., W. H., &c., M. H., &c., and G. S., &c., on, &c., at, &c., a certain paper writing, containing in itself a certificate of four sufficient housekeepers of the neighbourhood, inhabiting in and near the said township, and with their names subscribed, and to the justices of the peace of the same county directed, that they the said housekeepers, had laid out a road and highway in the said township, according to an order of the same justices in their Quarter Sessions made for the laying out the same, which to the same justices in their Quarter Sessions had been and legally made, certified and returned, and of record affiled, according to the act of assembly in such case made and provided, to wit, at the City of Philadelphia, in the said county, unjustly and unlawfully did burn and destroy, to the manifest contempt of the good laws of this province, to the evil example of all others in the like case offending, against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER IX.

FORCIBLE ENTRY AND DETAINER.(*a*)

General frame of indictment at common law.

That A. B., late of, &c., C. D., late of, &c., and E. F., late of, &c., together with divers other persons, to the number of six or more,

(*p*) Drawn by Tench Francis (attorney-general of Pennsylvania), some years before the Revolution, though I have been unable to fix the exact date. The existence of this, and of several kindred precedents under the head of "Malicious Mischief," "Nuisances," &c., shows the liberality with which the common law was applied under the colonial system.

(*a*) Before considering the pleading in forcible entry and detainer, the general character of the offence will be considered.

(*Forcible entry at common law*). The assertion of right to lands or houses by force has always been discouraged by courts, from a just apprehension of the tumults to which such proceedings may lead. Although, therefore, no indictment will lie for a mere trespass, accompanied only by constructive force, yet it seems to be established that an entry on land or into a house, garden, &c., or a church, though no one be therein, with such actual violence as amounts to an unlawful act, or public breach of the peace, expressed in law to

whose names are to the jurors aforesaid as yet unknown, on, &c., with force and arms, and with pistols, staves and other offensive

be "with force and arms and a strong hand," *e. g.* bringing unusual weapons, threatening violence, breaking open a door, or violent ejection of the possessor of a house, is an offence indictable at common law, as a forcible entry; Langdon *v.* Potter, 3 Mass. 215; Harding's case, 1 Greenl. 22; Com. *v.* Taylor, 5 Binn. 277; Newton *v.* Harland, 1 Man. & G. 644; Cruiser *v.* State, 3 Harrison 206; State *v.* Mills, 2 Dev. 420; State *v.* Spierin, 1 Brevard 119; though the statute gives other remedies to the parties grieved, viz. restitution and damages; and that the illegal and violent maintenance of possession, if the entry was unlawful, is, in like manner, indictable as a forcible *detainer;* Reg. *v.* Newlands, 4 Jur. 322, Littledale J.; Le Blanc J., R. *v.* Wilson and others, 8 T. R. 363; Ld. Kenyon, *ib.* 357; Co. Lit. 257; R. *v.* John Wilson, 3 A. & E. 817; S. C. 5 N. & M. 164; Com. Dig. *tit. Forcible Entry*, (A. 1, 2, B. 1). An entry, though by one person only, will be forcible if either by act or threat at the time of his entry he gives the party in possession just cause to fear bodily hurt if he does not give way: and the same circumstances of violence or terror which make an entry forcible, make a detainer forcible also. A detainer may be forcible whether the entry were so or not; Hawk. b. 1, c. 64; Com. Dig. *tit. Forcible Entry*, if such entry was unlawful; R. *v.* Oakley, 4 B. & Ad. 307; 1 N. & M. 58. Though a breach of the peace is necessary to constitute the offence, Com. *v.* Dudley, 10 Mass. 403, it seems that no circumstances of great public violence or terror are requisite; for it is laid down "that an entry may be said to be forcible, not only in respect of violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any violence in the manner of entry, as by breaking open the doors of a house, whether any person be in it at the same time or not, especially if it be a dwelling house;" Hawk. b. 1, c. 64, s. 26; State *v.* Pollock, 4 Iredell 305; Bennett *v.* State, 4 Rice 340. The offence of forcible entry at common law is punishable by fine or imprisonment, in respect to the injury done to the public peace.

(*Forcible entry within the statutes*). But further to discourage the attempts of parties to assert their claims by violence, statutes were passed in England in very early times, which have been substantially re-enacted in several of the states, not merely to annex punishment to the offence of entering by strong hand on a peaceable possession, but to grant restitution to the party dispossessed, on the conviction of the offender. After, therefore, the statute 5 Rich. II. s. 1, c. 8, had declared the law "that none should make entry into lands and tenements, but in cases where entry is given by the law, nor in such cases, with strong hand nor with multitude of people, (ten making a 'multitude;' Co. Lit. 257 a; R. *v.* Heine, cited Stra. 195; *ex parte* Davy, 6 Jur. 949, Wightman J.), but only in a peaceable and easy manner, on pain of imprisonment and ransom," the statute 15 Rich. II. c. 2, gave a remedy by summary commitment of the offender till fine and ransom; and by 8 Hen. VI. c. 9, this provision was extended to cases of *forcible detainer*, and justices of the peace were empowered to restore the premises to the former possessor, where the force had been found by a jury summoned by them; Reg. *v.* Harland and others, 1 P. & D. 33; S. C. 8 A. & E. 826; 2 M. & Rob. 141; R. *v.* Hake, 4 Man. & Ry. 483, n. The inquisition must set forth the estate possessed by the party in the property disputed; Reg. *v.* Bowser, 8 D. P. C. 128. On these statutes it was doubted whether any but a freeholder could have restitution; and, therefore, the 21 Jas. I. c. 25, applied the power conferred by the former acts to the restitution of possession of which tenants for terms of years, tenants by copy of court roll, guardians by knight service, and tenants by elegit, statute merchant, or statute staple, had been forcibly deprived; on this account the prosecutor's interest in the premises must be stated in the indictment; Ld. Kenyon, R. *v.* Wilson and others, 8 T. R. 357. Under these acts, therefore, a prosecutor who is a freeholder or leaseholder, &c., may have restitution on conviction of the party of whose dispossession he complains. This restitution may be awarded by the Court of Quarter Sessions, as justices of the peace are expressly empowered to grant it; and in this respect they act as judges of record; 3 B. & Ad. 688, Littledale J., and have greater power than justices of Oyer and Terminer and Gaol Delivery, who cannot grant restitution, but can only punish the offender; Hawk. b. 1, c. 64, s. 61; Bac. Abr. *Forcible Entry* (F).

It seems to have been at one time supposed that greater force was necessary to sustain an indictment for forcible entry at common law, than under the statutes; R. *v.* Bake, 3 Burr. R. 1731; but the observations of Ld. Kenyon in R. *v.* Wilson, 8 T. R. 357, seem to negative this distinction, and to place both proceedings on their true ground. "I do not know," said he, "that it has ever been decided that it is necessary to allege a greater degree of force in an indictment at common law for a forcible entry, than in an indictment on the statutes; therefore an indictment at common law charging the defendants with having entered unlawfully and *with strong hand*, is good," and Le Blanc and Lawrence

weapons, &c., into a certain messuage or garden(*b*) there situate, and then(*c*) and there being in the peaceable possession(*d*) of G. H., unlawfully, violently and injuriously, *and with a strong hand*(*e*) did enter; and that the said A. B., C. D. and E. F., together with the said other persons, then and there, with force and arms and with a strong hand, unlawfully, violently, forcibly and injuriously did expel, amove and put out the said G. H. from the possession of the said messuage and garden, and the said G. H., so as aforesaid expelled, amoved and put out from the possession of the same, then and there, with force and arms and with a strong hand, unlawfully, violently, forcibly and injuriously have kept out,(*f*) from the day and year aforesaid, until the taking of this inquisition,(*g*) and still do keep out,

Js., added that the words *with strong hand* mean something more than *vi et armis*, or a common trespass, viz. the degree of violence amounting to a breach of the public peace, and therefore indictable as forcible entry; see 8 T. R. 361, 363. In truth there is no good sense in any distinction as to the degree of force indictable in either way; but in neither case will a mere entry by an open door or window, or with a key, however procured, as by trick and contrivance, suffice; Com. Dig. *Forcible Entry* (A); 3 Hawk. b. 1, c. 64, s. 26; nor an entry which the possessor is induced by threats of destroying his cattle or goods; Hawk. b. 1, c. 64, s. 25; but an entry effected by an actual breaking of a dwelling house, or attended by an actual array of force, will be indictable in either form. The true distinction is, that on an indictment at common law the prosecutor needs only to prove a peaceable possession at the time of the ouster; and that there, as he alleges no title, so he can have no restitution: while in an indictment on the statute of Richard, his interest, viz. a seisin in fee, must be alleged; on the statute of James, the existence of a term or other tenancy; and on these statutes, restitution will be granted; 1 Brevard 119; 1 Greenl. 31. It must be observed, however, that even on these statutes, proof that the prosecutor holds colourably as a freeholder or leaseholder, will suffice; and that the court will not, on the trial, enter into the validity of an adverse claim made by the defendant, which he ought to assert, not by force, but by action. Per Vaughan B., in R. *v.* Williams, Monmouth Summer assizes, 1828, Dickinson's Q. S. 378; confirmed on motion for a new trial; and see Jayne *v.* Price, 5 Taunt. 325; 1 Marsh. 68, S. C.; Dutton *v.* Tracy, 4 Conn. 79; Res. *v.* Shryber, 1 Dall. 68; People *v.* Anthony, 4 Johns. 198; People *v.* Rickert, 8 Cow. 226.

(*b*) The premises must be described with certainty; and therefore an allegation that the defendant entered a *tenement* will not suffice; 3 Leon. 102; Co. Lit. 6, a. The indictment must describe the premises entered, with the same particularity as in ejectment. Thus, an indictment of forcible entry into a messuage, tenement and tract of land, without mentioning the number of acres, was held bad after conviction; M'Nair *et al. v.* Rempublicani, 4 Yeates 326. Where the words were, "a certain messuage with the appurtenances, for a term of years in the district of Spartanburgh," it was adjudged that the place where was not described with sufficient legal certainty; State *v.* Walker and Davidson, Brev. MSS.; Wh. C. L. 443. It is sufficient to describe the premises as "a certain close of two acres of arable land, situate in S. township, in the county of H., being a part of a large tract of land adjoining lands of A. and B.;" Dean *et al. v.* Com., 3 S. & R. 418.

(*c*) See 2 Chit. C. L. 220, 222; 2 Q. B. Rep. 406.

(*d*) Possession is all that need be laid at common law; Burd *v.* Com., 6 S. & R. 252; Res. *v.* Campbell, 1 Dall. 354; though upon this averment alone restitution cannot be awarded, *ante*, p. 218; Wh. C. L. 442. Under the statutes, however, it is necessary that either a freehold or leasehold estate should be laid, as will be presently seen.

(*e*) These words are vital; greater force must be averred than is expressed by the words *vi et armis*. The trespass must involve a breach of the peace, or directly tend to it, as being done in the presence of the prosecutor, to his terror or against his will; State *v.* Mills, 2 Dev. 420; but see Harding's case, 1 Greenl. 22.

(*f*) The same description and degree of force is necessary to constitute a forcible *detainer*, as a forcible *entry;* Dalt. 126; Hawk. b. I, c. 64, s. 39.

(*g*) No indictment can warrant an award of restitution, unless it alleges that the wrongdoer both ousted the party grieved, and continued in possession at the time of finding the indictment; for it would be a repugnancy to award restitution to one who never was in possession, and vain to award it to one who does not appear to have lost it; Hawk. b. I, c. 64, s. 41.

to the great damage of the said G. H., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form of same.(*h*)

That A. B., &c., on, &c., at, &c., with an axe and augur, unlawfully, violently, forcibly, injuriously and with a strong hand, did enter into the dwelling house of J. C., in said and in his actual and exclusive possession and occupation with his family, and the said A. B. did then and there unlawfully, violently, forcibly, injuriously and with a strong hand, bore into said dwelling house with said augur, and cut away part of said house, and stove in the doors and windows

(*h*) This count was sustained in Harding's case, 1 Greenl. 22.

"If the facts charged," said Preble J., "do not constitute an indictable offence at common law, no sentence can be pronounced upon the defendant.

"The earlier authorities do sanction the doctrine, that at common law, if a man had a right of entry in him, he was permitted to enter with force and arms, when such force was necessary to regain his possession, (Hawk. P. C. c. 64, and the authorities there cited). To remedy the evils arising from this supposed defect in the common law, it was provided by statute 5 Rich. II. c. 7, that, 'none should make any entry into any lands or tenements but in cases where entry is given by the law; and in such cases, not with strong hand nor with multitude of people but only in a peaceable and easy manner.' The authorities are numerous to show that for a trespass,—a mere civil injury, unaccompanied with actual force or violence, though alleged to have been committed with force and arms—an indictment will not lie. But in Rex *v.* Bathurst, Say. R. 305, the court held, that *forcibly entry into a man's dwelling house* was an indictable offence *at common law*, though the force was alleged only in the formal words *vi et armis*. In Rex *v.* Bake, 3 Burr. 1731, it was held, that for a forcible entry an indictment will lie *at common law:* but actual force must appear on the face of the indictment, and is not to be implied from the allegation, that the act was done *vi et armis*. In the King *v.* Wilson, 8 D. & E. 357, an indictment *at common law* charging the defendant with having unlawfully and with a strong hand entered the prosecutor's mill and expelled him from the possession, was held good. In this latter case, Lord Kenyon remarks, 'God forbid these acts, if proved, should not be an indictable offence;—the peace of the whole country would be endangered, if it were not so.' The case at bar is a much stronger one, than either of those cited. The peace of the state would indeed be jeopardized, if any lawless individual destitute of property might, without being liable to be indicted and punished, *unlawfully, violently and with a strong hand*, armed *with an axe and augur, forcibly enter a man's dwelling house*, then *in his actual, exclusive possession and occupancy with his wife and children—stave in the doors and windows, cutting and destroying, and putting the women and children in fear of their lives.*

"The second objection, that no seisin is alleged, does not apply to indictments for forcible entries at common law. Under the statute of New York against forcible entry, the party aggrieved has restitution and damages; and hence it is necessary that the indictment should state the interest of the prosecutor. The People *v.* Shaw, cited by the defendant's counsel, and the People *v.* King, 2 Caines 98, are cases upon the statute of that state. In Rex *v.* Bake, Mr. Justice Wilmot remarks: 'No doubt indictments will lie at common law for a forcible entry, though they are generally brought on the acts of parliament. On the acts of parliament it is necessary to state the nature of the estate, because there must be restitution, but they may be brought at common law.' In the King *v.* Wilson, Lord Kenyon says: 'No doubt the offence of forcible entry is indictable at common law, though the statutes give other remedies to the party aggrieved, restitution and damages; and therefore in an indictment on the statutes, it is necessary to state the interest of the prosecutor.' Our statute contains no such provision, and gives no remedy by indictment. It simply provides a process to obtain restitution, leaving the parties, the one to his action for damages, the other to his liability to be indicted and punished at common law.

"With respect to the third objection, it is alleged in the indictment that the house was *Cates' dwelling house, in his actual and exclusive possession and occupation with his family*, and that the defendant *unlawfully entered*, &c. On the whole we think the indictment contains sufficient matter to warrant a judgment upon the verdict which has been found against the defendant, and the motion in arrest is accordingly overruled."

thereof with said axe, said J. C.'s wife and children being in said house, thereby putting them in fear of their lives, &c.

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

That I. K., at, &c., on, &c., unlawfully, violently, forcibly and injuriously did enter into a certain lot of ground and the stable thereon erected, situated between North alley and South alley, and between Delaware Fifth and Delaware Sixth streets in the said city, the said lot of ground being forty-nine feet north and south and sixteen feet or thereabouts east and west in dimension, then and there being in the peaceable possession of one T. L., and that the said I. K. then and there with force and arms and with a strong hand, unlawfully, violently, forcibly and injuriously did expel, remove and put out the said T. L. from the possession of the said premises, and the said T. L. so as aforesaid expelled, amoved and put out from the possession of the same, with force and arms, &c., and with a strong hand, unlawfully, violently, forcibly and injuriously has kept out, from the day and year aforesaid until the taking of this inquisition, and still doth keep out, and other wrongs to the said T. L. then and there did, to the great damage of the said T. L., to the evil example of all others in the like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Forcible entry, &c., into a freehold, on stat. 5 *Rich. II. c.* 8.(*j*)

That one J. N., &c., at, &c., on, &c., was seized(*k*) in his demesne as of fee, of and in a certain messuage, with the appurtenances there situate and being, and the said J. N., being so seized thereof as aforesaid, J. S., late of the parish aforesaid, in the county aforesaid, labourer, afterwards, to wit, on the day and year last aforesaid, in the parish aforesaid, in the county aforesaid, into the said messuage and appurtenances aforesaid, with force and arms and with strong hand, unlawfully did enter, and the said J. N., from the peaceable possession of the said messuage with the appurtenances aforesaid, then and there with force of arms and with strong hand, unlawfully did expel and put out, and the said J. N. from the possession thereof so as aforesaid with force and arms and with strong hand, being unlawfully expelled and put out, the said J. S. from the aforesaid third day of August, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force and arms and with strong hand, unlawfully and injuriously then and there did keep out, and still doth keep out, to the great damage of the said J. N., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*i*) Com. *v.* Kinsman, Sup. Ct. Pa. Dec. T. 1830, No. 13. Sentence was entered on this indictment after a plea of guilty.

(*j*) Archbold's C. P. 5th Am. ed. 709.

(*k*) See Fitch *v.* Rempublicam, 3 Yeates 19, S. C.; 4 Dall. 212; Resp. *v.* Shryber, 1 Dall. 68.

Forcible entry into a leasehold, on stat. 21 *Jac. I. c.* 15.(*l*)

(*Same as in last precedent, adapting the form, however, to a term of years, as thus*):

That J. N., &c, on, &c., at, &c., was possessed of a certain messuage with the appurtenances, there situate and being, for a certain term of years, whereof divers, to wit, ten years were then to come, and are still unexpired, and the said J. N. being so possessed thereof, &c. (*as in last precedent*).

Forcible detainer on stat. 8 *Hen. VIII. c.* 9, *or* 21 *Jac. I. c.* 51.(*m*)

(*The same as in the last two precedents respectively, to the end of the statement of the seisin or possession, then proceed thus*):

And the said J. N. being so seised (*or possessed*) thereof, J. S., late, &c., into the said messuage with the appurtenances aforesaid, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage with the appurtenances aforesaid, then and there unlawfully did expel and put out, and the said J. N. from the possession thereof, so as aforesaid, being unlawfully expelled and put out, the said J. S. from the said third day of August, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage with the appurtenances aforesaid, with force and arms and with strong hand, unlawfully and injuriously then and there did keep out, and the said messuage with the appurtenances and the possession thereof, then and there unlawfully and forcibly did hold, and still doth hold from the said J. N., to the great damage of the said J. N., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

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

That A. B., &c., on, &c., at, &c., together with divers other evil disposed persons, to the number of four or more, whose names are to the jurors aforesaid as yet unknown, with force and arms and with a strong hand, unlawfully, violently, forcibly and injuriously did enter into (*describing premises*), then and there being in the peaceable possession of C. D., and that the said A. B., with the said evil disposed persons, then and there, with force and arms and with a strong hand unlawfully, violently, forcibly and injuriously did expel, remove and put out the said C. D. from the possession of the said premises, with the appurtenances; and the said C. D. so as aforesaid expelled, removed and put out from the possession of the same, with force and arms and with a strong hand, unlawfully, violently, forcibly and injuriously have kept out from the same, from the day and year aforesaid until the taking of this inquisition, and still do keep out; and other wrongs to the said C. D. then and there did, to the great dam-

(*l*) Archbold's C. P. 5th Am. ed. 712. See Pa. v. Elder, 1 Smith's Laws 3.

(*m*) Archbold's C. P. 5th Am. ed. 712.

(*n*) This form includes a count at common law, and a count on each of the statutes mentioned *ante*, p. 218.

age of the said C. D., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Entry upon freehold.

That the said C. D., on, &c., at, &c., was seized in his demesne as of fee, of and in the messuage, tenement and premises hereinbefore specified and described, with the appurtenances thereto; and the said C. D. being so seized thereof as aforesaid, the said A. B. afterwards, to wit, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, into the said messuage, tenement, premises and appurtenances aforesaid, with force and arms and with a strong hand, unlawfully did enter, and the said C. D. from the peaceable possession of the said messuage, tenement, premises and appurtenances as aforesaid, then and there with force and arms and with strong hand, unlawfully did expel and put out; and the said C. D. from the possession thereof so as aforesaid, with force and arms and with strong hand being unlawfully expelled and put out, from the day and year aforesaid until the day of the taking of this inquisition, from the possession of the said messuage, tenement, premises and appurtenances, with force and arms and with strong hand, unlawfully and injuriously then and there did keep out and still do keep out, to the great damage of the said C. D., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Entry upon leasehold.

That the said C. D., on, &c., at, &c., was possessed of the said messuage, tenement, premises and appurtenances, as hereinbefore described, for a certain term of years, whereof divers, to wit, two years, were then to come, and are still unexpired; and that the said C. D. being so possessed thereof, the said A. B. afterwards, to wit, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, into the said messuage, tenement, premises and appurtenances, as aforesaid, with force and arms and with a strong hand, unlawfully did enter, and the said C. D. from the peaceable possession of the said messuage, tenement, premises and appurtenances as aforesaid, then and there with force and arms and with a strong hand, unlawfully did expel and put out; and the said C. D. from the possession thereof so as aforesaid, with force and arms and with strong hand, being unlawfully expelled and put out, from the day and year aforesaid until the taking of this inquisition, from the possession of the said messuage, tenement, premises and appurtenances, with force and arms and with strong hand, unlawfully and injuriously then and there did keep out, and still do keep out, to the great damage of the said C. D., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For breaking and entering a close and cutting down a tree, under the Pennsylvania act.

That D. B. and J. T., &c., on, &c., at, &c., into a certain close of the honourable J. H. Esq., situate in the township of Lancaster, and in and upon the possession of the said J. H. Esq., into which the said D. B. and J. T. had not the legal right of entry, did enter, and one

oak tree of the said J. H. then and there growing, then and there did cut, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER X.

CHEATS.

1. CHEATS AT COMMON LAW.
2. FALSE PERSONATION OF BAIL.
3. SECRETING GOODS WITH INTENT TO DEFRAUD CREDITORS.
4. FRAUDULENT INSOLVENCY IN PENNSYLVANIA.
5. VIOLATION OF FACTOR LAW.
6. OBTAINING GOODS BY FALSE PRETENCES.

I. CHEATS AT COMMON LAW.

Selling by false weight or measure.(*a*)

That A. B., late of, &c., on, &c., and from thence until the taking of this inquisition, did use and exercise the trade and business of a

(*a*) Dickinson's Q. S. 6th ed. 327.

(*Cheats at common law generally*). A mere private imposition short of felony, and effected by a "naked lie," without the association of artful device or false token, voucher, order, &c., is not indictable as a cheat at common law, unless it is public in its nature, and calculated to defraud numbers, or to injure the government or the public in general; 1 East P. C. 817, 821; Dickinson's Q. S. 290; and see 10 A. & E. 37; 2 Per. & Dav. 334. Per Ld. Denman. Forcible illustrations of the distinction between a cheat which becomes indictable or otherwise as it acquires or loses generality, are found in Weierbach *v.* Trone, 2 W. & S. 408; and Com. *v.* Warren, 6 Mass. 72. Putting a stone in a single pound of butter, for the purpose of cheating as single, is not an indictable offence: putting a series of stones in a series of pounds of butter, for the purpose of defrauding the public, is. For in other cases prudence and caution would supply sufficient security; 1 Hawk. c. 71, s. 2; 2 East P. C. 818; R. *v.* Gibbs, 1 East R. 173; but the selling by false weights and measures, though to one person only, or producing false tokens, or taking other like methods to cheat, which cannot be guarded against by ordinary care, were always held indictable offences; R. *v.* Young, 3 T. R. 98, per Buller J.; R. *v.* Wheatly, 1 Bla. R. 273; 10 A. & E. 37; 2 Burr. 1125, S. C.; State *v.* Patillo, 4 Hawks 348; Com. *v.* Warren, 6 Mass. 72; Com. *v.* Morse, 2 Mass. 138; Hiel *v.* State, 1 Yerg. 76; People *v.* Stone, 9 Wend. 182; State *v.* Scroll, 1 Rich. 241; People *v.* Miller, 14 Johns. 37; State *v.* Wilson, 2 Rep. Con. Ct. 135; People *v.* Babcock, 7 Johns. 201; State *v.* Vaughan, 1 Bay 282; Cross *v.* Peters, 1 Greenl. 367; Com. *v.* Speer, 2 Va. Cases 65; Lambert *v.* People, 9 Cow. 578; Com. *v.* Hearsay, 1 Mass. 137.

Such are the following among other frauds. Those affecting the administration of public justice, as counterfeiting a creditor's authority to discharge his debtor from prison (though, if genuine, it would be good), whereby his liberation was effected; R. *v.* Fawcitt, 2 East P. C. 826, 862; or endangering the public health by selling unwholesome provisions, unfit for the food of man, whether to the public generally, R. *v.* Treeve, 2 East P. C. 821, or under a contract with government for supplies to particular bodies, as foreign

grocer, and during that time did deal in the buying and selling by weight of (tea, &c.) and of divers other goods, wares and merchandises, to wit, at, &c., aforesaid; and that the said A. B., contriving and fraudulently intending to cheat and defraud the people of the said state, whilst he used and exercised his said trade and business, to wit, &c., and in divers other days and times between that day and the day of taking of this inquisition, at, &c., did knowingly, wilfully, falsely, fraudulently and deceitfully keep in a certain shop there, wherein he the said A. B. did so as aforesaid carry on his said trade, a certain false pair of scales for the weighing of goods, wares and merchandises by him sold in the way of his said trade, which said scales

prisoners of war under the king's protection, *ib.*; or the military asylum at Chelsea; R. *v.* Dixon, 2 Campb. 12; 3 M. & S. 11, S. C. So in Pennsylvania, an indictment was sustained against a baker in the employ of the United States' army, in baking two hundred and nineteen barrels of bread, and marking them as weighing eighty-eight pounds each, when, in fact, they severally weighed but sixty-eight pounds; Resp. *v.* Powell, 1 Dall. 47; see 2 Rep. Con. Ct. 139. Frauds calculated to affect all persons, as selling by false weights and measures; R. *v.* Wheatly, 1 Bla. R. 273; R. *v.* Young, 3 T. R. 98; 2 Burr. 1125, S. C., overruling R. *v.* Wood, 1 Sess. Ca. 217; counterfeiting tokens of public authenticity, as the alnager's seal on cloth, while those duties remained unrepealed by 11 and 12 Wm. III. c. 20, s. 2, R. *v.* Edwards, Tremaine's P. C. 103; playing with false dice, R. *v.* Leeser, Cro. Jac. 497; obtaining money from a soldier on a false pretence of having a power to discharge him, Serlested's case, Latch 202; or getting the king's bounty by enlisting as a soldier, being an apprentice, liable to be retaken by a master, R. *v.* Joseph Jones, 2 East P. C. 822; 1 Leach 174, S. C. In Virginia the rule has been pressed much further, it having been held that, the procuring goods, &c., by means of a note purporting to be a bank note of the Ohio Exporting and Importing Company, there being no such bank or company, is a cheat punishable by indictment at common law, if the defendant knew that it was such a false note. It is necessary in such case to aver the scienter in the indictment; Com. *v.* Speer, 2 Va. Cases 65; but see State *v.* Patillo, 4 Hawks 348. So, where the defendants purchased goods from the prosecutor's clerk, and gave in payment an instrument purporting to be a five dollar bill of the Bank of Tallahasse, in Florida, the blanks of which were filled up, except those opposite the words "cashier" and "president;" but in those blanks an illegible scrawl was written, which, on careless inspection, might have been mistaken for the names of those officers, and the defendants knew, before they passed the instrument, that it was worthless; it was held, in South Carolina, that they were guilty, at common law, of cheating by a false pretence; State *v.* Stroll and Carr, 1 Rich. 244.

The following are some instances of frauds on individuals, which not being effected in the course of general practice, or by means generally calculated to injure the public, are not indictable at common law; selling a smaller as and for a larger quantity of an article, if without using false weights or measures; this being a deception which could not have taken effect but for the buyer's carelessness in accepting without measure, R. *v.* Wheatly, 2 Burr. 1125 (the beer case); Cowp. 324; East P. C. 817, 819; or inducing an illiterate person to sign a deed by reading it to him falsely; State *v.* Justice, 2 Dev. 199. The like where a miller who had received good barley to grind, delivered in return meal of musty and unwholesome barley, or of barley mixed with other grain, but not for the food of man, and the mill not being a soke mill, to which certain residents were obliged to resort to grind their corn; R. *v.* Haynes, 4 M. & S. 220; see 6 East 133. So as to obtaining money of A. by pretending to come by command of B. to receive money, R. *v.* Jones, 2 Ld. Raym. 1013; Salk. 379; 6 Mod. 105, S. C.; see 2 East P. C. 818; 1 Hawk. c. 71, s. 2; or detaining part of corn sent to be ground; Channel's case, Stra. 793. On the same principle, it is not an indictable offence to get possession of a note, under pretence of wishing to look at it, and carrying it away and refusing to return it, People *v.* Miller, 14 Johns. 37; nor to obtain money by falsely representing a spurious note of hand to be genuine, State *v.* Stroll, 1 Rich. 244; State *v.* Patillo, 4 Hawks 348; see Com. *v.* Speer, 2 Va. Cases 65; nor to pretend to have money ready to pay a debt, and thereby obtaining a receipt in discharge of the debt, without paying the money; People *v.* Babcock, 7 Johns. 201; nor to put a stone in a pound of butter so as to increase its weight; Weierbach *v.* Trone, 2 W. & S. 408; nor to obtain goods on credit, by falsely pretending to be in trade, and to keep a grocery shop, and giving a note for the goods, in a fictitious name, Com. *v.* Warren, 6 Mass. 72; nor to obtain, in violation of an agreement and by false pretences, possession of a deed lodged in a third person's hands as an escrow; Com. *v.* Hearsay, 1 Mass. 137.

were then and there by artful and deceitful contrivance so made and constructed, as to cause every quantity of goods, wares and merchandises weighed therein and sold thereby, to appear of greater weight than the real and true weight, by one-tenth part of such apparent weight; and that the said A. B. on, &c., aforesaid, at, &c., aforesaid (he the said A. B. then and there well knowing the said scales to be false as aforesaid), did knowingly, wilfully and fraudulently sell and utter to one C. D.,(*aa*) a citizen of the said state, certain goods in the way of his said trade, to wit, a large quantity of tea, weighed in and by the said false scales, and as and for ten pounds weight of tea, whereas in truth and in fact the weight of the said tea so sold as aforesaid, was short and deficient of the said weight of ten pounds, by one-tenth part of the said weight of ten pounds, to wit, at, &c., aforesaid, against, &c. (*Conclude as in book* 1, *chap.* 3).

Cheating at common law by false cards.(*b*)

That A. B. *et al.*, being persons of dishonest conversation, and common gamblers and deceivers, with false dice and cards, on, &c., at, &c., contriving, practising and falsely, fraudulently and deceitfully intending one A. S. with false cards and false play, falsely, unlawfully, unjustly, fraudently and deceitfully to deceive and defraud, and from the said A. S. by means of the said false cards and false play, craftily and subtilly, falsely, fraudulently and deceitfully, different sums of money to acquire and obtain, then and there did solicit, incite, provoke and procure the said A. S. to play with them the said A. B. *et al.*, at a certain unlawful game called whist, for divers sums of money, by means whereof the said A. S. did then and there play with the said A. B., &c., at the said unlawful game called whist, for divers sums of money, and that the said A. B. *et al.* did then and there with force and arms at the said unlawful game called whist, by means of false cards and false play, subtilly, falsely, unlawfully and fraudulently receive, have and obtain into their own hands and possession the sum of eighty pounds of lawful moneys of the said A. S. and from the said A. S., and the same did then and there carry away, to the great damage, &c., and against, &c.(*c*) (*Conclude as in book* 1, *chap.* 3).

Second count. Cheating at common law, at a game of dice called passage.

That the defendants being such persons as aforesaid, on, &c., at, &c., did solicit, incite, provoke and procure the said A. S. to play with them the said A. B. *et al.*, at a certain unlawful game called passage, for divers sums of money, by means whereof the said A. S. did then and there play with the said A. B. *et al.*, at the said unlawful game called passage for divers sums of money, and that the said A. B. *et al.* did then and there with false dice and by false throwing of the same, that is to say, by slurring the said dice, subtilly, falsely, unlawfully and fraudulently receive, have and obtain into their own hands and possession the sum of eighty pounds of the lawful moneys of the said A. S. and from the said A. S., and the same did then and

(*aa*) It is better to aver a particular person defrauded, though it seems enough, if such be the fact, to allege the sale to have been to divers citizens unknown; 2 Stark. C. P. 467.
(*b*) Stark. C. P. 444. (*c*) R. *v.* Arnope, Trem. 91, and see R. *v.* Betsworth, Trem. 93.

there carry away, to the great damage, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Information. Passing a sham bank note, the offence being charged as a false token.(*d*)

D. K., attorney to the State of Connecticut, for the County of New Haven, now here in court information makes that G. B. S., of the town of New Haven in the County of New Haven, on, &c., did wilfully and designedly and with intent to cheat and defraud one F. W. I. of said town of New Haven, utter and pass to the said F. W. I. as money, a certain false token made and executed after the general similitude of a bill of a banking company intended as money and purporting to be a bank bill of the denomination of five dollars, and to have been issued by a banking company or corporation in the State of New York, by and under the name of "The Globe Bank," and purporting also to be signed by N. B. as president and to be countersigned by S. D. D. as cashier thereof; which false token is of the following purport and effect, that is to say, (*here set out the token or bill*); whereby and by means of said false token the said G. B. S. did then and there knowingly and fraudulently obtain from the said F. W. I. certain goods, the property of the said F. W. I., that is to say, one pair of boots of the value of five dollars; whereas in truth and in fact at the time when said false token was so uttered and passed to the said F. W. I., no such banking company or corporation existed in the State of New York as "The Globe Bank," nor did such banking company or corporation ever have existence in said State of New York, nor was there at the time when said false token was uttered and passed to the said F. W. I. as aforesaid, or at any other time, any banking company or coporation in the State of New York known by or doing business under the name of "The Globe Bank," but said pretended bank bill and pretended signatures thereto were and are wholly false, fictitious and fraudulent. All which is to the great damage and deception of the said F. W. I., against, &c., and contrary, &c.

Whereupon the attorney prays the advice of this honourable court in the premises.

Obtaining goods by means of a sham bank note, as a misdemeanor at common law.

That A. B., &c., on, &c., at, &c., falsely and deceitfully did obtain and get into his hands and possession, from one T. C., three yards of velvet, &c., of the value in the whole of nine dollars eighty seven and a half cents, of the goods and chattels, wares and merchandise of the said T. C., and bank notes and money of the said T. C. to the further amount of ten dollars and twelve and a half cents, by colour and means of a certain false note and token, purporting to be a bank note for twenty dollars, issued and purporting to be payable on demand

(*d*) On this information, which was drawn by Mr. Kimberly of New Haven, the defendant was convicted and sentence passed.

by the Ohio Exporting and Importing Company, at their bank in Cincinnati, and purporting to be subscribed by one Z. S., president, and countersigned by J. L., cashier, and which said false note the said F. C. believed to be a true bank note for twenty dollars; and that he the said J. S. did thereby and therefor procure the said T. C. then and there to deliver to him the said J. S., the goods and chattels, wares merchandise, bank notes and money, of him the said T. C. aforesaid, he the said J. S. then and there well knowing the said note to be false and fraudulent as aforesaid, to the great injury and deception of him the said T. C., to the evil example, &c., and contrary to the form of the statute, &c.(*e*) (*Conclude as in book* 1, *chap.* 3).

Cheat by means of a counterfeit letter.(*f*)

That J. G., &c., on, &c., at, &c., a certain false and counterfeit letter in the name of a certain T. G., of the township aforesaid, farmer, to a certain B. D., in the township of Plymouth, in the said county, merchant, directed, falsely and deceitfully contrived, made, imagined and devised, the tenor of which said false and counterfeit letter follows in these words, to wit:

"New Providence, December 25th, 1755. Friend B. D., let the bearer J. G., have half a gallon of rum; he is going down the road a little way, and at his return send me half a gallon home by him, and I will pay you; the latter end of next week I shall go to town.

T. G."

and afterwards, to wit, the day and year aforesaid, at Plymouth

(*e*) Com. *v.* Speer, 2 Va. Cases 65. The prisoner was convicted, but before judgment was rendered, the court below adjourned to general court the following questions: 1. Is the falsely passing as a true note, a false and forged note purporting to be a note of the Bank of the Ohio Exporting and Importing Company, and purporting to be signed, and payable as in the indictment is set forth, and procuring the goods and other property in the indictment mentioned, for the said false and forged note, when no such bank or company ever existed, either chartered or uncharted, such a false token or counterfeit letter as comes within the true intent and meaning of the act of assembly, passed November, 1789, and if so, is the indictment in this case good and sufficient? 2. If this is not an offence within the act of assembly, is it an indictable offence at common law, and if so can judgment be given against the defendant upon this indictment, that he be imprisoned, the jury not having assessed a fine?

Per curiam: "The court is unanimously of opinion, that the falsely passing as a true note, a false and forged note purporting to be a note on the Bank of the Ohio Exporting and Importing Company, and purporting to be signed and payable as in the indictment is set forth, and procuring the goods and other property in the indictment mentioned for the said false and forged note, when no such bank or company ever existed, either chartered or unchartered, is not such an offence as can be prosecuted under the act entitled 'an act against those who counterfeit letters or privy tokens, to receive money or goods in other men's names,' passed November 18th, 1789.

"And the court is further unanimously of opinion, that the offence of falsely procuring the goods, &c., of other men, by means of a false and counterfeit note, such as is set forth in the indictment, knowing the same to be false and counterfeit, is indictable as a cheat at common law, but that judgment cannot be rendered against the defendant in this case, because the indictment doth not expressly aver that the said defendant knew that the said note was a false and fraudulent note."

The count in the text has been amended by the insertion of the scienter required by the court, though even as thus qualified it is questionable whether a more full averment of the invalidity of the notes would not be advisable.

(*f*) This indictment was framed in 1756, by Benjamin Chew, the then attorney-general of Pennsylvania.

township aforesaid, in the county aforesaid, the said false and counterfeit letter to the aforesaid B. D. falsely and deceitfully did give and deliver, by colour and means of which said false and counterfeit letter so as aforesaid to the said B. D. delivered, the said J. G., the day and year aforesaid, at Plymouth township aforesaid, in his hands and possession, one gallon of rum of and from the aforesaid B. D., falsely, unlawfully, unjustly and deceitfully did acquire and obtain, and the said B., then and there of the aforesaid one gallon of rum falsely, unlawfully, unjustly and deceitfully did deceive and defraud, to the evil and pernicious example of all others in such case delinquent, and against, &c. (*Conclude as in book* 1, *chap.* 3).

II. FALSE PERSONATION OF BAIL.

Under 11 *Geo. IV. and* 1 *Wm. IV. c.* 66, *s.* 11.(*g*)

That A. B., late, &c., on, &c., at, &c., before the right honourable Sir J. P., knight, one of the barons of her majesty's Court of Exchequer, at Westminster (the said Sir J. P., knight, then and there having lawful authority to take any recognizance of bail in any suit then depending in the said court), then and there feloniously did acknowledge a certain recognizance of bail, in the name of J. N., in a certain cause then depending in the said court, wherein A. B. was plaintiff and C. D. defendant, he the said J. N. not being then and there privy or consenting to the said J. S., so acknowledging such recognizance in his name as aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

III. SECRETING GOODS, &c.

First count. Secreting, &c., with intent to defraud, &c.(*h*)

That A. K., &c., on, &c., at, &c., being a person of an evil disposition, ill name and fame and of dishonest conversation, and unlaw-

(*g*) Arch. C. P. 7th Am. ed. 478.

(*h*) The 26th section of the act abolishing imprisonment for debt in New York (Laws of 1831, 402), and the 20th section of the act under the same title in Pennsylvania (Pamph. Laws, 1842, 339; Purd. 585), make it penal in a debtor to secrete his goods with intent to defraud his creditors. The precedent in the text has been several times sustained in New York, though it has not yet received a final adjudication in the Pennsylvania courts. In New York the question came up in People *v.* Underwood, 16 Wend. 546. In that case exception was taken because it was neither averred nor proved that the prosecutory creditors were judgment creditors. Bronson J., in noticing this position, said: "The 26th section of the statute, under which the defendant was indicted, declares that 'any person who shall remove any of his property out of any county, with intent to prevent the same from being levied upon by any execution, or who shall secrete, assign, convey or otherwise dispose of any of his property with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and any person who shall receive such property with such intent, shall, on conviction, be deemed guilty of a misdemeanor.' The language of the act plainly extends to all creditors, and I can perceive no sufficient reason for restricting its construction to such creditors as have obtained judgments for their demands. The fraudulent removal, assignment or conveyance of property by a debtor, which the legislature intended to punish criminally, usually takes place in anticipation of a judgment, and for the very purpose of defeating the creditor of the fruits of his recovery. If there must first be a judgment before the crime can be committed, the sta-

fully devising and intending to defraud A. C. R. and H. B., merchants, doing business in the City of New York, under the name, style and firm of R. and B., said firm of R. and B. being creditors of him the said A. K., on, &c., at, &c., unlawfully did secrete, assign, convey and dispose of(*hh*) the personal property of him the said A. K., to wit, &c., (*stating goods, as in larceny*), with intent to defraud the said firm of R. and B., then and there being creditors of him the said A. K., to the great damage of the said A. C. R. and H. B., doing business as aforesaid under the name, style and firm of R. and B., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same, with intent to defraud and prevent such property from being made liable for payment of debts.

That the said A. K. further devising and intending to defraud the said A. C. R. and H. B., doing business under the name, style and firm of R. and B., so being creditors as aforesaid of him the said A. K., afterwards, to wit, on the day and year aforesaid, with force and arms, at the ward, city and county aforesaid, wickedly, fraudulently and unlawfully did secrete, assign, convey and dispose of certain other property of him the said A. K., to wit, &c., with intent then and there to defraud the said A. C. R. and H. B., doing business under the name, style and firm of R. and B. as aforesaid, and then and there being creditors of him the said A. K., and to prevent such property being made liable for the payment of the debts of him the said A. K., to the great damage of the said A. C. R. and H. B., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Same, not specifying property.

That the said A. K., on, &c., at, &c., fraudulently, wickedly and unlawfully did secrete, assign, convey and otherwise dispose of his property with intent to defraud the said A. C. R. and H. B., then and there being creditors of him the said A. K., and then and there doing business under the name, style and firm of R. and B., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Averring intent to defraud persons unknown.

That the said A. K. being a person of an evil disposition (*as in the first count mentioned*), further devising and intending to defraud divers other persons to the jurors aforesaid unknown, creditors of him the said A. K., afterwards, to wit, on the said fourth day of April, in

tute will be of very little public importance. This is not like the case of a creditor seeking a *civil remedy* against a fraudulent debtor. There the creditor must complete his title by judgment and execution, before he can control the debtor in the disposition of his property; he must have a certain claim upon the goods before he can inquire into any alleged fraud on the part of the debtor; Wiggins *v.* Armstrong, 2 Johns. Ch. 144. But this is a public prosecution, in which the creditor has no special interest. The legislature has relieved the honest debtor from imprisonment, and subjected the fraudulent one to punishment as for a criminal offence. The crime consists in assigning or otherwise disposing of his property with intent to defraud a creditor, or to prevent it from being made liable for the payment of his debts. The public offence is complete, although no creditor may be in a condition to question the validity of the transfer in the form of a civil remedy. I think the jury were properly instructed on this question, and that the exception should be overruled."

As to the extent of "creditors" in the act, see Johnes *v.* Potter, 5 S. & R. 519, where it was held that the word included not only persons whose debts are due and payable, but those whose debts are not yet due.

(*hh*) See *ante*, p. 130, n. *c*., and Wh. C. L. 81, as to this joinder.

the year aforesaid, with force and arms, at the ward, city and county aforesaid, fraudulently, wickedly and unlawfully did secrete, assign, convey and otherwise dispose of (*stating goods*) of the property of him the said A. K., with intent then and there to defraud divers persons to the jurors aforesaid unknown, then and there being creditors of him the said A. K., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count. Same, not specifying goods, with intent to defraud persons unknown.

That the said A. K., afterwards, on, &c., at, &c., wickedly, fraudulently and unlawfully did secrete, assign, convey and otherwise dispose of his property, with intent to defraud divers other persons to the jurors aforesaid unknown, then and there being creditors of him the said A. K., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count. Same, with intent to prevent property from being levied on.

That the said A. K., afterwards, on, &c., at, &c., wickedly, fraudulently and unlawfully did secrete, assign, convey and otherwise dispose of his property to prevent such property being made liable for the debts of him the said A. K., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form on the same statute. First count, intent to defraud, to prevent property being made liable, &c.(*i*)

That A. B., &c., on, &c., at, &c., wickedly, fraudulently and unlawfully devising and intending to defraud I. C. F., the said I. C. F. being then and there a creditor of him the said R. in a large amount, to wit, four thousand dollars, of his just debt so as aforesaid due from him the said R. to him the said I., did then and there fraudulently, wickedly and unlawfully secrete (*goods, as in larceny*) being then and there the property of the said R. with intent to defraud the said I., being as aforesaid a creditor of the said R., and to prevent the said specified goods and chattels and property of the said R. being made liable for the payment of the debt aforesaid, so as aforesaid due from him the said R. to the said I., to the great damage of the said I., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same, with intent to defraud another person.

That R. B., on, &c., at, &c., wickedly, fraudulently and unlawfully devising and intending to defraud J. P. B., the said J. P. B. being then and there a creditor of him the said R., in a large amount, to wit, four thousand dollars, of his just debt so as aforesaid due from him the said R. to him the said J. P. B., did then and there fraudulently, wickedly and unlawfully secrete two hundred pressing plates, two screws, twenty shafts, two hundred wooden frames, one horse, one wagon, being together of the value of two thousand dollars, being then and there the property of the said R., with intent to defraud the said J. P. B., being as aforesaid a creditor of the said R., and to prevent the said specified goods and chattels and property of the said R.

(*i*) This indictment was drawn in 1847, with great skill and care, by Mr. Webster, the assistant of the attorney-general of Pennsylvania, but was never tried.

being made liable for the payment of the debt as aforesaid so as aforesaid due from him the said R. to the said J. P. B., to the great damage of the said J. P. B., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Secreting, assigning, &c., with intent to defraud two, &c. That the said R. B., on, &c., at, &c., wickedly, fraudulently and unlawfully devising and intending to defraud I. C. F. and J. P. B., the said F. and B. being then and there creditors of him the said R. in large amounts, to wit, in the sum of eight thousand dollars, of their respective just debts, so as aforesaid due from the said R. to them the said F. and B., did then and there wilfully, wickedly, unlawfully and corruptly secrete, assign, convey and dispose of the property, goods, wares and merchandises and moneys of him the said R. of great value, to wit, of the value of ten thousand dollars, the character, quality, quantity, description and denomination of which said goods, property, wares and merchandises and moneys, are to the inquest unknown, with intent to defraud the said I. C. F. and J. P. B., so being creditors of the said R. and to prevent the said property, goods, wares and merchandises and moneys being made liable for the payment of the debts of the said R., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Secreting, &c., averring creditors to be judgment creditors.

That, on, &c., J. S., J. L. and L. H., trading as S., L. and H. were creditors of the said R. B. by judgment, which said judgment was entered in favour of them the said J. S., J. L. and L. H. trading as aforesaid, against him the said R. in the District Court for the City and County of Philadelphia, at the September term of the said court, in the year one thousand eight hundred and forty-six, being numbered two hundred and fifty-seven of the said term, for the sum of seven thousand nine hundred dollars, and was founded on a certain bond and warrant of attorney thereto annexed, executed by the said R. B. in favour of them the said J. S., J. L. and L. H., trading as S., L. and H., dated the twenty-fourth day of October, one thousand eight hundred and forty-six, in the penal sum of seven thousand nine hundred dollars, conditioned for the payment of the just sum of three thousand nine hundred and fifty dollars on demand, with lawful interest, which said judgment still remains on the records of the said courts unpaid and unsatisfied; and the inquest, &c., on their oaths, &c., do further present, that the said R. B., on, &c., at, &c., wickedly, fraudulently and unlawfully devising and intending to defraud the said J. S., J. L. and L. H., trading as S., L. and H., the said J. S., J. L. and L. H. trading as S., L. & H., being then and there judgment creditors of him the said R. B., as aforesaid set forth, of their just debt and judgment so as aforesaid due from him the said R. to them the said S., L. and H., trading as aforesaid, did then and there wilfully, wickedly, unlawfully and corruptly secrete the goods and chattels in the aforesaid first, second and third counts mentioned and referred to, being then and there the property of the said R., with intent to defraud the said J. S., J. L. and L. H., trading as aforesaid, being as aforesaid the judgment creditors of him the said R. B., and to prevent the said goods and

chattels being made liable for the payment of the aforesaid debt and judgment so as aforesaid due from the said R. to the said J. S., J. L. and L. H., trading as aforesaid, to the great damage of the said J. S., J. L. and L. H., trading as aforesaid, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count. Same in another shape.

That the said R. B., on, &c., at, &c., wickedly, fraudulently and unlawfully devising and intending to defraud J. S., J. L. and L. H., trading as S., L. and H., the said S., L. and H., trading as aforesaid, being then and there judgment creditors of the said R., to wit, by a judgment entered in the District Court for the said city and county wherein they the said J. S., J. L. and L. H., trading as aforesaid, were plaintiffs, and the said R. was defendant, which said judgment was for a large sum of money, to wit, seven thousand nine hundred dollars, and is number two hundred and fifty-seven on the docket of the September term of the said court for the year one thousand eight hundred and forty-six, of their just debt and judgment so as aforesaid due from him the said R. to them the said S., L. and H., did then and there wilfully, wickedly, unlawfully and corruptly secrete, assign, convey and dispose of the property, goods, wares and merchandises and moneys of him the said R., of great value, to wit, of the value of ten thousand dollars, the character, quality, quantity, description and denomination of which said goods, property, wares and merchandises and moneys are to the inquest unknown, with intent to defraud the said J. S., J. L. and L. H., trading as aforesaid, so being judgment creditors of him the said R., and to prevent the said property, goods, wares and merchandise and wares and moneys being made liable for the payment of the debts of the said R. and of the aforesaid judgment, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

IV. FRAUDULENT INSOLVENCY IN PENNSYLVANIA.

That T. W. D., &c., on, &c., at, &c., made and presented to the Honourable the Judges of the Court of Common Pleas of the County of Philadelphia, his petition in writing praying for the benefit of the insolvent laws of this commonwealth, according to the form, force and effect of the said insolvent laws, * and the said T. W. D. so petitioning as aforesaid, and being then and there indebted to a certain B. L. of the said county, yeoman, and also to divers others, whose names are to the jurors aforesaid unknown, in divers large sums of money, the said court on the said petition, so presented as aforesaid, did then and there appoint the eleventh day of January, in the year of our Lord one thousand eight hundred and thirty-nine, for the purpose of hearing the said T. W. D. and his creditors, at the county court house in the City of Philadelphia, on which said last mentioned day, and at the court house aforesaid, and on the several days and times thereafter to which the said case was duly adjourned, to wit, at the county aforesaid, the said court did meet and sit, for the purpose aforesaid; and the said T. W. D., fraudulently and wickedly contriving and intending to cheat and defraud the said B. L. and others, his

creditors as aforesaid, to wit, on the day and year first aforesaid, at the city and county aforesaid, did collude and contrive with a certain J. B. D. and a certain C. W. D., for the concealment of a part of his estate and effects, to wit, merchandise, consisting of groceries, † viz., one hundred chests of tea; dry goods, viz., five thousand yards of domestic goods; hardware and other articles, to the jurors aforesaid unknown, of great value, to wit, of the value of one hundred thousand dollars, thereby expecting a future benefit to himself, with intent to defraud the said B. L. and others, his creditors, to the evil example of all others in like cases offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same as first down to asterisk, and then proceed:

And the said T. W. D., was then and there indebted to B. L., J. R. and D. M., of the said city and county, yeomen, and also to divers others, whose names are to the jurors aforesaid unknown, in divers large sums of money, and that the said T. W. D., so petitioning as aforesaid, did with intent to defraud his creditors aforesaid, convey to a certain J. B. D. and C. W. D., for the use of himself, thereby expecting a future benefit to himself, part of his estate and effects, to wit, merchandise, consisting of groceries, &c. (*Concluding as in first count from* †).

Third count. Same as first, but averring collusion with another person.

Fourth count.

That the said T. W. D., on, &c., at, &c., made and presented to the Honourable the Judges of the Court of Common Pleas of the County of Philadelphia his petition in writing, praying for the benefit of the insolvent laws of the Commonwealth of Pennsylvania, and that the same T. W. D. so petitioning as aforesaid, on the day and year first aforesaid, at the city and county aforesaid, did fraudulently * convey to a certain T. W. D., Jr., part of his estate, effects and credits, to wit, merchandise, consisting of groceries, viz., one hundred chests of tea; dry goods, viz., five thousand yards of cotton goods; hardware, and other articles to the jurors aforesaid unknown, of great value, to wit, of the value of twenty thousand dollars, with the expectation of receiving future benefit to himself, and with intent to defraud his creditors and for the use of himself, to the evil example, &c.

Fifth and sixth counts. Same as first, but averring collusion with another person.

Seventh count. Same as second, but specifying another assignee.

*Eighth count. Same as fourth to *, and then proceed*:

conceal part of his estate, effects and credits, to wit, merchandise, consisting of groceries, one hundred chests of tea; dry goods, viz., five thousand yards of cotton domestic goods, and other articles to the jurors aforesaid unknown, of great value, to wit, of the value of fifty thousand dollars, with the expectation of receiving future benefit to himself, and with intent to defraud his creditors, and for the use of himself, to the evil example, &c.(*j*)

(*j*) This was the indictment in Dyott's case, which having undergone a severe scrutiny, and after having been thoroughly canvassed by eminent counsel, was sustained by the Supreme Court of Pennsylvania. Com. v. Dyott, 5 Whart. 67.

Fraudulent insolvency by a tax collector. First count, embezzling creditor's property.

That E. N. F., &c., on, &c., at, &c., made and presented to the Honourable the Judges of the Court of Common Pleas of the County of Philadelphia his petition in writing, praying for the benefit of the insolvent laws of this commonwealth, according to the form, force and effect of the said insolvent laws, and the said E. N. F., so petitioning as aforesaid, being then and there indebted to the County of Philadelphia in a large sum of money, to wit, in the sum of ten thousand dollars, being the same sum of money embezzled as hereinafter mentioned, and also to divers others, whose names are to the jurors aforesaid unknown, in divers large sums of money to the jurors aforesaid unknown, the said court, on the said petition so presented as aforesaid, did then and there appoint the third day of November, one thousand eight hundred and forty-seven, for the purpose of hearing the said E. N. F. and his creditors, at the county court house, in the City of Philadelphia, on which said last mentioned day and at the court house aforesaid, and on the several days and times thereafter to which the said case was duly adjourned, to wit, at the county aforesaid, the said court did meet and sit, for the purpose aforesaid. And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that theretofore, to wit, on the day and year first aforesaid, at the county and within the jurisdiction aforesaid, he the said C. N. F., * being then and there the agent of the said County of Philadelphia, unlawfully embezzled divers large sums of money, to wit, ten thousand dollars, the property of said county, with which said sums of money he had been entrusted as agent aforesaid, by the said County of Philadelphia, to the prejudice of the said County of Philadelphia, the said county being then and there a creditor of him the said E. and opposing his petition aforesaid, as well as of the other opposing creditors of said E., with intent to defraud the said County of Philadelphia, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

*Second count. Applying to his own use trust money, &c. Same as in first count to *, and then proceed*:

being then and there the agent of the County of Philadelphia and entrusted as such with divers large sums of money, to wit, ten thousand dollars, the property of said county, unlawfully applied to his own use the said money, to the prejudice of the said County of Philadelphia, the said county being an opposing creditor of him the said E., at the hearing aforesaid, as well as of the other opposing creditors of said E., with intent to defraud the said county, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

*Third count. Same, differently stated. As in first count to *, and proceed*:

being then and there the agent of the County of Philadelphia, unlawfully embezzled and applied to his own use divers large sums of money, to wit, ten thousand dollars, the property of said county, with which said money he had been entrusted as agent aforesaid, by the said County of Philadelphia, to the prejudice of the said county, the said county being creditor of the said E., opposing his petition as

aforesaid, as well as of the other opposing creditors of the said E., with intent to defraud the said county, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Embezzlement, &c. The appointment as collector being more fully set forth.

That the said E. N. F., on, &c., at, &c., was duly constituted and appointed collector of taxes for the County of Philadelphia, in South Ward in the City of Philadelphia, and being so constituted and appointed, he the said E., then and there exercised the said office of collector of taxes, and was entrusted with and collected divers large sums of money in his capacity as collector and agent as aforesaid for the said county, said money belonging to said county. And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the county and within the jurisdiction aforesaid, he, &c., made and presented to the said Judges of the Court of Common Pleas his petition in writing, (the effect of which in the first count of this indictment is more particularly set forth), he the said E., being then and there indebted to the said County of Philadelphia, in the sum of money embezzled as hereinafter mentioned, and also to divers others, whose names are to this inquest unknown; whereupon the said court took such action on said petition, and such proceedings were thereon had therein as in the first count of this indictment is described. And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the county and within the jurisdiction aforesaid, the said E. N. F., being such collector of taxes and agent as aforesaid for the said County of Philadelphia, * unlawfully embezzled divers large sums of money, to wit, ten thousand dollars, being part of the said money which he had collected as collector of taxes and agent as aforesaid for the County of Philadelphia, said money being the property of the said county, to the prejudice of the said county, the said county being an opposing creditor of the said E. at the hearing aforesaid, as well as of the other opposing creditors of said E., with intent to defraud the said county, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count. State the office, &c., as in fifth count to asterisk, and proceed:

unlawfully applied to his own use divers large sums of money, to wit, ten thousand dollars, being the said money with which he had been entrusted as collector aforesaid, and agent for the said County of Philadelphia, said money being the property of the said county, to the prejudice of the said county, the said county being an opposing creditor of the said E. at the hearing aforesaid, as well as of other opposing creditors of said E., with intent to defraud the said county, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Seventh count. Same as sixth, introducing the averment that the money embezzled was part of the money which had been entrusted to the collector.

*Seventh count. Colluding, &c. Same as first count to *, and then proceed*:

And the said E. N. F., fraudulently and wickedly contriving and intending to cheat and defraud the said County of Philadelphia, and

others, his creditors aforesaid, to wit, on the day and year first aforesaid, at the city and county aforesaid, did collude and contrive with certain persons whose names are to this inquest as yet unknown, for the concealment of a part of his estate and effects, to wit, money of the value of ten thousand dollars, thereby expecting further benefit to himself, with intent to defraud the said County of Philadelphia, and others, his creditors, to the evil example of all others in like manner offending, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

V. VIOLATION OF FACTOR LAW.

First count. Pledging goods consigned, and applying the proceeds to defendant's use, under the Pennsylvania statute.

That J. Q. A., &c., and D. S. H., on, &c., at, &c., then and there being the factors and consignees of a certain C. D., with force and arms, &c., did then and there receive as a consignment for sale from the said C. D., certain goods and merchandise, to wit, (*stating the goods with the same particularity as in larceny*), together with other goods and merchandise of the goods and property of the said C. D., in all of great value, to wit, of the value of one thousand four hundred and two dollars, and that the said J. Q. A. and D. S. H., so being such consignees and factors as aforesaid, on the day and year as aforesaid at the county aforesaid and within the jurisdiction aforesaid, with force and arms, &c., in violation of good faith and with intent to defraud the said C. D., did then and there deposite and pledge with one J. B.(*k*) said merchandise, so consigned to them as aforesaid, as a security for certain money, to wit, the sum of one thousand four hundred and two dollars, which they the said J. Q. A. and D. S. H. had before that time borrowed from the said J. B., and did then and there apply and dispose of to their own use the said money, to the great damage of the said C. D., to the evil example of all others in the like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Selling same, and applying to defendant's use the proceeds.

That the said J. Q. A. and D. S. H., on, &c., then and there being the consignees and factors of the said C. D., with force and arms, &c., did then and there receive from the said C. D., as a consignment for sale, certain other goods and merchandise, to wit, &c., of the goods and property of the said C. D., and that the said J. Q. A. and D. S. H. so being such consignees and factors as last aforesaid, on the day and year last aforesaid at the county aforesaid and within the jurisdiction of this court, with force and arms, &c., in violation of good faith, and with intent to defraud the said C. D., did then and there sell the last mentioned goods and merchandise to one B. C., at and for the sum of one thousand four hundred and two dollars, and apply and dispose of to their own use, the said sum of one thousand four hundred and two dollars so received, to the great damage of the said C. D., to the

(*k*) If the party from whom the money was borrowed and to whom the property was pledged, be unknown, it can be averred so.

evil example of all others in like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Selling same for negotiable instrument.

That the said J. Q. A. and D. S. H., on, &c., then and there being the consignees and factors of the said C. D., with force and arms, &c., did then and there receive from the said C. D. as a consignment for sale, certain other goods and merchandise, to wit, of the goods and property of the said C. D., * and that the said J. Q. A. and D. S. H., so being such consignees and factors as last aforesaid, on the day and year last aforesaid, at the county aforesaid, with force and arms, &c., in violation of good faith and with intent to defraud the said C. D., did sell the said last mentioned goods and merchandise to one A. B., at and for the price and sum of one thousand four hundred and two dollars, and received therefor as such consignees the negotiable instruments of the purchasers of said last mentioned goods and merchandise, whose names are as yet unknown to the inquest aforesaid, and with force and arms, &c., and in violation of good faith and with intent to defraud the said C. D., did then and there apply and dispose of to their own use the said negotiable instruments raised and acquired by the sale of the said last mentioned goods and merchandise of the said C. D., to the evil example of others in like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

*Fourth count. Same as third to *, and proceed:*

and did then and there undertake and faithfully promise the said C. D. to sell the said last mentioned goods and merchandise for and on account of him the said C. D., and to render him a just and true account of said last named sale, and well and truly to pay to the said C. D. the proceeds thereof according to their duty as such consignees and factors as last aforesaid, but that the said J. Q. A. and D. S. H., so being such consignees and factors as last aforesaid, on the day and year last aforesaid at the county aforesaid, with force and arms, &c., in violation of good faith and with intent to defraud the said C. D., did then and there sell to one A. B. the last named goods and merchandise at and for the price and sum of one thousand four hundred and two dollars, and did then and there apply and dispose of to their own use the said last named sum of one thousand four hundred and two dollars raised by the sale of the last named goods and merchandise, to the great damage of the said C. D., to the evil example of all others in like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count. Same stated in another shape.

That the said J. Q. A. and D. S. H., on, &c., then and there being the consignees and factors of the said C. D., with force and arms, &c., in violation of good faith and with intent to defraud the said C. D., did apply and dispose of for their own use, certain other money, to wit, the sum of one thousand four hundred and two dollars, which said last mentioned sum of money had before that time been raised and acquired by them the said J. Q. A. and D. S. H., by the sale of certain other goods and merchandise, to wit, (*stating the goods*), of the goods and property of the said C. D., which said last named goods and merchandise had been before that time consigned for sale to them the said J. Q. A. and D. S. H. by the said C. D., to the great damage

of the said C. D., to the evil example of others in like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

VI. OBTAINING GOODS BY FALSE PRETENCES.(*l*)

General frame of indictment.

That A. B., &c., on, &c., at, &c., devising and intending to cheat and defraud, &c., (*stating party intended to be defrauded*), of his goods, moneys, chattels and property, unlawfully did falsely(*a*) pretend(*b*) to C. D.,(*c*) that(*d*) (*setting out the pretence*), whereas in truth and fact (*negativing the pretence*),(*e*) as he the said A. B., then and there well knew, (*or*, which said pretence, the said A. B. then and there well knew to be false),(*f*) by colour and means(*g*) of which said false pretence, and pretences, he the said A. B. did then and there unlawfully obtain(*h*) from the said C. D. (*stating the property obtained*),(*i*) being then and there the property of the said C. D.,(*j*) with intent to cheat and defraud the said C. D.(*k*) to the great damage of the said C. D.(*l*) contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*l*) Before examining the nature and requisites of an indictment for obtaining goods by false pretences, it will be proper to take a general view of the offence itself. It will be observed at the outset, that in their operative clauses, the statutes in England and in Massachusetts, New York and Pennsylvania, are the same; see Wh. C. L. 459. Keeping this in mind, the general definition afforded by the cases both in England and this country is, that a false pretence must be a false representation as to some existing fact, made for the purpose of inducing the prosecutor to part with his property; and not a mere promise, which the promisor intends to break, as for payment of goods on delivery; R. *v.* Goodhall, R. & R. 461; R. *v.* Parkes, 2 Leach 616; Com. *v.* Drew, 19 Pick. 184; Com. *v.* Hutchinson, 2 Pa. L. J. 242; Com. *v.* Stone, 4 Met. 48; Com. *v.* Wilgus, 4 Pick. 177. Thus, where an indictment stated the false pretence to be, that the prisoner would tell the prosecutor where his strayed horse was, if he would give him one pound, without alleging that the prisoner pretended he knew where it was, it was held bad, though the prisoner received the money, and refused to tell; R. *v.* James Douglass, 1 Mood. C. C. 462. But it has been holden that obtaining money as a share of a bet, on a fraudulent representation that it had been laid, though to be decided by the future event of a pedestrian feat, is a false pretence; R. *v.* Young, 3 T. R. 98. It is not necessary to constitute the offence, as was thought in New York, People *v.* Conger, 1 Wheel. C. C. 449, that the prisoner should orally or in writing make any false assertion, for, if he present a genuine order for the payment of money, and assumes by his conduct to be the person to whom it is payable, and by this means fraudulently obtains money which belongs to another, he will be within the statute; R. *v.* Story, R. & R. 81. Thus where a party not being a member of the University of Oxford, went into a shop there, wearing the academic cap and gown, and obtained goods, his dress was held a sufficient false pretence, though nothing passed in words; R. *v.* Barnard, 7. C. & P. 784. Another instance in which the acts and conduct of a party were held tantamount to a false pretence, without false verbal representations, was that where a party obtained goods and money in exchange for a counterfeit promissory note, by asking for goods at a shop, and at the same time throwing down, as in payment, the note in question, which purported to be of larger value than the price of the goods, without stating it to be genuine; R. *v.* Freeth, R. & R. 127. (In this case the first and second counts were in the statute for false pretence, the third was for a cheat at common law. Against the last count it was argued that a note for less than twenty shillings being void and prohibited by law, it was no offence to forge it (as to which point see Rushworth's case, R. & R. 318), or to obtain money on it when forged, as the party to whom it was uttered ought to have been on his guard; Graham B., however, left the case to the jury, directing them, that the evidence, if true, sustained the second and third counts. Verdict, guilty on both those counts. The judges were of the opinion stated above, which appears, in substance, confined to the second count; but Lawrence J., thought the shop-keeper not cheated if he parted with his goods for a piece of paper, which, being a promissory note for less than twenty shillings, he must be presumed in law to know in law was worth nothing, if genuine). Where, how-

ever, goods were obtained by means of a forged order in writing, requesting the prosecutor to let the bearer have linen for J. R. and signed J. R., this is reported to have been held by Taunton J., to be uttering a forged request for delivery of goods, and a felony under 1 Wm. IV. c. 66, s. 19; R. *v.* Evans, 5 C. & P. 553; whereas, obtaining money from a county treasurer by a forged note purporting to be signed by a magistrate, for paying the expenses of conveying vagrants, had been held a false pretence in R. *v.* Rushworth, R. & R. 317; 1 Stark. C. P. 396, S. C. Uttering as good and available, a bank note which had been long cancelled, and the makers bankrupt, has been thought not to be sufficient evidence of a fraud indictable at common law, or a cheat, unless bankruptcy be brought home to all the parties; R. *v.* Spencer, 3 C. & P. 420; R. *v.* Hurst, R. & R. 460; see Dickinson's Q. S. p. 330. So great a strictness in proof, however, is not deemed essential in this country; Com. *v.* Stone, 4 Met. 43. And the reason of the distinction here is that where a bank becomes publicly insolvent there is no one behind to pursue, whereas in England the members of the company are still responsible. On the other hand, it is evident that putting a note of this kind into the general circulation of the country is likely, by defrauding a succession of persons, to affect the public, and is not the mere case of cheating in a private bargain.

Obtaining goods by giving in payment a check on a banker with whom the party keeps no cash, and which he knows will not be paid, was declared by all the judges to be indictable as a false pretence, though it was not an indictable fraud at common law; R. *v.* Lara, 6 T. R. 565; R. *v.* Hunt, R. & R. 460. In a false pretence of this kind it was held to be well laid, "that the check was a good and genuine order for the payment of, and of the value of, the sum specified;" R. *v.* Smythe Parker, 2 Mood. C. C. 1. A count alleged the prisoner to have obtained from G. P. by a false pretence (stated), a sovereign "with intent to defraud G. P. of the sum of five shillings, parcel of the value of the last mentioned piece of the current gold coin." Prisoner was shown to have made the pretence laid, viz. that he was Mr. H., and thereby induced G. P. to buy, at the cost of five shillings, a bottle of stuff he said would cure G. P.'s child. G. P. gave him a sovereign and received fifteen shillings in change. Prisoner was shown not to be H.; held to be a false pretence, and with intent well laid; Reg. *v.* Bloomfield, C. & M. 537. See *post*, p. 245. A false statement to a parish officer as an excuse for not working, that the party has not clothes, is not a false pretence within the act, though it induce the officer to give him clothes, as it was rather an excuse for not working than a false pretence to obtain goods; R. *v.* Wakeling, R. & R. 504.

Obtaining money by a pretence, known by the offender to be false at the time, is equally criminal, though the party who parted with the money laid a plan to entrap him into committing the offence; R. *v.* Ady, 7 C. & P. 140.

As to the subject matter obtained, it is said that obtaining a check on a banker, on unstamped paper, payable to a person not named, but not to bearer also, is not obtaining a "valuable security" within the act, for by 55 Geo. III. c. 184, the banker would be liable to a penalty of £50 for paying it; R. *v.* Yates, 1 Mood. C. C. 170. Obtaining credit on account from the prisoner's bankers, by drawing a bill on a person on whom he has a right to draw, and which has no chance of being paid, and delivering it to them, is not obtaining *money* under 7 and 8 Geo. IV., though the bankers in consequence pay money on the prisoner's account to other people, to a larger extent than they would otherwise have done; R. *v.* Worrell, 1 Mood. C. C. 224.

In the cases which have occurred in this country the same rules are applied. Thus, where one under a fictitious name delivered to a person to sell on commission, spurious lottery tickets purporting to be signed by himself, and received from the agent the proceeds of the sale; Com. *v.* Wilgus, 4 Pick. 177; where a keeper of an intelligence office, by falsely pretending he had a situation in view, induced the prosecutor to pay him two dollars as a premium; Com. *v.* Parker, Thacher's C. C. 24; where the defendant falsely pretended to the prosecutor that a horse he was about to sell him was the horse "Charley," whereas he was not that horse, but another of equal worth; State *v.* Mills, 17 Maine R. 211; where a person obtained goods under the false pretence that he lived with and was employed by A. B., who sent him for them; People *v.* Johnson, 12 Johns. 292; Lambert *v.* People, 9 Cow. 578; where the defendant represented himself to be in a successful business as a merchant in Boston, with from $9,000 to $10,000 over and above all his debts, and to give weight to this assertion represented that he had never had a note protested in his life, and had then no endorsers; where in one count the pretence was, "that he, the said J. A. B., possessed a capital of $8,000, that the said $8,000 had come to him through his wife, it being her estate, and that a part of it had already come into his possession, a part would come into his possession in the month then next ensuing, and that for the remaining part thereof he would be obliged to wait for a short time;" and in the second count, that he, the said J. A. B., "possessed a capital of $8,000, which said $8,000 had come to him through his wife, it being her estate;" and in a third, "that he, the said J. A. B., was then and there possessed of $8,000;" where the defendant pretended to the prosecutor that the goods to be purchased were ordered for a hotel-keeper in Washington, who was

a man of credit, and to whom they were to be immediately forwarded; Com. *v.* Spring, cited 3 Pa. L. J. 89; where the pretence was, that the defendant owned real estate in Passyunk Road worth $7,000, and that he had personal property and other means to meet his liabilities, and that he was in good credit at the Philadelphia Bank; Com. *v.* M'Crossin, 3 Pa. L. J. 219; where the indictment charged that N. represented to O. that he possessed four valuable negroes, and that he would let him have them for four bills of exchange on Philadelphia, and that in consequence of this representation the bills were drawn by O., and that this representation was made knowingly and designedly and with intent to cheat O. of his drafts, and that in fact N. possessed no such slaves as he pretended to have; State *v.* Newell, 1 Mo. R. 177;—in all these cases, there was held to be the false representation of an existing fact, and that the exigencies of the statute therefore were satisfied.

(*a*) An indictment averring that the defendant did "falsely and *feloniously* pretend," &c., was held bad; R. *v.* Walker, 6 C. & P. 657. In those states, however, as in New York, where the offence is a felony, the averment is of course essential.

(*b*) The word pretend is indispensable, though the word falsely, according to the English practice, R. *v.* Airey, 2 East R. 31, is not essential, the pretences being subsequently negatived. It is much safer however to insert it.

(*c*) The pretence need not be to the party from whom the property is obtained; if made to his agent, who communicates it to the principal, it is sufficient; Com. *v.* Call, 21 Pick. 515; Com. *v.* Harley, 7 Met. 462. And in the same case, it was held that an indictment which substantially averred that the false pretences were practised on A. B., and his money obtained thereby with intent to defraud C. D., was good.

Where the indictment averred the pretences to have been made to a firm, it is sufficient to show that they were made to one of the firm; Com. *v.* Mooare, Thach. C. C. 410; and, in a late case, the Supreme Court of Massachusetts held, that a false pretence made use of to an agent, who communicates it to his principal, and who is influenced by it to act, is within the statute; Com. *v.* Call, 21 Pick. 515; Com. *v.* Harley, 7 Met. 462; see also Com. *v.* Bagly, 7 Pick. 279. A false pretence made to A. in B.'s hearing, by which money is obtained by B., may be laid as a pretence made to B.; R. *v.* Dent, 1 C. & K. 249. And it is said that money paid by an agent is rightfully laid as money paid by a principal.

The money of a benefit society whose rules were not enrolled, was kept in a box, of which E., one of the stewards, and two others, had keys; the defendant on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained from the hands of E., out of the box, five pounds; it was held, that in an indictment the pretence might be laid as made to E., and the money as the property of "E. and others," obtained from E.; *ib.*

(*d*) It is not necessary to describe the pretences more particularly than they were shown or described to the party at the time, and in consequence of which he was imposed on; 2 East P. C. c. 18, s. 13, p. 837, 838. It is sufficient to state the effect of the pretence correctly; the very words need not be used; R. *v.* Scott, cited in Rex. *v.* Parker, 2 Mood. C. C. R. 1; 7 C. & P. 825. But a variance between the indictment and the evidence, with regard to the effect of the pretences, will be fatal; thus, where the indictment stated that the defendant pretended *he had paid a sum of money into the Bank of England*, and the evidence showed that he had said, generally, *that the money had been paid into the bank*, Ellenborough C. J., held the variance fatal; R. *v.* Prestow, 1 Campb. 494.

But it is not necessary to prove the whole of the pretences charged; proof of part, and that the property was obtained by force of such part, is enough; R. *v.* Hill, R. & R. 190; R. *v.* Ady, 7 C. & P. 140. In New York it has been held that where one or more of the pretences are proved to be false, it is sufficient, *per se*, to constitute the offence; the accused may be convicted, notwithstanding that the other pretences in the indictment are not proved; such pretences being in such case, regarded as surplusage; see People *v.* Stone, 9 Wend. 182; State *v.* Mills, 17 Maine 211. The same rule exists in the analagous cases of perjury and blasphemy; Ld. Raym. 886; 2 Camplb. 138-9; Cro. C. C. 7th ed. 662; State *v.* Hascall, 6 N. Hamp. 358; Com. *v.* Kneeland, 20 Pick. 206; Wh. C. L. p. 164. (*See next note*).

An indictment stated that by the rules of a benefit society, every free member was entitled to five pounds on the death of his wife, and that the defendant falsely pretended that a paper which he produced was genuine, and contained a true account of his wife's death and burial, and that he *further* falsely pretended that he was entitled to five pounds from the society, by virtue of their rules, in consequence of the death of his wife; by means of which "last mentioned false pretence" he obtained money; it was held good; R. *v.* Dent, 1 C. & K. 249.

(*e*) It is necessary for the pleader to negative specifically all the false pretences relied on to sustain the indictment; Tyler *v.* State, 2 Humph. 37; R. *v.* Perott, 2 M. & S. 379. There must be a special averment that the pretences, or *some of them*, are false; and where *none* of them are negatived, the case will be reversed on error. It was held, in one case, that if the proof was adequate as to the offence, though only coming up to a portion

of the pretence averred in the indictment, a conviction was good; R. *v.* Hill, R. & R. 190. In R. *v.* Perott, the question was thoroughly examined by Ellenborough C. J., and it was remarked as a reason for the rule above laid down, "to state merely the whole of the false pretence, is to state a matter generally combined of some truth as well as falsehood." Such is the law in New York; People *v.* Stone, 9 Wend. 182; People *v.* Haynes, 11 Wend. 563. But it would seem to be safer to negative each pretence specifically in the indictment; it being plain that if only one of the assignments is well laid and is proved on trial to have been the moving cause of the transfer of property from the prosecutor to the defendant, the rest may be disregarded. It is difficult to say how a court, on demurrer or motion in arrest of judgment, can go behind the indictment and say that the particular assignment, though one among many, which the pleader has omitted to negative, was not the operative motion on the prosecutor's mind. In a case, however, where one portion of the assignment of fraud must necessarily, from its structure, be true, *e. g.* where the defendant pretends that *being the servant of A. B.*, he was employed by him to convey goods to the defendant, for the carrying of which, porterage is charged, and where the fact is that the defendant *is* the servant of A. B., but was not employed by him to carry the goods in question, it is of course only necessary to negative what is in fact the false pretence used.

(*f*) It is always prudent to allege a scienter, and it is necessary so to do, unless the pretences stated are of such a nature as to exclude the possible hypothesis of the defendant not knowing of their falsity; R. *v.* Philpotts, 1 C. & K. 112; see also Com. *v.* Speer, 2 Va. Cases 65; see *ante*, p. 228. A contrary opinion, it is true, is expressed by Judge Parsons, in Com. *v.* Blumenthal, Philadelphia, 1846, to a manuscript copy of which I have had the opportunity to refer.

"But it has been further contended that an indictment for this offence should always aver the *scienter*, that the accused made the representations charged in the bill *knowing* them to be false, for *non constat*, but that in a case like the present, where a defendant is charged with having made a representation as to his means, solvency and ability to pay, he might not have known of the true condition of his affairs, and if such was the case, he would be guilty of no offence. It seems to me, however, there might be two answers given to this argument, without resorting to authority. In the first place there is nothing said of the *scienter* in the statute, unless we take it from the words 'intent' and 'designedly,' and we have already given an understanding of them. And in the second place, where the charge on the record is, that the intention was to cheat and defraud, the fact that the accused made a statement of his means and ability, which he honestly believed was true, but in fact was mistaken, it would be matter of proof by him to rebut the assertion upon the record that his intention was to cheat, and the further averment that the representation was false.

"To sustain his position the learned counsel has cited a number of respectable English authorities where it was ruled that in consequence of the *scienter* not being averred in the bill, the indictment was held bad. But I think on an examination of the forms of most of the English pleaders as given in the elementary writers, and the decisions on this point, the *scienter* has been required to be averred only, where the statute under which the party was indicted contained that as one of its provisions, or where from the character of the offence it was necessary to state in the indictment the material facts and circumstances which the public prosecutor was bound to prove, in order to make the act criminal.

"The first section of the act of the 30 Geo. II. c. 26, is in these words: 'That all persons who *knowingly* and designedly by false pretence or pretences, shall obtain from any person or persons money, goods, wares and merchandise, with intent to cheat and defraud any person or persons of the same,' &c. It will be found by a reference to the forms given by Mr. Chitty, of indictments under this statute, the *scienter* is averred. The fifty-third section of the 7 and 8 Geo. IV. c. 29, is as follows: 'If any person shall by any false pretence obtain from any other person any chattels, money or valuable security with intent to cheat or defraud any person of the same,' &c. Now I observe that in indictments under this statute, the *scienter* is not always averred, and does not seem to be, except in those cases where from the facts in the case, it was material in order to constitute the offence, and when without an averment, that the accused knew of the falsity of the means alleged to have been used, there would have been no crime; and such I am certain was the case of the Queen *v.* Wickham, 10 A. & E. 38, where the offence charged was in relation to a promissory note, and the representations made about the same, when it was material to aver and prove that the prisoner knew that the note for twenty-one pounds was not a good and valuable security. And not unlike it is the case of the Queen *v.* Henderson, 1 C. & M. 330, where it was also, from the nature of the offence charged, material to show that the prisoner knew that the allegation was false, for, from the nature of the assertion set forth, the legitimate inference was that it was true.

"But in the case before us the averment of the false statement is one alleged to have been made with regard to the prisoner's own affairs, where from the nature of the assertion, the

Form used in Massachusetts.

That A. B., &c., on, &c., at, &c., being a person of an evil disposition, and devising and intending by unlawful ways and means to obtain and get into his hands and possession the goods, merchandise, chattels and effects of the honest and good citizens of this commonwealth, and with intent to cheat and defraud C. D., &c., did then and there unlawfully, knowingly and designedly, falsely pretend and represent to said C. D., (*stating pretences*); and the said C. D. then and

inference is inevitable that he *knew* whether what he was stating was true or false, and on proof of its falsity, his guilt might be legitimately inferred, unless by countervailing testimony, he can show that he was innocently mistaken in the representations he made. Therefore it is not a material fact which the prosecution are bound to state in the indictment, or prove on the trial, in order to bring the case within the act of 1842. If the accused could show to the satisfaction of a jury, that he *did not know* that his asseveration of facts relating to his condition, was untrue, it perhaps it might avail him as a defence to the allegation in the bill, of an intention to cheat and defraud, for that is the essence of the charge.

"The second cause assigned for the demurrer, is, that the offence set forth in the bill is not a crime under the laws of this state. In my opinion this case comes within the principles laid down by this court in Com. *v.* Poulson, 6 L. J. 272, and that case must be considered the law in this county, until it is reversed by a higher tribunal.

"The indictment charges that the prisoner did falsely pretend that he and his brother Alexander, trading as Blumenthal and Brother, were then doing an excellent and profitable business at Norfolk, Virginia, and that they were perfectly solvent and prosperous. Now when we have it admitted upon the record that this representation was made 'devising and intending' to cheat and defraud the prosecutors out of their property, that the *whole* was false and untrue, that by colour and means of said false pretence, they obtained the goods mentioned in the bill, with an intent to cheat and defraud the prosecutors and to their damage, it seems to me that it is a pretence within the meaning of the statute, and to hold any different rule would tend to increase the frauds against which the act intended to guard. When we are told by the Supreme Court, 'It is certain that a fraudulent misrepresentation of a party's means and resources is within the English statutes, and, *a fortiori*, within our own,' it seems to me such a false statement is a crime, when made with an intention to cheat and defraud a party out of his goods.

"I have, after mature reflection, seen no reason for retaining the rule laid down in the case of Poulson; that opinion was formed after a thorough examination of the law, and was the determination of the whole court, and one by which we are all bound until reversed; nor shall I attempt in any case to avoid giving full effect to the law as therein settled. As I view the present record there can be no doubt that this court would be justified in pronouncing sentence upon the prisoner. He is fully apprised of all he has to answer, and after admitting all which is stated to be true, there can be no question but that such acts are a violation of the law. Hence judgment must be entered in favour of the commonwealth on the demurrer, unless it is withdrawn."

This is all very vigorous and true, and though, as before mentioned, it is prudent to insert the *scienter* in all cases, it can hardly be held necessary in instances in which, like that just noticed, the defendant must necessarily have been conscious of the falsity of his own statement.

(*g*) To omit to aver that it was by means of the pretences as laid that the property was obtained, is fatal; R. *v.* Airey, 2 East 30.

(*h*) The "obtaining" must be alleged in name; State *v.* Bacon, 7 Verm. 219.

(*i*) It is necessary that the property obtained should be described with the same accuracy as in larceny. Where a signature to a note has been obtained by false pretences, and the party defrauded has been obliged to pay the note, it is enough to charge the sum paid to have been obtained, &c., without setting forth the obtaining of the signature; People *v.* Herrick, 13 Wend. 87.

(*j*) The indictment must state the goods to be the property of some person named, and where no owner is laid the indictment will be quashed; R. *v.* Parker, 3 A. & E. 292; R. *v* Norton, 8 C. & P. 196; State *v.* Lathrop, 15 Verm. R. 279; R. *v.* Martin, 8 A. & E. 481; 3 N. & P. 472.

(*k*) This is essential under the statutes.

(*l*) It is not necessary, as it has been laid down in New York and Massachusetts, to aver damage to the prosecutor; People *v.* Genung, 11 Wend. 18; Com. *v.* Wilgus, 4 Pick. 177.

there believing the said false pretences and representations, so made as aforesaid by the said A. B., and being deceived thereby was induced, by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver to the said A. B., (*stating goods*), of the proper goods, merchandise, chattels and effects of said C. D., and the said A. B. did then and there receive and obtain the said goods, merchandise, chattels and effects of the said C. D., by means of the false pretences and representations aforesaid, and with intent to cheat and defraud the said C. D. of the same goods and merchandise, chattels and effects; whereas in truth and in fact (*negativing the pretences*); and so the jurors aforesaid upon their oaths aforesaid, do say that the said A. B., by means of the false pretences aforesaid, on, &c., at, &c., unlawfully, knowingly and designedly did receive and obtain from said C. D., the said goods, merchandise, chattels and effects of the proper goods, merchandise, chattels and effects of the said C. D., with intent to defraud C. D. of the same, against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in New York.

That A. B., &c., on, &c., at, &c., being a person of an evil disposition, ill-name and fame and of dishonest conversation, and devising and intending, by unlawful ways and means, to obtain and get into his hands and possession the moneys, valuable things, goods, chattels, personal property and effects of the honest and good people of the State of New York, to maintain his idle and profligate course of life, on, &c., at, &c., with intent feloniously to cheat and defraud one C. D., did then and there feloniously, unlawfully, knowingly and designedly, falsely pretend and represent to the said C. D., that (*stating the pretences*), and the said C. D. then and there believing the said false pretences and representations so made as aforesaid, by the said A. B., and being deceived thereby, was induced, by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver to the said A. B., (*stating goods*), of the proper moneys, valuable things, goods, chattels, personal property and effects of the said C. D., and the said A. B. did then and there designedly receive and obtain the said, &c., of the said C. D., of the proper moneys, valuable things, goods, chattels, personal property and effects of the said C. D., by means of the false pretences and representations aforesaid, and with intent feloniously to cheat and defraud the said C. D. of the said, &c., whereas in truth and in fact the said (*negativing pretences*); and whereas in fact and in truth the pretences and representations, &c., so made as aforesaid, by the said A. B. to the said C. D., was and were in all respects utterly false and untrue, to wit, on the day and year last aforesaid, at the ward, city and county aforesaid; and whereas in fact and in truth the said A. B. well knew the said pretences and representations so by him made as aforesaid to the said C. D., to be utterly false and untrue at the time of making the same.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., by means of the false pretences aforesaid, on the day

and year last aforesaid, at the ward, city and county aforesaid, feloniously, unlawfully, falsely, knowingly and designedly did receive and obtain from the said C. D., of the proper moneys, valuable things, goods, chattels, personal property and effects of the said C. D., with intent feloniously to cheat and defraud C. D. of the same, against, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that defendant was agent of a lottery, &c.(*m*)

That A. W. W., &c., on, &c., at, &c., being a wicked and evil disposed person, and a common cheat, and contriving and intending fraudulently and deceitfully to cheat and defraud one E. H. of his moneys and property, on, &c., falsely and fraudulently did knowingly and designedly pretend to the said E. H., that his name was H. C., that he was an agent for the managers of a certain lottery, called The Maryland Grand State Lottery, and that he had a number of quarters of tickets in said lottery, and then and there exhibited a great number of quarters of tickets in said lottery, signed H. C., with the numbers of the original tickets in said lottery written therein, and then and there falsely and fraudulently did knowingly and designedly pretend that the said quarters of tickets were true and genuine, and that he had the original tickets corresponding with the numbers of the said quarters of tickets then deposited in a bank in Boston, whereas in truth and in fact, his true name was A. W. W., and not H. C., as he falsely pretended, and in truth and in fact he was not, and never was an agent for the managers of the lottery called The Maryland Grand State Lottery, and the said quarters of tickets so exhibited by the said A. W. W. were not genuine parts of original tickets in said lottery, but were spurious and fabricated for the sole purpose to deceive, defraud and injure, and he had not and never had in his possession, nor deposited in any bank the original and genuine tickets corresponding to the numbers of said quarters of tickets so exhibited to the said E. H. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. W. W., on the day and year last aforesaid, at said Cambridge, in the county aforesaid, by the false tokens and pretences aforesaid, falsely and fraudulently did knowingly and designedly obtain and get into his possession from the said E. H. fifteen dollars, of the moneys and property of the said E. H., with the intent him the said E. H. then and there to cheat and defraud of the same, to the great damage of the said E. H., in evil example to others in like case to offend, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that defendant was Mr. H., who had cured Mrs. C. at the Oxford Infirmary, whereby he induced the prosecutor to buy a bottle of ointment, &c., for which he received a sovereign, giving 15*s. in change.*(*n*)

That A. B., &c., on, &c., at, &c., did unlawfully and falsely pre-

(*m*) See Com. *v.* Wilgus, 4 Pick. 177, where this count was held good.

(*n*) R. *v.* Bloomfield, 1 C. & M. 537. The defendant was convicted before Creswell J., at the sessions, and sentence passed; see *ante*, p. 240.

tend to one C., the wife of G. P., that he, the said D. B. was M. H., and that he was the same person that had cured Mrs. C. at the Oxford Infirmary; by means of which said false pretence, he the said D. B. did then and there obtain from the said G. P., the husband of the said C. P., one piece of the current gold coin of this realm called a sovereign, of the moneys, goods and chattels of the said G. P., with intent then and there to cheat and defraud him the said G. P. of the sum of five shillings, parcel of the value of the said last mentioned piece of the current gold coin, whereas in truth and in fact, &c. (*negativing the false pretences, and proceeding as in general frame*).

Against a member of a benefit club or society, for obtaining money belonging to the rest of the members under false pretences.(o)

That on, &c., at, &c., certain persons united together and formed themselves into a certain lawful and beneficial club or society, called, &c. (*as the name may be*), under certain printed articles, rules, orders or regulations, made for the good order and government of the said club or society, (which said articles, rules, &c., were afterwards, to wit, at the General Quarter Sessions of the Peace, holden at in the county of aforesaid, duly exhibited, confirmed and filed, according to the statute in such case made and provided), and then and there, and on divers other days and times, between that day and the third of May, in the twenty-ninth year, &c., contributed and paid divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of one hundred pounds and upwards, of lawful money into the said club or society, and deposited the same in a certain box, left in the dwelling house of one T. R. at K. aforesaid, commonly called or known by the name or sign of, &c., (*as it may be*), and there kept for the use, benefit and advantage of the members of the said club or society at the time being. And the jurors, &c., do further present, that in and by a certain article of the said rules and orders of the said club or society, it is declared, ordered and agreed that, &c., (*here recite the article relating to the payment of money, towards the funerals of the members' wives*). And the jurors, &c., that on the same day and year last aforesaid, at, &c., aforesaid, one L. P., late of, &c., one A. B. and one C. D., &c., (*here insert the rest of the members' names which appear by the club book to be existing at this time*), were members of the said club or society, contributing and paying money into and for the use of the said club or society, that is to say, for the general benefit and advantage of all members thereof, at the said house of the said T. R., for the purpose, amongst other things, mentioned, declared and contained in the said article above mentioned and set forth. And the jurors, &c., do further present, that on, &c., last aforesaid, at, &c., aforesaid, a large sum of money, to wit, the sum of one hundred pounds, (*this need not be the exact sum, let it be something under the sum contained in the box at this time*), of like lawful money, was and remained in the said box, kept for the purpose in that behalf aforesaid, in the said

(o) Dickinson's Q. S. 6th ed. 336.

house of the said T. R., there before then deposited therein, by and for and on behalf of all the members of the said club or society. And the jurors, &c., do further present, that by the assent and concurrence of all the members of the said club or society, it had been usual and customary during all the time aforesaid, (except the nights on which the said club or society had been there holden), for the members of the society, having a right or occasion to withdraw, or receive any money to which they had been entitled by the articles, rules and orders of the said club or society, from and out of the said box, to apply to the said T. R. for the payment of the same, upon condition that he the said T. R. should be repaid the same from and out of such money contained in the said box, for the purpose in that behalf aforesaid, on some subsequent night on which the said club or society should be holden at the said house of him the said T. R., at K., aforesaid. And the jurors, &c., that the said L. P., so being such member as aforesaid, and well knowing all and singular the premises aforesaid, on, &c., at, &c., aforesaid, unlawfully, knowingly and designedly did falsely pretend to the said T. R. that the wife of him the said L. P. was then dead, and that he the said L. P. then wanted thirty shillings to bury his said wife, by means of which said false pretences he the said L. P. then and there unlawfully, knowingly and designedly did obtain of and from the said T. R. the said sum of thirty shillings, with intent then and there to cheat and defraud the said A. B., C. D., &c., (*the other members of the club*), of the same, whereas in truth and in fact, the wife of him the said L. P. was not dead at the said time he so made the false pretences to the said T. R. as aforesaid; and whereas, in truth and in fact, he the said L. P., at the time of the false pretences, did not want the said sum of thirty shillings, or any sum of money whatsoever for the purpose of burying his wife, or any person whatsoever, having then lately then been the wife of him the said L. P., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form for same, coupled with a production to the society of a false certificate of burial. First count. (*In substance*).(*p*)

That A. B., &c., on, &c., at, &c., unlawfully did falsely pretend to F. E., that the wife of him the said R. D., was then dead. By means of which he obtained from the said F. E. silver coin to the amount of three pounds fifteen shillings, of the moneys of the said F. E., with intent to defraud F. E., whereas in truth and in fact the said wife of the

(*p*) R. *v.* Dent, 1 C. & K. 249. After a conviction on this indictment, a motion for arrest of judgment was refused. It appeared that the money of a benefit society, whose rules were not enrolled, was kept in a box, of which E. one of the stewards and two others had keys. The defendant, on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained from the hands of E. out of the box, £5. It was held, that in an indictment the pretence might be laid as made to E., and the money, the property of "E. and others," obtained from E. The first count describes the wife of the defendant, and the third count mentions "the said wife" of the defendant. It was ruled, that the third count sufficiently referred to the person mentioned as his wife in the first count.

said R. D. was not then dead, as he the said R. D. then well knew, &c.

(*The second count was similar, only adding all through it the words* "and others," *after the name of F. E.*)

Third count. (*In full*).

That before and at the time of the committing of the offence in this count mentioned, to wit, &c., there was a certain friendly society commonly called "The George and Dragon Friendly Society," and that the said R. D. was then and there a free member of the said society, and that by the rules of the said society it was amongst other things provided, that when any free member's wife dies, such member shall be allowed five pounds out of the society's stock, to wit, at, &c.

That before and at the time of the committing the offence in this count mentioned, to wit, &c., the said F. E. was one of the stewards of the said society.

That the said R. D. being such member of the said society as aforesaid, &c., on, &c., at, &c., did produce to the said F. E., so being such steward as aforesaid, a certain paper writing directed to one G. H. S. G., near Bristol, paid; and which said paper writing then was in the words and figures following, that is to say:

"London, November the 8th, 1843.

"Sir—I received your letter this morning, and was sorry to state that we did not send the particulars to you in the last letter we sent. She (meaning the said wife of the said R. D.), died October 18th, and was buried on Monday 23d, at the Baptis (meaning Baptist), Chappell, in New Pye Street, Westminster, London. I hope this will find you in perfect health, as it leaves us all at present. So I conclude, with kind love to you and all her inquiring friends. Please to deliver this to Mr. R. D.

"This is to certify, that I., T. H. N., atended (meaning attended), the funeral of M. D., on the 23d day of October, being the minister of the Baptist Chappell, in New Pie Street, Westminster, London."

That the said R. D., so being such free member of the society as aforesaid, then and there unlawfully, knowingly and designedly, did falsely pretend to the said F. E., so being such steward of the said society as aforesaid, that the said paper writing was a true, correct and genuine paper writing, and that the same contained a true, correct and genuine account of the death of the said wife of the said R. D., and of her burial at the Baptist chapel, in New Pye Street, Westminster, London; and that the said R. D., so being such free member as aforesaid, did then and there further unlawfully, knowingly and designedly, falsely pretend to the said F. E., so being such steward of the said society as aforesaid, that the said wife of the said R. D. was then dead, and that he the said R. D., as such free member as aforesaid, was then and there entitled to receive from the stewards of the said society the sum of five pounds, under and by virtue of the rules of said society, in consequence of the death of his said wife. By means of which said last mentioned false pretence, the said R. D. did then and there unlawfully obtain from the said F. E. two pieces of the current silver coin of this realm, called crowns (*describing silver and copper coins to the amount of* three pounds fifteen shillings), of the moneys of the said F. E. and others, with intent then and there to cheat and de-

fraud the said F. E. and others of the same; whereas in truth and in fact, the said paper writing was not a true, correct or genuine paper writing; and whereas in truth and in fact, the said paper did not contain a true, correct or genuine account of the death of the said wife of the said R. D., or of her burial at the Baptist chapel, New Pye Street, Westminster, London; and whereas in truth and in fact, the said wife of the said R. D. was not then dead; and whereas in truth and in fact, the said R. D., as such free member as aforesaid, was not then entitled to receive from the stewards of the said society the sum of five pounds, or to any other sum whatever, under and by virtue of the said rules of the said society, in consequence of the death of his said wife.

That the said R. D. well knew, at the time when he did so falsely pretend as last aforesaid, that each and every of the said pretence were false, to wit, at the parish aforesaid, in the county aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that a broken bank note was good.(*q*)

That J. S., &c., on, &c., at, &c., being a person of evil disposition, and contriving and intending unlawfully, fraudulently and deceitfully to cheat and defraud one H. S. G., an honest and worthy citizen of the commonwealth, on, &c., did falsely, knowingly, unlawfully and designedly pretend to the said H. S. G., that a certain note, partly written and partly printed, which he the said J. S. then and there produced and delivered to the said H. S. G., and which said note was and is as follows, that is to say, (*here set out note*), was a good and valuable promissory note for the payment of money, called a bank note, issued by the Commercial Bank of Millington, and that the said Commercial Bank of Millington was a good and solvent bank; by means of which said false pretences the said J. S. did then and there unlawfully obtain from the said H. S. G. one rifle of the value of nine dollars, lawful money, of the property of him the said H. S. G., and one dollar lawful money of the moneys of him the said H. S. G., with intent to cheat and defraud him, the said H. S. G., of the same. Whereas in truth and in fact, the said promissory note for the payment of money, called a bank note, issued by the Commercial Bank of Millington, was not a good and valuable promissory note for the payment of money, and was of no value whatever. And whereas in truth and in fact, the said Commercial Bank of Millington was not a good and solvent bank, which he the said J. S. then and there at the time of the false pretences aforesaid well knew, to the great damage and deception of the said H. S. G., to the evil example of all others in like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*q*) This form is given by Judge Lewis, in his excellent work on Criminal Law, p. 647. See R. *v.* Philpotts, 1 C. & K. 112; and see also particularly, *ante*, p. 239–40.

Pretence that a worthless check made by the defendant was good.(*r*)

That A. B., &c., on, &c., at, &c., being a person of a deceitful and subtle mind and disposition, and intending to cheat and defraud one W. M., did unlawfully, falsely and wickedly pretend to the said W. M., that a certain paper writing, which he the said defendant then and there produced to the said W. M., and which was as follows:

"£25. 6th January, 1837.

To Messrs. S. & Co., bankers, Bristol. Pay the bearer twenty-five pounds. R. C. C. S. P."

was a good and genuine order for the payment of the said twenty-five pounds, and of the value of twenty-five pounds; whereas in truth and fact (*negativing the pretence*), which he the said defendant then and there well knew, by means of which said false pretence, &c. (*stating the thing obtained*).

Another form for same.

That A. B., &c., on, &c., at, &c., did go to a certain shop of one B. M. there situate, and then and there unlawfully, knowingly and designedly did falsely pretend to the said B. M., that if he the said B. M. would send a pair of candlesticks of him the said B. M. (which the said B. M. then showed to the said A. B.), the next day to him the said A. B., to his lodgings at, &c., with a bill and receipt, that he the said A. B. would pay for them upon the delivery, by giving said B. M. an order for the payment of money which he the said A. B. then and there falsely pretended was in his possession, by means of which said false pretence he the said A. B., afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, unlawfully, knowingly and designedly did obtain from the said B. M., one pair of candlesticks of the value of, &c., of the goods, wares and merchandises of him the said B. M., with intent then and there to cheat and defraud him of the same; whereas in truth and in fact when he the said B. M., on the day and year aforesaid, sent the said goods, &c., to the said lodgings of him the said A. B., at, &c., aforesaid, with a bill and receipt, he the said A. B. did not pay for them upon the delivery by a valid order for the payment of money or otherwise, but did then and there unlawfully, knowingly, designedly, fraudulently and deceitfully deliver to W. J., a servant of him the said B. M., sent by the said B. M. to the said A. B. with the said goods, &c., and who delivered the same to him with a bill and receipt, a certain paper writing purporting to be an order for payment of money, *subscribed A. B.*(*s*), purporting to bear date the, &c., and to be directed to P. and Q., bankers and partners, by the name and description of, &c., for the payment, of, &c., to Messrs. R. and M., or bearer, he the said A. B. then and there *well knowing*(*s*) the same to be of no value, and that the same

(*r*) R. *v.* Parker, 7 C. & P. 825. This is the substance of the fourth count in this case, on which a majority of the judges held the conviction right.

(*s*) It must be shown to be A. B.'s handwriting, and that he knew it to be worthless; Wickham *v.* The Queen (in error), 10 A. & E. 31; 2 Per. & Da. 333, S. C.; R. *v.* Philpotts, C. & K. 112; see R. *v.* Jackson, Dickinson's Q. S. 332, n.

would not be paid. And whereas in truth and in fact the said A. B. had not, at the time of the false pretence aforesaid, in his possession or power, any valid order for the payment of money whatsoever, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

And the jurors, &c., that the said A. B., on, &c., did fraudulently inform and promise the said B. M., that if he the said B. M. would send a pair of candlesticks of the said B. M., which he the said B. M. then showed to the said A. B., the next day to him the said A. B. to his lodgings at, &c., with a bill and receipt, that he the said A. B. would pay for them upon the delivery. And the jurors, &c., that the said A. B., did then and there, to wit, on, &c., at, &c., deliver to W. J., then being the servant of the said B. M., and then having the said candlesticks in his possession, a certain paper writing purporting to be an order for payment of money, subscribed, &c. (*as in last count*), and then and there unlawfully, knowingly and designedly did falsely pretend to the said W. J., that he the said A. B. then kept cash with the said P. and Q., and that they were then his bankers, and that the sum of, &c., mentioned in the said paper writing, purporting to be an order for payment of money, would be duly paid by them; by means of which said last mentioned false pretences, the said A. B. did then and there, to wit, at, &c., unlawfully, knowingly and designedly obtain from the said W. J., one pair of candlesticks of the value, &c., the goods, &c., of the said B. M., with intent then and there to defraud him of the same; whereas in truth and in fact, the said A. B. did not then keep cash with P. and Q., nor were they then his bankers, nor was the sum of, &c., mentioned in the said paper writing, purporting to be an order for payment of money, duly paid by them, or hath the same, or any part thereof been paid by them or him the said A. B., or any person or persons whomsoever; and whereas, in truth and in fact, the said A. B. then and there well knew that the said paper writing, purporting to be an order for payment of money, was of no value, and was fabricated by him on purpose to cheat and defraud the said A. B., and that the sum of money therein mentioned would not be paid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that defendant was the agent of A. B., and as such had been sent by A. B. to C. D., to receive certain money due from the latter to the former.(*t*)

That F. C., &c., on, &c., at, &c., being a person of an evil disposition, and devising and intending by unlawful ways and means to

(*t*) This form was sustained in Com. v. Call, 21 Pick 515. Morton J., said, "This indictment is founded on the Rev. Stat. c. 126, s. 32, which provides, that if any person shall designedly, by any false pretence, and with intent to defraud, obtain from any other person, any money, goods, wares, merchandise or other property, he shall be punished, &c.

"The indictment clearly brings the offence within the interdiction of the statute, and indeed, uses all the substantive words of the statute itself. It alleges that the defendant '*designedly*,' '*with an intent to defraud*,' '*by false pretences*,' (fully setting them forth), did '*obtain*' certain *money*. These, with other necessary allegations to show who was intended to be and actually was defrauded, who was intended to be and actually was deceived, and whose was the money obtained, most certainly contain every averment which

obtain and get into his hands and possession, the goods, merchandise, chattels and effects of the honest and good citizens of this commonwealth, and with intent to cheat and defraud one A. W. and one G. S., of their money, did then and there unlawfully, knowingly and designedly, falsely pretend and represent to one C. A. P., a person who owed a sum to said W. and S., to wit, the sum of eleven dollars and sixty-three cents, that he the said C., then and there was an authorized collector and a servant of said W. and S., that said W. and S. had employed and sent him to collect and receive for them said sum of money so due as aforesaid, and owed by the said C. A. P. to them. And the said C. A. P., then and there believing the said false pretences and representations so made as aforesaid by the said C., and being deceived thereby, was induced by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver to the said F. C., the sum of eleven dollars sixty-three cents due and owing from him said P., to said W. and S., of the proper money and effects of said P., due and owing as aforesaid to said W. and S., and the said C. did then and there receive and obtain the said money and effects of the said P., due and owing as aforesaid to said W. and S., by means of the false pretences and representations aforesaid, and with the intent to cheat and defraud the said P. and said W. and S. of the same money and effects; whereas in truth and in fact said F. C., then and there was not an authorized collector and a servant of said W. and S., and the said W. and S. had not then and

can be needed 'fully and plainly, substantially and formally' to describe the offence of which the defendants stand indicted.

"The objection to the indictment, that it alleges an intent to defraud one person, and that false pretences were practised upon another; that one man was deceived and *his* money obtained, and another defrauded. The facts reported clearly show that these allegations are the only ones which would meet the proof; and that if this indictment cannot be sustained, a gross fraud may be practised within the words of the statute, and yet not be liable to punishment under it. A combination of facts has here occurred, and may occur again, where a deception has been practised upon one person, and *his* property obtained, and the loss has fallen upon another, the intention being to defraud him. This is clearly within the mischief intended to be guarded against, and, we have no doubt, within the effective prohibition of the statute.

"This indictment would manifestly be bad at common law, because the obtaining property by false pretences is not an offence punishable at common law. But had false tokens, one of the means of deception mentioned in this statute, been used, it is contended that the indictment would still be defective by the rules of the common law, because the allegation that one was deceived, and another defrauded, is repugnant, absurd and suicidal. And the case of the King *v.* Lara, 2 Leach 739, is relied upon as deciding this point. That case, which certainly seems to be directly in point, was an old Bailey trial, in which, according to the report, the decision appears to have been made by the jury, rather than the bench. At most it was a hasty ruling, during a criminal trial, in a tribunal more remarkable for its promptitude than its deliberation in such trials; it never received a revision, and is not entitled to much respect.

"But without stopping to inquire whether such an indictment would be good at common law or not, we are all satisfied that this is a good indictment under the statute.

"The grammatical and critical objections, however ingenious and acute they may be, cannot prevail. The age has gone by when bad Latin or even bad English, so it be sufficiently intelligible, can avail against an indictment, declaration or plea. The passage objected to may be somewhat obscure, but by a reference to the context, is capable of a pretty certain interpretation. The pronoun *them* must be referred to that antecedent to which the tenor of the instrument and the principles of law require that it should relate, whether exactly according to the rules of syntax or not.

"The motion in arrest must be overruled."

there employed and sent, and did not then and there employ and send said C. to collect and receive for them said sum of money so due and owing as aforesaid from said C. A. P. to them, but had forbidden said C. to collect any money and receive any for them, and had long before turned him out of their employment; and so the jurors aforesaid, upon their oath aforesaid do say, that the said F. C., by means of the false pretences aforesaid, on, &c., at, &c., unlawfully, knowingly and designedly did receive and obtain from said C. A. P., said sum of eleven dollars and sixty-three cents, being the said money due and owing as aforesaid, and effects of the proper money and effects of the said P., due, owing and payable to said W. and S., with intent to defraud them of the same, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence made to a tradesman that defendant was a servant to a customer, and was sent for the particular goods obtained.(*u*)

That A. B., &c., on, &c., at, &c., contriving and intending unlawfully, fraudulently and deceitfully to cheat and defraud one C. D. of his goods, wares and merchandises, on, &c., at, &c., aforesaid, unlawfully, knowingly and designedly did falsely pretend to the said C. D., that he the said A. B. then was the servant of one C. Q., of, &c., tailor (the said C. Q., then and long before, being well known to the said C. D., and a customer of the said C. D. in his said business and way of trade), and that he the said A. B. was sent by the said C. Q. to the said C. D., for ten yards of certain superfine woollen cloth, by which said false pretence the said A. B. did then and there, to wit, on, &c., at, &c., aforesaid, unlawfully, knowingly and designedly obtain from the said C. D., ten yards of superfine woollen cloth of the value of fifteen pounds, of the goods, wares and merchandises of the said C. D.,(*v*) with intent then and there to cheat and defraud him the said C. D. of the same, whereas in truth and in fact the said A. B. was not then the servant of the said C. Q., and whereas he the said A. B. was not then, or ever hath been, sent by the said C. Q. to the said C. D. for the said cloth, or for any cloth whatsoever, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form for same.(*w*)

That A. B., &c., on, &c., at, &c., intending, &c., unlawfully, knowingly and designedly did falsely pretend to one J. N., that the said J. S. then was the servant of one R. O. of St. Paul's Churchyard, in the City of London, tailor (the said R. O. then and long before being well known to the said J. N., and a customer of the said J. N. in his business and way of trade as a woollen draper), and that the said J. S. was then

(*u*) Dickinson's Q. S. 335.

(*v*) Essential to be stated; Reg. *v.* Parker, 3 Q. B. 292; Reg. *v.* Norton, 8 C. & P. 196. The want of it will occasion indictment to be quashed (by four judges), S. C., for it is not cured by verdict under 7 Geo. IV. c. 64, s. 21; see Martin *et ux.* *v.* The Queen (in error), 3 N. & P. 472; 8 A. & E. 481; R. *v.* Douglas, Dickinson's Q. S. 337.

(*w*) Archbold's C. P. 5th Am. ed. 345.

sent by the said J. O. to the said J. N. for five yards of superfine woollen cloth, by means of which said false pretences, the said J. S. did, then and there unlawfully obtain from the said J. N. five yards of superfine woollen cloth, of the value of five pounds, of the goods, ("any chattel, money or valuable security"),(*x*) of the said J. N., with intent then and there to cheat and defraud him the said J. N. of the same; whereas in truth and in fact the said J. S. was not then the servant of the said R. O.; and whereas in truth and in fact the said J. S. was not then or at any other time sent by the said R. O. to the said J. N., for the said cloth or for any cloth whatsoever, to the great damage and deception of the said J. N., to the evil example of all others in the like case offending, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that prisoner was an unmarried man, and that having been engaged to her, and the engagement broken off, he was entitled to support an action of breach of promise against her, by which means he obtained money from her.(*y*)

That S. M. C., otherwise called S. M., &c., on, &c., unlawfully did falsely pretend to the said A. C., then and there being a single woman, that he was a single and unmarried man, and thereby then and there obtained a promise of marriage from the said A. C., to wit, a promise that in consideration that he would marry her she would marry him. And the jurors, &c., do further present, that the said A. C., afterwards, to wit, on the day and year, &c., wholly refused to marry the said S. M. C., otherwise called, &c. And the jurors, &c., do further present, that the said S. M. C., otherwise called, &c., afterwards, to wit, on the day and year, &c., unlawfully did falsely pretend to the said A. C., that he was at the time of the said promise and refusal in this count mentioned, a single and unmarried man and entitled to bring and maintain an action for breach of the said promise of marriage against her the said A. C., by means of which said last mentioned false pretence in this count mentioned, the said S. M. C., otherwise called, &c., did then and there unlawfully obtain from the said A. C., one promissory note of the Governor and Company of the Bank of England, for the payment of one hundred pounds, &c., (*describing various kinds of money and securities*), of the property and moneys of the said A. C., with intent then and there to cheat and defraud her the said A. C. of the same; whereas in truth and in fact, the said S. M. C., otherwise called, &c., was not at the time of the said promise of marriage in this count mentioned, or at the time of the said refusal in this count mentioned, a singleman or an unmarried man, nor was he at either of those times or at any

(*x*) See 7 and 8 Geo. IV. c. 29, s. 5.

(*y*) R. *v.* Copeland, 1 C. & M. 516.

Held (Lord Denman C. J., and Maule J.), that the fact of the prisoner paying his addresses was sufficient evidence for the jury on which they might find the first pretence that the prisoner was a singleman and in a condition to marry; and per Maule J., that this was sufficient evidence on which to find the falseness of the other pretence, that he was entitled to maintain his action for breach of promise of marriage, and that such latter false pretence was a sufficient false pretence within the statute.

other time entitled to bring or maintain an action for breach of the said promise of marriage against the said A. C., &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that defendants were the agents of P. N., who was the owner of certain stock and land, &c., the latter of which was in fact mortgaged.(z)

That R. H. and J. C., &c., on, &c., at, &c., being persons of an evil

(z) This form was sustained in Com. *v.* Harley, 7 Met. 464.

Dewey J: "As to the first exception taken to the instructions given to the jury, at the trial, we think the principle stated in Young and others *v.* The King, 3 T. R. 98, referred to by the counsel for the defendant, sustains the ruling, rather than the objection to it. The argument for the plaintiffs in error there was, that the words could not have been spoken by all, and that one of them could not be affected by words spoken by another; each being answerable for himself only. But it was held, that 'if they all acted together, and shared in the same transaction,' they committed the offence jointly. Grose J. said, 'Every crime, which may be in its nature joint, may be so laid. Here it is stated that all the defendants committed this offence, by all joining in the same plan; they were all jointly concerned in defrauding the prosecutor of his money.' Now it seems to us, that if two may be indicted for the words spoken by one in the presence of the other, it appearing that they came to act in concert, it establishes the position, that all which is necessary to cause the liability to attach to an individual of having participated in making false pretences, is his co-operation and acting in concert in the general purpose; and the concert and co-operation may be shown, although one said nothing by way of assenting to or expressing his concurrence in the false pretences. If this be so, it seems necessarily to follow that, if A. procures B. to go to C., and with a false pretence, of which A. is conversant, to obtain the goods of C., A. is guilty in the matter of obtaining these goods by false pretences; and whether A. be outside or within the door of the shop of C. is immaterial; all that is necessary to be proved is, that he is at the time acting in concert with B. and aiding in putting forth the false pretences, and that the precise false pretences and representations charged in the indictment be made with his knowledge, concurrence and direction. The instruction on this point was therefore correct.

"The next instruction to the jury, which is objected to, was in these words, 'It is not necessary for the government to prove that the defendants, or either of them, obtained the goods on their own account, or that they, or either of them, derived, or expected to derive, personally, any pecuniary benefit therefrom; but that if the jury were satisfied that the defendants obtained said goods by means of said false pretences, for the sole use and benefit of said P. Harley, this was sufficient to sustain the allegation in the indictment, that the defendants obtained said goods by said false pretences.'

"It is not contended by the defendant's counsel that it was necessary, in order to support the indictment, for the government to prove that the defendant intended any pecuniary gain or personal benefit. That the contrary is the rule is very clear, and was fully conceded in the argument. But the ground assumed is that of a variance between the matter set forth in the indictment, and the proof showing that the goods were obtained for the sole use of P. Harley. I should doubt, from the report of the case, whether the question of variance was distinctly raised at the trial. The point seems rather to have been, whether a party charged with obtaining goods by false pretences must not be shown to have obtained them thus for his own use or pecuniary benefit. If, however, we look at the question as one of variance, we think the exception cannot prevail. The only allegation, which is supposed to conflict with the evidence that the goods were obtained for the use of P. Harley is this, that the defendants, 'devising and intending by unlawful means to get into their hands and possession,' &c. But the evidence fully sustained the allegation. By means of these false pretences, the defendants did actually obtain and get into their hands and possession these goods; and although they might have had a further purpose of eventually delivering them to P. Harley for her sole use, that fact, if shown by the defendants, would not avail them to escape from this indictment.

"The remaining exception was, that the false pretences were not, as shown by the evidence, made personally to either of the members of the firm of George B. Blake and Co., but to a clerk acting for them in their shop, and by him communicated to one of the firm. This objection was not much relied on, and it cannot be sustained. It was directly overruled in the case of Com. *v.* Call, 21 Pick. 515, where it was held that a false representation to an agent who communicates it to his principal, who is influenced by it, is a false pretence to the principal."

disposition, and devising and intending by unlawful ways and means to obtain and get into their hands and possession the goods, merchandise, chattels and effects of the honest and good citizens of this commonwealth, and with intent to cheat and defraud one G. B. B., one D. N. and one E. H. R. L., all of said Boston, Massachusetts, and copartners in trade, transacting business under the name, firm and style of G. B. B. and Company, did then and there unlawfully, knowingly and designedly, falsely pretend and represent to said G. B. B. and Company, that they were in the employment of one P. H., of said Boston, trader; that said P. H. was possessed of and was the rightful owner of the stock of goods which then were in a certain shop, situated at the corner of Hanover street and Union street in said Boston, and was solvent and in good credit, and they were authorized to buy goods in the name of said P. H. by said P. H., and that said R. H. was authorized to give promissory notes for such goods, in the name of and in behalf of said P. H., that said P. H. was a man and wanted to buy goods on credit of said G. B. B. and Company, in the fair and usual honest course of trade, with intent to pay honestly for them at the expiration of the term of credit upon which they should be sold.

And the said B., N. and L., then and there believing the said false pretences and representations so made as aforesaid, by the said R. H. and J. C., and being deceived thereby, were induced by reason of the false pretences and representations so made as aforesaid, to deliver and did then and there deliver to the said R. H. and J. C. for said P. H., sundry goods and merchandise of great value, to wit, of the value of one hundred and forty-seven dollars and sixty-six cents, to wit, one piece of wool black cloth, one piece of ribbed cassimere cloth, one piece of mixed doe-skin cloth, six pounds weight of thread and one pound of beaux-sewings, of the proper goods, merchandise, chattels and effects of said B., N. and L.

And the said C. and R. H., did then and there receive and obtain the said goods, merchandise, chattels and effects of the said B., N. and L., by means of the false pretences and representations aforesaid, and with the intent to cheat and defraud the said B., N. and L., of the same goods and merchandise, chattels and effects.

Whereas in truth and in fact, said P. H. was not possessed of and was not the rightful owner of said stock of goods in said store, at said corner of Hanover street and Union street, but before that time had made, executed and delivered divers, to wit, five mortgages on said stock and her property, conditioned for the payment of large sums of money, to wit, sums of money collectively amounting to more than the value of said stock of goods and her mortgaged property aforesaid; all which mortgages are recorded in the city clerk's office of said City of Boston, according to law, one of which is dated on the fourteenth day of July, in the year eighteen hundred and forty-one, to R. H., administrator on the estate of one C. H.; another is dated on the tenth day of May, in the year eighteen hundred and forty-two, to the same administrator, and another is dated on the second day of June, in the same year to the same administrator, and another of said mortgages is dated on the twenty-ninth day of September, in the same year to the same administrator, and another of said mortgages is dated on

the thirty-first day of October in the same year to the same administrator; and said P. H. was not a solvent person in good credit, but was poor, embarrassed and unable to pay the debts said P. H. owed, and the said P. H. was not a man but a woman, named P. H., who was insolvent and unable to pay her debts, and she did not want to buy goods honestly on credit in a fair way of business, and said C. and R. H. did not want for her to buy goods honestly in a fair course of trade on credit of said B., N. and L., with intent to pay for them as aforesaid, but to cheat them.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said R. H. and J. C., by means of the false pretences aforesaid, on the said fourth day of November, in the year of our Lord eighteen hundred and forty-two, at Boston aforesaid, unlawfully, knowingly and designedly did receive and obtain from said B., N. and L., the said goods, merchandise, chattels and effects of the proper goods, merchandise, chattels and effects of the said B., N. and L., with intent to defraud them of the same, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That defendant possessed a capital of eight thousand dollars, which had come to him through his wife, it being her estate, and that a part of it had already come into his possession, and a part would come into his possession in the month then next ensuing, &c.(*a*) *First count.*

That J. A. B., late of the said county, trader, maliciously and wickedly devising and intending to cheat W. H. A. and E. R. of their

(*a*) This was the indictment in Com. *v.* Burdick, 2 Barr 163, with the single exception of the introduction in the text of the "scienter" after the allegation of the falsity of the pretences. The statute in this case received an extremely liberal construction from Gibson C. J.: "The rule of the common law," he said, "that cheating in private transactions without affecting the public, must, to be indictable, have been affected by artful devices or false tokens, was found to be too narrow for the business of the world, and the English statute, 20 Geo. II. c. 29, which has given place to the 7 Geo. IV. c. 92, s. 53, was enacted to extend the limits of the offence. From these, our act of 1842, sect. 21, seems to have been taken, and decisions on the clause in the first, which declares it an indictable offence to get money, chattels or securities from another, 'by false pretence or pretences,' or in the second, 'by *any* false pretence,' may be advantageously applied to cases here. The distinctions taken under these statutes, between cases sometimes differing in almost imperceptible degrees, are nice and well founded; and though not authoritative here, may help us in attaining a sound construction of our own statute, which differs from either of its models very little in substance or in form. It would be a waste of time to pass those decisions in review, as they are collected and arranged in all the text books of criminal law, but it may be collected from them, that a professed intent to do an act which the party did not mean to do, as in Rex *v.* Goodall, R. & R. 461, and Rex *v.* Douglass, 1 Mood. C. C. 462, is the only species of false pretence to gain property, which is not indictable. These two cases having been decided by the twelve judges, are eminently entitled to respect; but I think it, at least, doubtful whether a naked lie, by which credit has been gained, would not, in every case, be deemed within our statute, which declares it a cheat to obtain money or goods by any false pretence *whatsoever*. Its terms are certainly more emphatic than those of either of the English statutes, but whether a false pretence of mere intent be within them or not, it is certain that a fraudulent misrepresentation of the party's means and resources is within the English statutes, and, *a fortiori*, within our own. In Rex *v.* Jackson, 3 Campb. 370, it was held to be an offence to obtain goods by giving a check on a banker with whom the drawer kept no cash. Of the same stamp is the King *v.* Parker, 2 C. & P. 825; but Regina *v.* Henderson and another, 1 C. & M. 1e3, is still more to the purpose. The prisoners falsely pretended that one of them was possessed of twelve pounds, which he agreed to give for his confederate's horse, for which it was pro-

goods and merchandise, on, &c., at, &c., did falsely, unlawfully, knowingly and designedly and fraudulently pretend to the said W. H. A. and the said E. R., that he the said J. A. B. possessed a capital of eight thousand dollars, that the said eight thousand dollars had come to him through his wife, it being her estate, and that a part of it had already come into his possession, a part would come into his possession in the month then next ensuing, and that for the remaining part thereof, he would be obliged to wait for a short time; whereas, in truth and fact, he the said J. A. B., did not then possess a capital of eight thousand dollars, nor had eight thousand dollars come to him through his wife, it being her estate, a part of which had already come into his possession, a part would come into his possession in the month then next ensuing, while for the remaining part thereof, he would be obliged to wait for a short time, as he, the said J. A. B., did then and there falsely pretend to the said W. H. A. and the said E. R.; of the falsity of which said pretences, he the said J. A. B. then and there well knew. And the inquest, &c., do further present, that the said J. A. B., afterwards, to wit, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, by the said false pretences aforesaid, did then and there unlawfully, fraudulently and designedly obtain from the said W. H. A. and E. R., divers goods and merchandise, to wit, six pieces rich satin stripe silk, being together of the value of one hundred and four dollars, and one piece of striped cloaking of the value of fifty dollars, being then and there the property of the said W. H. A. and E. R., with intent to defraud the said W. H. A. and E. R. of the same, to the great damage of the said W. H. A. and the said E. R., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. That defendant had a capital of $8000, *which came through his wife.*

And the inquest, &c., do further present, that the said J. A. B. wickedly and fraudulently devising and intending, as aforesaid, to cheat and defraud the said W. H. A. and E. R. of their goods and merchandise, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, did falsely and fraudulently pretend to the said W. H. A. and E. R., that he the said J. A. B. possessed a capital of eight thousand dollars, which said eight thousand dollars had come to him through his wife, it being her estate; whereas, in truth and fact he the said J. A. B. did not then and there possess a capital of eight thousand dollars, nor had eight thousand dollars come to him through his wife, nor had she, his wife, as aforesaid, an estate of eight thousand dollars, as he the said J. A. B. did then and there falsely pretend to the said W. H. A. and the said E. R., of the falsity of which said pretences, he the said J. A. B. then and there well knew. And the inquest, &c., do further present, that the said J. A. B., afterwards,

posed that the prosecutor should exchange his mare; and this was held to be clearly a false pretence within the statute. Now the defendant is charged in the indictment before us, with having wilfully misrepresented that he had a capital of eight thousand dollars, in right of his wife; that a part of it was already received; that another part of it would be received in the course of a month; and that the residue would be received shortly afterwards; and if, as was said in Mitchell's case, 2 East P. C. 80, a false pretence is within the English statute, wherever it has been the efficient cause of obtaining credit, the false pretence before is within our own."

to wit, on the day and year aforesaid, at the county and within the jurisdiction aforesaid, did, unlawfully, knowingly and fraudulently obtain from the said W. H. A. and the said E. R., divers goods and merchandise, to wit, six pieces of rich satin stripe silk, together of the value of one hundred and four dollars, and one piece of striped cloaking of the value of fifty dollars, being then and there the property of the said W. H. A. and E. R., with intent to defraud the said W. H. A. and E. R. of the same, to the great damage of the said W. H. A. and the said E. R., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. That defendant had a capital of $8000.

That the said J. A. B., wickedly and fraudulently devising and intending as aforesaid to cheat and defraud the said W. H. A. and E. R. of their goods and merchandise, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, did falsely and fraudulently pretend to the said W. H. A. and the said E. R., that he the said J. A. B. then and there possessed a capital of eight thousand dollars; whereas in truth and in fact the said J. A. B. did not then and there possess a capital of eight thousand dollars, as he the said J. A. B. then and there did falsely pretend to the said W. H. A. and the said E. R. And the inquest, &c., do further present, that the said J. A. B. did then and there unlawfully, knowingly and fraudulently obtain from the said W. H. A. and the said E. R., divers goods and merchandise, to wit, six pieces of striped silk, being together of the value of one hundred and four dollars, and one piece of striped cloaking of the value of fifty dollars, being then and there the property of the said W. H. A. and the said E. R., with intent to defraud the said W. H. A. and the said E. R. of the same, to the great damage of the said W. H. A. and the said E. R., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that defendant was well off and free from debt, &c.(*b*)

That A. G. D., &c., on, &c., at, &c., unlawfully and wickedly devising and intending to cheat and defraud one W. F. of his goods, moneys, chattels and property, unlawfully did falsely pretend to the said W. F. that he, the said A. G. D., had paid every dollar of the old score that he owed in Philadelphia, that he was well off, and that he was very rich, and had a great deal of property in Kentucky. Whereas in truth and fact, he the said A. G. D. had not paid every dollar of the old score that he owed in Philadelphia, and was not well off, and was not very rich, but on the contrary was very poor, and did not own a great deal of property in Kentucky; and he the said A. G. D. then and there well knew the said pretence and pretences to be false; by colour and means of which said false pretence and pretences, he the said A. G. D. did then and there unlawfully obtain from the said W. F. one black mantilla of the value of twenty-five dollars, one garnet mantilla of the value of twenty dollars, one

(*b*) Com. *v.* Daniels, Phil. 1848. Under this indictment the defendant was convicted in Philadelphia, and sentenced. A writ of error was afterwards taken in the Supreme Court (the assignment of error being confined to the sentence), and the judgment of the court below was affirmed.

black silk mantilla of the value of fourteen dollars, one black embroidered mantilla of the value of fourteen dollars, two plain silk mantillas of the value of twenty-four dollars, two figured silk mantillas of the value of eighteen dollars, twenty-six yards and a-half of striped silk of the value of forty-three dollars and six cents, two silk shawls of the value of twenty-four dollars, two cashmere shawls of the value of twenty dollars, two net bags of the value of eight dollars, two velvet bags of the value of eight dollars, twelve yards of figured silk of the value of nineteen dollars and fifty cents, one trunk of the value of one dollar and fifty cents, being together of the value of two hundred and thirty-nine dollars and six cents, being then and there the property of the said W. F., with intent to cheat and defraud the said W. F., to the great damage of the said W. F., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Negativing the pretence more fully.

That the said A. G. D., &c., on, &c., at, &c., unlawfully and wickedly designing and intending to cheat and further defraud the said W. F. of his goods, moneys, chattels and property, unlawfully did further falsely pretend to the said W. F., that he the said A. G. D. had paid every dollar of the old score that he owed in Philadelphia, meaning thereby that he paid and discharged all the old debts which he owed in Philadelphia, and all debts which he had previously contracted in Philadelphia), that he was well off (meaning thereby that he had ample means), that he was rich, and had a great deal of property in the State of Kentucky (meaning thereby that he was a person of great wealth). Whereas in truth and in fact, he the said A. G. D. had not then and there paid off every dollar of the old debts which he owed in Philadelphia, and had not paid off all debts which he had previously contracted in Philadelphia, but on the contrary, then and there owed and still does owe large sums of money to various persons, as follows: Seven hundred and fifty-eight dollars and seventy-eight cents to J. M. O., J. T. and S. B. D., trading as O. and T.; ten hundred and forty dollars and eighteen cents to S. W. A., G. W. J. and W. F., trading as A., J. and Co.; eight hundred and twenty-two dollars and twenty-two cents to R. L. and H. J., trading as L. and J.; three hundred and ninety dollars and twenty-four cents to I. H. and W. J. W., trading as H. and W.; four hundred and forty-one dollars and thirty-four cents to R. D. W., Y., J. A., J. B. and H. W., trading as W. and A.; three hundred and ninety-seven dollars and fifty-one cents to R. W. D. T., W. S. P. and C. B. T., trading as T., P. and T.; eighty-five dollars and twenty-six cents to R. J. T. and O. E., trading as T. and E.; and he the said A. G. D. was not well off, but on the contrary was very poor, and he the said A. G. D. was not rich, but on the contrary was then insolvent and unable to pay his debts, and he the said A. G. D. had not then a great deal of property in Kentucky; by colour and means of which said false pretence and pretences, he the said A. G. D. did then and there unlawfully obtain from the said W. F. the goods and chattels, property and merchandise in the aforesaid first count mentioned, with intent to cheat and defraud the said W. F., to the great damage of the said W. F., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that a certain draft for $7700, *drawn by a house in Charleston on a house in Boston, which the defendant exhibited to the prosecutor, had been protested for non-payment; that the defendant had had his pocket cut, and his pocket-book containing* $195 *stolen from it; that a draft drawn by a person in Philadelphia, which the defendant showed the prosecutor, had been received by the defendant in exchange for the protested draft, and that the defendant expected to receive the money on the last mentioned draft.*(c)

That E. H., late, &c., being a person of an evil disposition, ill name and fame, and of dishonest conversation, and devising and intending by unlawful ways and means to obtain and get into his hands and possession the moneys, goods, chattels and effects of the honest and good people of the State of New York, to maintain his idle and profligate course of life, on, &c., at, &c., with intent to cheat and defraud one A. B., did then and there unlawfully, knowingly and designedly, falsely pretend and represent to the said A. B., that a certain draft for six thousand seven hundred dollars, purporting to have been drawn by a Mr. E. of Charleston, on a house in Boston (and which the said E. H. then and there exhibited to the said A. B.), had been protested for non-payment. That he the said E. H. had his pocket cut, and his pocket-book containing one hundred and seventy-five dollars stolen therefrom, and that he had got the pocket-book subsequently at the police office in the City of New York, but no money; that a certain other draft for six thousand five hundred dollars, drawn on a Mr. T. of Philadelphia (which said E. H. then and there exhibited to the said A. B.), had been received in exchange by him the said E. H. for the protested draft as aforesaid; and that the said E. H. expected to receive the money on the said last mentioned draft; and the said A. B. then and there believing the said false pretence and representation so made as aforesaid by the said E. H., and being deceived thereby, was induced by reason of the false pretence and representation so made as aforesaid, to deliver, and did then and there deliver to the said E. H. thirty pieces of silver coin, called dollars, of the value of one dollar each, ten promissory notes for the payment of five dollars each, and of the value of five dollars each, then and there being due and unsatisfied, five other promissory notes for the payment of three dollars each, and of the value of three dollars each, then and there being due and unsatisfied, of the proper moneys, goods, chattels and effects of the said A. B., the said E. H. did then and there receive and obtain the said promissory notes and money of the said A. B., of the proper moneys, goods, chattels and effects of the said A. B., by means of the false pretence and representation aforesaid, and with intent to cheat and defraud the said A.

(c) People *v.* Hale, 1 Wheel. C. C. 174. This count purports to have been "settled" by Mr. Maxwell, the then district attorney of New York. The offence is set forth with sufficient particularity, with the exception perhaps of the last assignment of pretence, "that defendant *expected* to receive the money," &c., which had it stood alone would have been insufficient to have sustained a verdict. It does not appear from the report whether any exception was taken to the indictment, the chief point in the case, so far as the syllabus is concerned, being the declaration of Recorder Riker, that "the court was always willing to hear what could be alleged in favour of a prisoner, in arrest of judgment."

B. of the said promissory notes and money; whereas in truth and in fact, the said E. H. had not any draft for six thousand seven hundred dollars, drawn by Mr. E. of Charleston on a house in Boston, and no such draft had been protested; and whereas in fact, the said E. H. had not been robbed of any money, and never did receive any pocket-book from the police office which had been stolen from him; and whereas in truth and in fact, no other draft for six thousand five hundred dollars, drawn on a Mr. T. of Philadelphia, had ever been received by him, the said E. H., in exchange for the said first mentioned draft; and whereas in truth and in fact, both drafts exhibited by the said E. H. as aforesaid to the said A. B. were forged and false, and the said E. H. never expected to receive any money by virtue thereof from the persons on whom they purported to be drawn, and which the said E. H. then and there well knew; and whereas in fact and in truth, the pretence and representation so made as aforesaid by the said E. H. to the said A. B., was in all respects utterly false and untrue, to wit, on, &c.; and whereas in fact and in truth, the said E. H. well knew the said pretence and representation, so made by him as aforesaid to the said A. B., to be utterly false and untrue at the time of making the same.

That the said E. H., by means of the false pretence aforesaid, on, &c., at, &c., unlawfully, falsely, knowingly and designedly, did receive from the said A. B., of the proper moneys, goods, chattels and effects of the said A. B., with intention to defraud him of the same, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that a certain watch sold by defendant to prosecutor was gold.(*d*)

That A. B., &c., contriving and intending one C. D., by false pretence to cheat and defraud of his money and property (and by means of divers false pretences to be hereinafter more particularly described,

(*d*) This indictment is based generally on that in Com. *v.* Strain, 10 Met. 521, the allegations in brackets being introduced. "The case at bar," said the court, "if confined in its proof, on the trial by the jury, to the mere allegations in the indictment, would be certainly quite bald. The indictment does not allege any bargain, nor any colloquium as to a bargain for a watch; nor any proposition of Blake to buy, or of the defendant to sell a watch; nor any delivery of the watch, as to which the false pretences were made, into the possession of Blake, as a consideration for the money he paid the defendant.

"It seems to us, that where money or other property is obtained by a sale or exchange of property, effected by means of false pretences, such sale or exchange ought to be set forth in the indictment; and that the false pretences should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be.

"Although the language of the Rev. Stats. c. 126, s. 32, is very broad, yet all will agree that, in its practical application, the false declaration must be made to a party who has an interest in the matter, and is affected injuriously by the falsehood. We go further, however, and hold that in a case like the present, where the alleged false pretences were injurious only by inducing another person to buy the article as to which such false representations were made, such sale or offer for sale must be set out as a part of the facts relied upon, and as a material allegation in the description of the offence.

"Upon the whole matter, the court are of opinion that this indictment does not plainly and distinctly set forth the offence intended to be charged; that it does not contain an averment of those material facts which the government would be bound to prove, before they could ask for a conviction; and that, for this cause, the judgment should be arrested."

to sell and dispose of as a genuine gold watch, to the said C. D., a certain watch of base and spurious metal), unlawfully, knowingly and designedly did falsely pretend to said C. D., that the said watch which he the said A. B. then and there had, was a gold watch (and that the said A. B., did thereupon effect a sale of the said watch to the said C. D. for the sum of, &c., of the money and property of the said C. D., he the said C. D. being induced to purchase said watch by the false pretence above mentioned), by means whereof, said A. B. then and there unlawfully, knowingly and designedly did obtain from said C. D., the said (*setting forth the money obtained*), of the money and property of him the said C. D. as aforesaid, with intent him the said C. D. then and there to cheat and defraud of the same; whereas in truth and in fact, said watch was not then and there a gold watch, but was a watch of base and spurious metal; and said A. B. then and there well knew that the same was not a gold watch, but was a watch of base and spurious metal as aforesaid; to the great damage and deception of him the said C. D., against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Pretence that a certain horse to be sold, &c., was sound, and was the horse called "Charley."(e)

That the said M., on, &c., contriving and intending knowingly and designedly, by false pretences to cheat and defraud one J. L. of his moneys, goods, wares and merchandise and other things, did, knowingly and designedly, falsely pretend to said L., that a certain horse which he the said M. then wished and offered to exchange with said L. for a certain colt and five dollars in money, was then and there a sound horse, and was the horse called the C., the said horse called the C., being well known to said L. by true and correct representations which he had received, although he had not seen said horse called the C., &c., by which false pretences said M., then and there induced the said L. to exchange with and deliver to said M., his said colt and five dollars in money for said horse falsely represented as aforesaid to be the C., &c., and whereas in truth and in fact, the said horse which said M. offered to and exchanged with said L., and which he represented as a sound horse, and as the horse called the C., was not a sound horse, and was not the horse called the C., but was a different horse and unsound, and wholly worthless, &c.

(e) This is the substance of an indictment sustained in Maine, in State *v.* Mills, 17 Maine 24. "The horse, called the *Charley*," said the court, "might have had the reputation of possessing qualities, which rendered it desirable for the party injured to become the owner of him. The defendant produced a horse, which he affirmed, was the *Charley*. It was a false pretence, fraudulently made, for the purpose of procuring a colt and money from another. The attempt succeeded. These facts the jury have found. It is a case literally within the statute; and we do not perceive why it is not within the mischief it was intended to punish. To sustain it would not be going further than precedents warrant. If the construction should be narrowed to cases, which might be guarded against by common prudence, the weak and imbecile, the usual victims of these pretences, would be left unprotected. It may not be easy to lay down any general rule, with proper qualifications and limitations; but in the case before us, we are of opinion, that the offence charged has been committed."

Pretence, that a horse and phaeton were the property of a lady then shortly before deceased, and that the horse was kind, &c.(*f*)

That T. K. the elder, &c., and S. K., &c., intending, &c., on, &c., at, &c., unlawfully, knowingly and designedly did falsely pretend to the said G. W. F., that a certain carriage, to wit, a carriage called a phaeton, and a certain mare and a certain gelding which they the said defendants then and there offered for sale to the said G. W. F., had then been the property of a lady then deceased, and were then the property of her sister, and were not then the property of any horse-dealer, and were then the property of a private person, and that the said mare and the said gelding were then respectively quiet to ride and drive, and quiet and tractable in every respect. By means of which said false pretences the said defendants did then and there unlawfully, knowingly and designedly obtain from the said G. W. F., a certain valuable security, to wit, an order for the payment of one hundred and sixty-eight pounds (being then and there the property of the said G. W. F.), with intent then and there to cheat and defraud him the said G. W. F. of the same. Whereas in truth and in fact, the said carriage, the said mare and the said gelding had not then been the property of a lady then deceased, and were not then the property of her sister; and whereas in truth and in fact, the said carriage, the said mare and the said gelding, were the property of a horse-dealer, and whereas in truth and in fact the said carriage, the said mare and the said gelding, were not then the property of a private person; and whereas in truth and in fact, the said mare and the said gelding were not then quiet to ride and drive, and were not then quiet and tractable in every respect; and whereas the said defendants then and there well knew that the said carriage, the said mare and the said gelding had not then been the property of a lady then deceased, and were not then the property of her sister; and also then and there well knew that the same were then the property of a horse-dealer, and that the same were not then the property of a private person, and that the said mare and the said gelding were not then quiet to ride and drive, and were not then quiet and tractable in every respect, to the great damage and deception of the said G. W. F., to the evil example, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Like the first, except that the offering for sale was alleged to have been by T. K. the elder, only.

Pretence that one J. P., of the City of Washington, wanted to buy some brandy, &c.; that said J. P. kept a large hotel at Washington, &c., that defendant was sent by said J. P. to purchase brandy as aforesaid, and that defendant would pay cash therefor, if prosecutor would sell him the same.(*g*) *First count.*

That A. S., late, &c., being an evil disposed person, with intent to

(*f*) R. v. Kenrick, 5 A. & E. N. S. 49, where this count appears to be sustained.

(*g*) Com. v. Spring, Oy. & Term. City and County of Philadelphia. See 3 Pa. L. J. 89. The defendant was convicted and sentence passed. The averment that he "intended"

and contriving and intending unlawfully, fraudulently and deceitfully to cheat and defraud J. L. and P. J., co-partners in trade, under the firm of J. L. and Company, of the said city and county, of their goods, wares and merchandises, on, &c., at, &c., unlawfully, knowingly and designedly, did falsely pretend to the said J. L. and P. J., as aforesaid, that one J. P., of the City of Washington, wanted to buy some brandy, to wit, two half pipes of brandy, that the said J. kept a large hotel at Washington City aforesaid, that he the said A. S. was sent by the said J. P. to purchase brandy as aforesaid for him, (said J. meaning), and he the said A. S. would pay therefor in cash, if they the said J. L. and P. J. would sell him the same; by which said false pretences the said A. S. did then and there, to wit, on, &c., at, &c., unlawfully, knowingly and designedly obtain from the said J. L. and P. J., as aforesaid, two half pipes of brandy, of the value of three hundred dollars, of the goods, wares and merchandises of the said J. L. and P. J., with intent then and there to cheat and defraud them the said J. L. and P. J. of the same; whereas, in truth and in fact the said A. S. was not then sent by J. P. to purchase such brandy as aforesaid for him or any other person, and the said J. P. did not want to buy any brandy as aforesaid, and did not keep a hotel at Washington City as aforesaid, and the said A. S. did not at the time of so as aforesaid procuring the said brandy, intend to pay for the same, (*insert scienter*), to the great damage and deception of the said J. L. and P. J., to the evil example of all others in like cases offending, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. That defendant was requested by one J. P., who kept a large hotel in Washington City, to purchase some brandy for said J. P., and that if prosecutor would sell defendant two half pipes of brandy, defendant would pay prosecutor cash for the same shortly after delivery.

That the said A. S., being such person as aforesaid, with intent to and contriving and intending unlawfully, fraudulently and deceitfully to cheat and defraud the said J. L. and P. J., co-partners as aforesaid, of their goods, wares and merchandises, on, &c., at, &c., unlawfully, knowingly and designedly, did falsely pretend to the said J. L. and P. J., as aforesaid, that he, the said A. S., was requested by one J. P., who kept a large hotel in Washington City, to purchase some brandy for him, said P.; and that if they, the said J. L. and P. J. would sell him, said A. S., two half pipes of brandy, he the said A. S. would pay for the same in cash shortly after delivery thereof; by which said false pretences the said A. S. did then and there, to wit, on the day and year last aforementioned, within the jurisdiction of the said court, unlawfully, knowingly and designedly obtain from the said J. L. and P. J., as aforesaid, two half pipes of brandy, of the value of three hundred dollars, of the goods, wares and merchandises of the said J.

to pay, in the first two counts would not have been alone sufficient, but as it was committed with other operative pretences, and as it could be disengaged from the context as surplusage, it did not vitiate the counts in which it is introduced. The omission of an averment, however, that the defendant knew the pretences to be at the time false, is more questionable.

L. and P. J., with intent then and there to cheat and defraud them, the said J. L. and P. J., of the same; whereas in truth and in fact, the said A. S. was not requested by J. P. to purchase brandy for him, said P., and said P. did not keep a hotel in Washington City, and the said A. S. did not at the time of procuring the said brandy as aforesaid, intend to pay for the same as aforesaid, (*insert scienter*), to the great damage and deception of the said J. L. and P. J., to the evil example of all others in like cases offending, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. That defendant had been requested by one J. P., to purchase for him some brandy, that he (the said J. P.), kept a large hotel in Baltimore, &c.

That the said A. S., being such person as aforesaid, with intent to and contriving and intending unlawfully, fraudulently and deceitfully to cheat and defraud the said J. L. and P. J., co-partners as aforesaid, of their goods, wares and merchandises, on the thirteenth day of July, in the year of our Lord one thousand eight hundred and forty-two, with force and arms, at the city and county aforesaid, and within the jurisdiction of the said court, unlawfully, knowingly and designedly, did falsely pretend to the said J. L. and P. J., as aforesaid, that he (the said A. S.), was requested by one J. P. to purchase for him some brandy, and that he (the said P.), kept a large hotel at Washington; by which said false pretences, the said A. S. did then and there, to wit, on the day and year last aforementioned, at the city and county aforesaid, and within the jurisdiction of the said court, unlawfully, knowingly and designedly obtain from the said J. L. and P. J., as aforesaid, two half pipes of brandy, of the value of three hundred dollars, of the goods, wares and merchandises of the said J. L. and P. J., with intent then and there to cheat and defraud them, the said J. L. and P. J., of the same; whereas in truth and in fact, the said A. S. was not requested by the said J. P. to purchase any brandy for him, and the said P. did not keep a hotel at Washington, (*insert scienter*), to the great damage and deception of the said J. L. and P. J., to the evil example of all others in like cases offending, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For pretending to an attesting justice and recruiting sergeant that defendant was not an apprentice, and thereby obtaining money to enlist.(*h*)

That on, &c., one D. K., then being a sergeant in the invalid battalion of the royal regiment of artillery of our said lady the queen, then and long before was a person in due manner appointed and authorized to enlist persons to serve our said lady the queen as soldiers in the corps of royal military artificers and labourers, and that one S. D. had then lately before enlisted with the said D. K., to serve our

(*h*) Dickinson's Q. S. 6th ed. 335, (*e*). 1 Stark. C. P. 474; see 8 Vict. cc. 8, 9, and annual mutiny acts; also *R. v. Joseph Jones*, 1 Leach C. C. 174. The indentures must be proved by a subscribing witness, if produced, *ib.*; for the guilt of the offence is constituted by the actual and legal binding.

said lady the queen as a soldier in the said corps of, &c., and the said S. D., on, &c., at, &c., in order to be attested, pursuant to the statute in that case made and provided, did in his proper person appear before H. L., esquire, then being one of the justices of our said lady the queen, assigned, &c. And the jurors, &c., do further present, that the said S. D., late of, &c., being an evil disposed person, and contriving and intending to cheat and defraud the said D. K. of his moneys, and to make it be believed that he the said S. D. was at liberty and eligible to be enlisted, to serve our said lady the queen as a soldier in the corps of, &c., on, &c., with force and arms, at, &c., aforesaid, unlawfully, knowingly and designedly, did falsely pretend to the said H. L. (he the said H. L. then and there being such justice as aforesaid, and then and there having sufficient and competent power and authority to attest persons to serve our said lady the queen as soldiers in the said corps of, &c.), that he the said S. D. was not then an apprentice (meaning that the said S. D. then and there, to wit, on, &c., at, &c., when he so appeared before the said H. L., the justice aforesaid, in order to be attested as aforesaid, was not an apprentice, and that he the said S. D. was then and there at liberty and eligible to be enlisted to serve our said lady the queen as a soldier in the said corps), by means of which said false pretence, he the said S. D. unlawfully, knowingly and designedly, did obtain from the said D. K. the sum of pounds, of the proper moneys of the said D. K., with intent to cheat and defraud the said D. K. of the same; whereas in truth and in fact, the said S. D., on, &c., at, &c., aforesaid, at the time when he so appeared before the said H. L., the justice aforesaid, in order to be attested as aforesaid, was an apprentice, and was not at liberty and eligible to be enlisted to serve our said lady the queen as a soldier in the said corps; and whereas, in truth and in fact, the said S. D. was then, to wit, on, &c., an apprentice to G. O.; and whereas, in truth and in fact, the said S. D. was not then, to wit, on, &c., at, &c., at liberty and eligible to be enlisted to serve our said lady the queen as a soldier in the said corps, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For obtaining more than the sum due for carriage of a parcel by producing a false ticket.(*i*)

That A. B., late of, &c., on, &c., at, &c., had in his custody and possession a certain parcel to be by him delivered to Maria Countess Dowager of Ilchester, upon the delivery of which he was authorized and directed to receive and take the sum of six shillings and sixpence, and no more, for the carriage and porterage of the same; yet, that the said A. B. produced and delivered to T. H., then being a servant to the said Countess of I., the said parcel, together with a certain false

(*i*) This was the indictment in R. *v.* Douglass, 1 Campb. 212, and it was holden, upon the terms of 30 Geo. II. c. 42, that a *basket* is sufficiently described as a *parcel*. It was also holden, that if money (as in this case) be obtained from the servant, who had money of his master in hand at the time, it might be well laid to be the property of the *latter;* but if he had not money enough of his employer in his hands at the time, such master cannot be stated to be the person defrauded.

and counterfeit ticket, made to denote that the sum of nine shillings and tenpence was charged for the carriage and porterage of the said parcel, and unlawfully, knowingly and designedly, did falsely pretend to the said T. H. that the said false and counterfeit ticket was a just and true ticket, and that the said sum of nine shillings and tenpence had been charged and was due and payable for the carriage and porterage of the said parcel, and that he the said A. B. was authorized and directed to receive and take the said sum of nine shillings and tenpence for the carriage and porterage of the said parcel, by means of which said false pretences defendant did unlawfully, knowingly and designedly, obtain of and from the said T. H., the sum of three shillings and fourpence, of the moneys of the said countess, with intent to cheat and defraud her of the same, whereas, in truth and in fact, &c. (*Negative the pretences and conclude as before*).

Pretence that defendant had no note protested for non-payment, that he was solvent, and worth from nine to ten thousand dollars.(*j*)

That C. H., late, &c., being a person of an evil disposition, ill name

(*j*) People *v.* Haynes, 14 Wend. 546. In this case ultimately there was a new trial given by the Court of Errors on the ground that where a purchase of merchandise is made, the goods selected, put in a box and the name of the purchaser and his place of residence marked thereon, and the box containing the goods sent by the vendor and put on board a steamboat designated by the purchaser, to be forwarded to his residence, the *sale is complete* and the goods become *the property of the purchaser.*

And where *after such delivery*, the vendor, on receiving information inducing him to suspect the *solvency* of the purchaser, expressed an intention to *reclaim* the goods, and the purchaser thereupon made *representations* in respect to his ability to pay, by means of which the vendor abandoned his intention, and the purchaser was then indicted, charged with the offence of having *obtained the goods by false pretences*, the *representations* made by him being alleged as *false pretences*, it was held, that the sale being complete before the *representations* were made, the defendant could not be considered guilty of the crime charged against him.

The above were the only points adjudged in the decision of the case; the court declining to pass upon the other questions presented by the bill of exception. Those questions are: 1. Whether, admitting the representations made by the defendant to have been made previous to the completion of the sale, and that thereby the vendors were induced to give him credit, such representations can properly be considered *false pretences within the meaning of the statute;* and 2. Whether when, as in this case, *several* pretences are alleged to have been made, and are averred to be false, the public prosecutor is bound to prove *all* the pretences to be false, or whether it is sufficient for less than all to be false, provided that enough be proved to authorize the jury to say that those proved had so material an effect in procuring the credit, or in inducing the delivery of the property, that without the influence of such pretences upon the mind of the party defrauded, he would not have given the credit or parted with the property. These questions being of an interesting character, and having been fully discussed by the chancellor and senator Tracy, the conclusions at which they severally arrived are here presented.

Conclusions arrived at by the chancellor in the opinion delivered by him:

"A bill of exception cannot be presented in a *criminal case*, to review the charge of the court, or the finding of the jury upon *mere matters of fact*, where there has been no erroneous decision upon the *matters of law.*

"Whether it is competent for a court to grant a new trial in a case of *felony*, at the instance of the defendant, where there has been a palpable misdiscretion of the court upon the mere matters of fact, or a verdict clearly against the weight of evidence without such misdiscretion, where no erroneous decision in point of law is made, *quere.*

"It is not necessary to constitute the offence of *obtaining goods by false pretences*, that the owner should have been induced to part with his property *solely and entirely by pretences which were false.* If the jury are satisfied that the pretences proved to have been false and fraudulent were *a part of the moving causes*, inducing the owner to part with his

and fame, and of dishonest conversation, and devising and intending, by unlawful ways and means, to obtain and get into his hands and possession, the moneys, valuable things, goods, chattels, personal property and effects of the honest and good people of the State of New York, to maintain his idle and profligate course of life, on, &c., at, &c., with intent feloniously to cheat and defraud F. S. C., C. A. and

property, and that the defendant would not have obtained the goods, had not the false pretences been superadded to statements which may have been true, or to other circumstances having a *partial influence* upon the mind of the owner, they will be justified in finding the defendant guilty of the offence charged within the letter, as well as within the spirit of the act.

"In the present case, although *all* the pretences stated in the indictment, as those upon the strength of which the goods were obtained, are charged to be false; still, if *either* of them was in fact false, was intended to deceive the owners of the goods, and induce them to part with their property, and produced that effect, the indictment was sustained; *one* false pretence is sufficient to constitute the crime, although *other false* pretences are charged.

"To constitute the offence of obtaining goods by false pretences, it is not necessary that any *false token* should be used, or that the false pretences should be such as that *ordinary care* and *common prudence* were not sufficient to guard against the deception.

"The offence consists in *intentionally and fraudulently* inducing the owner to part with his goods or other things of value, either by a *wilful falsehood*, or by the offender *assuming a character* he does not sustain, or by *representing himself* to be in a station which he knows he does not occupy.

"As to the ownership of the goods at the time of the making of the representations, the chancellor was of opinion, that the delivery of the property on board of the steamboat, for the purposes for which it was delivered, *divested* the vendors not only of the *possession*, but of the *title* to the goods;—that they however had the right of stoppage *in transitu* in case of the *insolvency* of the purchaser; but that to re-invest themselves with the right of property and possession of the goods, they were bound to take corporal possession of them or to give notice to the carrier not to deliver them to the purchaser, or to do some other equivalent act. Not having done so, the property in the goods was in the defendant, and consequently he *did not obtain the possession or delivery of them by means of the false pretences* stated in the indictment; and although he probably by his false representations prevented the vendors from exercising the right of stoppage *in transitu*, still he could not be convicted of the charge of *obtaining the goods* by false pretences; for which reason, and that alone, he was of opinion that the judgment of the Supreme Court ought to be *revised*."

Conclusions arrived at by Senator Tracy in the opinion delivered by him:

"The delivery on board the steamboat under the circumstances of the case, was an *absolute* delivery, and vested in the purchaser not only the possession but the title to the goods; and even if the vendors had the right of stoppage *in transitu*, in case of insolvency of the purchaser, the existence of that right did not render the delivery *conditional*, nor could the exercise of it divest the purchaser of the ownership of the goods. The *representations* relied on as false pretences being *subsequent* to such delivery, if they could be considered as *false pretences*, would not therefore subject the defendant to the charge of *obtaining the goods* by false pretences.

"Where there are several pretences alleged in the indictment to be false, *all must be proved to be false.* The offence consists of two distinct elements, to wit, *false pretences* and *obtaining goods of another.* All the pretences together constitute but one portion of the offence; and every pretence, therefore, set forth and alleged to be false, is a substantive or *constituent element* of the offence, and cannot be deemed immaterial; the *petit jury* can convict only upon the pretences found by the *grand jury*, as it cannot be known that they would have found the bill true, unless it had been proved before them that *all* the pretences found to have been made, had in fact been made and falsely made.

"The words *other false pretence* in the statute, considered in connexion with the other terms used, and the circumstances under which the statute 30 Geo. II. was passed, upon which ours is founded, meant not a *bare naked lie*, unaccompanied with any *artful contrivance* fitted to deceive, although intentionally and fraudulently told, with the purpose of obtaining the property of another; but they mean an *artfully contrived story* which would naturally have the effect upon the mind of the person addressed, equivalent to a *false token* or *false writing*, an ingenious contrivance, an unusual artifice, against which common sagacity and the exercise of ordinary caution is not a sufficient guard."

J. H. S., then and there co-partners in business under the firm of C. A. and Co., did then and there feloniously, unlawfully, knowingly and designedly, falsely pretend and represent to C. A., being such co-partner, that he, the said C. H., had then no note protested for non-payment, that he was then solvent and worth from nine to ten thousand dollars after the payment of all his debts, that he was perfectly easy in his money concerns, that he had no endorser and that he had never endorsed more than one note. And the said C. A. then and there believing the said false pretences and representations so made as aforesaid, by the said C. H., and being deceived thereby, was induced, by reason of the false pretences and representations so made as aforesaid, to deliver, and did then and there deliver to the said C. H. five pieces of gros de nap of the value of thirty dollars for each piece, two pieces of gros de Swiss of the value of eighty dollars each piece, one piece of bombazine of the value of sixty-four dollars, nine dozen of belt ribbons of the value of three dollars and fifty cents each dozen, two pieces of black silk velvet of the value of thirty dollars each piece, one piece of silk of the value of one hundred dollars, eight pieces of satin levantine of the value of fifteen dollars each piece, four pieces of figured vestings of the value of fifteen dollars each piece, of the proper valuable things, goods, chattels and effects of the said F. S. C., C. A. and J. H. S., and the said C. H. did then and there designedly receive and obtain the said goods, chattels and effects of the said F. S. C., C. A. and J. H. S. of the proper valuable things, goods, chattels and effects of the said F. S. C., C. A. and J. H. S., by means of the false pretences and representations aforesaid, and with intent feloniously to cheat and defraud the said F. S. C., C. A. and J. H. S., of the said goods, chattels and effects; whereas in truth and in fact the said C. H. at that time had a note protested for non-payment; and whereas in truth and in fact the said C. H. was then insolvent and unable to pay his debts; and whereas in truth and in fact the said C. H. was not then easy in his money concerns, but on the contrary thereof greatly embarrassed in his affairs; and whereas in truth and in fact the said C. H. had endorsers; and whereas in truth and in fact the said C. H. was at that time an endorser for persons to the jurors unknown; and whereas in fact and truth the pretences and representations so made as aforesaid, by the said C. H. to the said C. A., was and were in all respects utterly false and untrue, to wit, on the day and year last aforesaid, at the ward, city and county aforesaid; and whereas in fact and in truth the said C. H. well knew the said pretences and representations so by him made as aforesaid to the said C. A. to be utterly false and untrue at the time of making the same.

And so the jurors aforesaid on their oath aforesaid, do say that the said C. H. by means of the false pretences aforesaid, on, &c., at, &c., feloniously, unlawfully, falsely, knowingly and designedly did receive and obtain from the said F. S. C., C. A. and J. H. S. the said goods, chattels and effects of the proper valuable things, goods, chattels and effects of the said F. S. C., C. A. and J. H. S., with intent feloniously to cheat and defraud them of the same, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Obtaining acceptances on drafts, by pretence that certain goods had been purchased by defendant and were about to be shipped to prosecutor.

That S. M., late, &c., wickedly devising and intending to cheat and defraud W. C. Jr., and P. P. G., co-partners, trading under the firm of C. and G., of their goods, chattels, moneys and properties, on, &c., at, &c., did request and solicit them the said W. and P., trading as aforesaid, to accept certain drafts or bills of exchange drawn by him the said S. M. on them the said C. and G. for the sum of three thousand dollars each, both dated Philadelphia, May twenty-sixth, one thousand eight hundred and forty-seven, one payable forty days after date, the other payable sixty days after date, and both being drawn to the order of him the said S.; and as the inducement for them the said W. and P., trading as aforesaid, to accept the said drafts or bills of exchange, he the said S. did then and there unlawfully and fraudulently and designedly pretend to the said W. C. Jr., then and there being co-partner as aforesaid, that he the said S. M. had purchased and had in Pittsburg, ready for shipment, nineteen thousand barrels of flour, and about fifty thousand bushels of wheat, rye, corn and oats; and that if he, the said W. C. Jr., partner as aforesaid, would accept the said two drafts above described, he the said S. would go out to Pittsburg and ship them, the said C. and G., two thousand barrels of flour to cover the said two drafts, and that he the said S. had already ordered to be shipped to them the said C. and G. one thousand barrels of flour, to cover a certain other draft or bill of exchange then before drawn by the said S. on the said C. and G. for the sum of six thousand three hundred and seventy-nine dollars and seventy-six cents, and duly accepted by the said C. and G., and then remaining unpaid, whereas in truth and fact he the said S. had not purchased, and had not in Pittsburg ready for shipment nineteen thousand barrels of flour, and about fifty thousand bushels of wheat, rye, corn and oats, and he the said S. did not intend to go out to Pittsburg and ship to them the said C. and G. two thousand barrels of flour to cover the said two drafts of three thousand dollars each, then asked to be accepted, and he the said S. had not ordered to be shipped to said C. and G. one thousand barrels of flour to cover and secure the payment of the said other draft of six thousand three hundred and seventy-nine dollars and seventy-six cents, drawn by the said S. as aforesaid, and he the said S. then and there well knew the said pretence and pretences to be false and fraudulent; by colour and means of which said false pretence and pretences, he the said S. did then and there unlawfully and with intent to cheat and defraud them the said C. and G., procure and obtain the acceptance of the said firm of C. and G. from the said W. C. Jr., then and there being partner as aforesaid, to and upon the said two drafts of three thousand dollars each, by the writing of the name of the said C. and G. on the face of the said drafts, which said drafts respectively are of the tenor and effect following, to wit:

"Dollars, 3000. Philadelphia, May 26th, 1847.
"Forty days after date please pay to my own order three thousand dollars, and charge the same to account of, Yours, &c.,
S. M."

"To Messrs. C. and G., Philadelphia."
[Accepted—C. and G].

"Dollars, 3000. Philadelphia, May 26th, 1847.
"Sixty days after date please pay to my own order, three thousand dollars, and charge same to account of, Yours, &c.,
S. M."

"To Messrs. C. and G., Philadelphia."
[Accepted—C. and G].

being then and there the said two drafts of the value of six thousand dollars. And the inquest aforesaid do further present, that afterwards, to wit, on, &c., the said S. M., the said drafts being so accepted by the said C. and G., endorsed the same in blank, and that afterwards, to wit, at the respective dates and times when the said drafts so accepted became due and payable according to the tenor thereof respectively, they the said C. and G. by reason of the said acceptances, were obliged to pay the amounts thereof and did pay the sum of six thousand dollars in cash, being then and there the moneys of the said W. C. Jr. and P. P. G., trading as C. and G., to the great damage of them the said C. and G., contrary, &c., and against, &c., (*Conclude as in book* 1, *chap.* 3).

Obtaining acceptances by the pretence that defendants had certain goods in storage subject to prosecutor's order.(*k*)

That J. J. M., late, &c., with intent to and contriving and intending unlawfully, fraudulently, designedly and deceitfully to cheat and defraud O. P. P. and W. T. E., who at the time hereinafter mentioned, to wit, on the ninth day of June, in the year of our Lord one thousand eight hundred and forty-five, were co-partners in trade, under the firm of P. and E., of the said city and county, on, &c., at, &c., did falsely, unlawfully, knowingly and designedly pretend and state to the said O. P. P. and W. T. E., then co-partners as aforesaid, that he the said J. J. M. and a certain D. E. T., then co-partners in trade, under the firm of T. and M., of the City of New York, then had received from certain persons trading together under the firm of S. and S., on storage, in certain warehouses of the said firm of said T. and M., in the said City of New York, numbered 24, 26, 28 and 30 Leonard street, twenty-two hundred barrels of cistern sugars, and they the said J. J. M. and D. E. T., co-partners as aforesaid, had agreed to hold the same subject to the order of the said firm of S. and S., and that the said T. and M., then had and held the same twenty-two hundred barrels of cistern sugars in the warehouses aforesaid, and the said J. J. M. did then and there execute a certain paper writing, in the words and figures following, to wit, "Philadelphia, June 9th, 1845,

(*k*) This count was drawn by eminent counsel in Philadelphia, in 1847. The defendant was acquitted.

received from Messrs. S. and S., on storage in our warehouses, at Nos. 24, 26, 28 and 30 Leonard street, New York, twenty-two hundred barrels of cistern sugars, which we agree to hold subject to their order. T. and M." And the said firm of S. and S., did then and there endorse the said paper writing with the following endorsement: "Deliver the within to the order of Messrs. P. and E. S. and S." And the said J. J. M. did then and there deliver to the said O. P. P. and W. T. E., co-partners as aforesaid, the said paper writing; whereas, in truth and in fact, the said J. J. M. and D. E. T., co-partners as aforesaid, had not received the said twenty-two hundred barrels of cistern sugars in the said warehouses, nor had they the said twenty-two hundred barrels of cistern sugars in said warehouses, nor had they any such warehouses as the said J. J. M. did then and there, to wit, on the day and year aforesaid, at the city and county aforesaid, falsely pretend and state to the said O. P. P. and W. T. E., then co-partners as aforesaid. And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present and say, that the said J. J. M., did designedly by the false pretences aforesaid, with intent to cheat and defraud the said O. P. P. and W. T. E., under the name and firm of P. and E., then and there, to wit, on, &c., at, &c., obtain from the said O. P. P. and W. T. E., then co-partners as aforesaid, their acceptance of the following drafts or bills of exchange, drawn by the said J. J. M. and D. E. T., co-partners as aforesaid, upon the said P. and E., in favour of themselves, the said T. and M., &c., (*setting forth drafts as in last form*), to the great damage of them the said O. P. P. and W. T. E., co-partners as aforesaid, to the evil example of all others in like cases offending, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add other counts, setting forth specially the bills obtained, &c.*)

For receiving goods obtained by false pretences, under the English statute.(*l*)

That A. B., late, of, &c., on., &c., at, &c., unlawfully, knowingly and fraudulently did receive ten gold watches, of the value of one hundred pounds, of the goods and chattels of E. F., by one C. D., then lately before unlawfully *obtained from the said E. F. by false pretences*,(*m*) that is to say, by falsely pretending that he the said C. D. was the servant of one G. H., and had been sent by the said G. H. for the said watches, to be inspected by him, whereas, in truth and in fact, he the said C. D. was not the servant of the said G. H. nor sent by him for the said watches to be inspected by him, or for any other purpose whatever; he the said A. B. at the time he so received the said gold watches, on, &c., at, &c., then and there *well knowing the same to have been so unlawfully obtained* by the said C. D. from the said E. F. by false pretences aforesaid; against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*l*) Dickinson's Q S. 6th ed. 444.

(*m*) Essential to be stated: as also that the receiver knew them to be so unlawfully obtained; Reg. *v.* Frances Wilson, 2 Mood. C. C. 52. "Unlawfully taken and carried away," will not suffice, S. C.; Dickinson's Q S. 6th ed. 444.

CHAPTER XI.

DESTROYING A VESSEL AT SEA, &c.(*a*)

Sinking and destroying a vessel, the parties not being owner in whole or in part, under the U. S. statute.(*b*)

That A. B., &c., late, &c., and C. D., late, &c., at, &c., on, &c., on the high seas, out of the jurisdiction of any particular state of the United States of America, within the admiralty and maritime jurisdiction of the United States and within the jurisdiction of this court, they the said then and there belonging to a certain vessel, being a called the which said was not owned in whole or in part, either jointly or severally by them, the said or either of them, and which said was then and there the property of some person or persons to the jurors aforesaid as yet unknown, they the said then and there on the day of aforesaid, being in and on board the said on the high seas as aforesaid, did then and there feloniously, wilfully and corruptly cast away and destroy the said called the against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first count, substituting*): "was then and there the property of then and still being citizens of the United States of America," *for* "was then and there the property of some person or persons to the jurors aforesaid as yet unknown."

Third count.

That A. B. and C. D., late, &c., heretofore, on, &c., the said then and there belonging, in the capacity of master (*or otherwise*), to a certain vessel, being a called the the property of a certain citizen or citizens of the United States of America, to wit, of and the said then and there belonging to the said called the in the capacity of mate (*or otherwise*), of which said they the said were not owners, nor was either of them an owner, did then and there feloniously, wilfully and corruptly cast away and destroy the said called the , against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

That A. B., late, &c., and C. D., late, &c., heretofore, &c., did then and there, in and on board of a certain vessel, being a called the the property of then and still being citizens of the United States of America, to which said they the said then and there belonged, the said as and the said

(*a*) See for prosecution for burning a vessel, &c., U. S. *v.* Lockman, 1 Bost. L. Rep. N. S. 151, Aug. 1848.

(*b*) This form was used in U. S. *v.* Snow, in New York, in 1847, without exception being taken to it.

as and of which said the said were not owners, nor was either of them an owner, feloniously, wilfully and corruptly procure the said called the to be cast away and destroyed, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count.

That the said A. B. and the said C. D., heretofore, to wit, on, &c., did then and there, in and on board of a certain vessel, being a called the the property of a certain person or persons, being a citizen or citizens of the United States of America, to the said jurors unknown, to which said they the said then and there belonged, and of which said the said were not owners, nor was either of them an owner, feloniously, wilfully and corruptly cast away and destroy the said called the , against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count.

That the said A. B. and the said C. D., on, &c., at, &c., belonged to a certain vessel, being a called the and were then and there, in and on board the said the said in the capacity of and the said in the capacity of the said not being owners, either in whole or in part, nor either of them being an owner, either in whole or in part of the said but the said being then and there the property of then and still being citizens of the United States of America, and that the said so being then and there on the high seas as aforesaid, in and on board of the said as aforesaid, did then and there, with force and arms, feloniously, wilfully and corruptly, make a certain hole of the width of inches, and of the depth of in and through the said by means of and through which said hole, so made as aforesaid, the sea entered, filled and sunk the said and the said did then and there by the means aforesaid, feloniously, wilfully and corruptly destroy said against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Seventh count.

(*Same as sixth count, substituting*): "the said being then and there the property of a certain person or persons, being a citizen or citizens of the said United States, to the said jurors unknown," *for* "the said being then and there the property of then and still being citizens of the United States of America."

Eighth count.

(*Same as sixth count, substituting*): "feloniously, wilfully and corruptly procure a certain hole of the width of inches, and of the depth of to be made in and through the starboard side (*or otherwise*), of the said by means of and through which said hole so made as aforesaid, the sea entered, filled and sunk the said and so the said did then and there by the means last aforesaid, feloniously, wilfully and corruptly procure the said to be cast away and destroyed," *for* "feloniously, wilfully and corruptly make a certain hole of the width of inches and of the depth of in and through the said by means of and through which said hole, so made as aforesaid, the sea entered, filled and sunk

the said and the said did then and there by the means aforesaid, feloniously, wilfully and corruptly destroy said ."

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Casting away a vessel with intent to prejudice the owners, under the English statute.(*c*)

That E. L., late, &c., a certain vessel called the D., the property of A. H. and others, on a certain voyage upon the high seas then being, then and there upon the high seas within the jurisdiction of the admiralty of England and within the jurisdiction of the Central Criminal Court, feloniously, unlawfully and maliciously did cast away and destroy, with intent to prejudice the said A. H. and another, being part owners of the said vessel, against the form of the statute, &c. And further, that P. M., &c., before the said felony was committed in form aforesaid, at London aforesaid, and within the jurisdiction of the said Central Criminal Court, did feloniously and maliciously incite, move, aid, counsel, hire and command the said E. L., the said felony, in manner and form aforesaid, to do and commit, against, &c. (*Conclude as in book* 1, *chap.* 3).

(*c*) R. *v.* Wallace, 1 C. & M. 113.

The statute 1 Vict. c. 89, s. 6, enacts, that "whosoever shall unlawfully and maliciously set fire to, or in any wise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony," &c. The 11th section of the same statute enacts, that "in the case of every felony punishable under this act, every principal in the second degree and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable," &c.

BOOK THE FIFTH.

OFFENCES AGAINST SOCIETY.

CHAPTER I.

PERJURY.

General frame of indictment. Perjury in swearing an alibi for a felon.(*a*)

That at the court, &c., (*setting forth the style of the court*),(*b*) before, &c., (*stating the members of the court*), one G. B. was in due form of law tried upon a certain indictment then and there depending against him, for having on the twentieth day of July, in, &c., felo-

(*a*) Stark. C. P. 459.

(*b*) The object of this part of the indictment, as is stated by Mr. Chitty, on whose authority (2 Chit. C. L. 307), a large portion of the following notes rests, is to render the assignments of perjury intelligible, where they would otherwise require explanation. It is not safe, however, to go beyond what is actually essential for the purpose. Thus, it is unnecessary to set out the continuances of the former prosecution, 1 Leach 201, or to state out of what office process issued, in case of perjury, on a bill of Middlesex, though, if a wrong office be stated, the indictment would be defective, Peake N. P. 112; Cro. C. C. 339, 356; and where a complaint was made *ore tenus*, by solicitor to the Court of Chancery, of an arrest in returning home after the hearing of a cause, it was holden sufficient to state, that "at and upon the hearing of the said complaint the defendant swore," &c., and there was no occasion for any positive averment of the hearing of the application; 1 T. R. 74. The usual and most regular course is to aver that a certain cause had arisen, and was depending, and came on to be tried in due form of law, or that at such a court I. K. was in due form of law tried on a certain indictment then and there depending against him for murder, and that the perjury was committed on the trial either of the civil or criminal proceeding; 5 T. R. 318; Cro. C. C. 7th ed. 612, n. *a*. A variance in setting out this matter of inducement would be fatal, if the matter stated could not be rejected as surplusage. A clerical error will be no variance; 5 T. R. 311; 2 Campb. 139; 1 Leach 192; 1 Campb. 404; 1 Esp. R. 97; 9 East 137; 1 Ld. Raym. 701; 13 East 547. But where the indictment purported to set out the substance and effect of the bill, and stated an agreement between the prosecutor and defendant respecting *houses*, and, upon the bill being read, the word *house* was in the singular number, the variance was held fatal; 1 R. & M. 98. So, an omission to charge in the bill of indictment, that the matter of traverse tried between the State of Tennessee and D., touching which the defendant gave his evidence, was by indictment or presentment, is fatal; Steinson *v.* State, 6 Yerg. 531. It is not necessary that it should appear whether the witness was compelled to attend court by subpœna, or whether he attended voluntarily; nor whether the false testimony was given in answer to

niously stolen, taken and carried away nineteen dollars of the moneys of one J. E., and that at the said trial, so then and there had as afore-

a specific question put to him, or in the course of his own relation of facts; but it is sufficient if it be averred that an issue was duly joined in court, and came on to be tried in due course of law; and that the court had competent authority to administer the oath, without an express averment that the court had jurisdiction of the cause of action; 1 Chip. Verm. R. 120; Com. *v.* Knight, 12 Mass. 274.

Any essential variance in the statement of the circumstances attending *the administering the oath* is fatal, State *v.* Street, 1 Murph. 156; Leach 150, 3d ed. 179; State *v.* Hardwick, 2 Mo. 185; 14 East 218, n. *a.*, and see 3 Stark. on Evid. 1136, where the indictment alleged that the cause came on to be tried before Lloyd, Lord Kenyon, &c., William Jones being associated, &c., and from the judgment roll it appeared that Roger Kenyon was associated, &c.; the variance was held fatal, 1 Esp. R. 97. Where in an indictment for perjury in an answer to a bill of chancery, the bill was described as exhibited against three persons only, when in fact it was against four, it was held that this was no variance; 1 R. & M. 101. Where an indictment, in setting out the record of a conviction, stated an adjournment to have been made *by Const, Esq., and* A. B. C. *and* D., *and others their fellows, &c., justices*, and an examined copy of the record of conviction, when produced, stated the adjournment to have been made *by Const, Esq., and* E. F. G. *and others, &c.*, the variance was held fatal, unless the defect was supplied by evidence of an adjournment made by the persons stated in the indictment; 1 R. & M. 171. Where it becomes necessary, in charging the commission of the offence, to allege that a certain term of a county court was duly holden, it is not sufficient that it was holden by and before the chief judge of such court, without mention of any assistant judges. If either of the judges is named, it should appear that at least a quorum of the court held the term; State *v.* Freeman, 15 Verm. 723; see Resp. *v.* Newell, 3 Yeates 407. Where the indictment alleged a bill of discovery filed in the Exchequer (in the answer to which perjury was assigned), to have been filed on a day specified, viz., first of December, 1807, and it appeared on the production of the bill to have been filed in the preceding Michaelmas term, according to the practice of the court, where a bill is filed in vacation, it was held that the variance was immaterial, the day not having been alleged as part of the document, 1 Stark. R. 521; and where the perjury was assigned in answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term by order of the court, it was held to be no variance, the amended bill being part of the original bill; 3 Stark. on Evid. 1138. Where the bill was alleged to have been filed by Francis Cavendish Aberdeen, and others, and on the production of the bill it purported to have been filed by J. C. Aberdeen, and others, the variance was held to be immaterial, evidence being given that Francis Cavendish Aberdeen, and the other persons named, did in fact file the bill, although it was objected that it ought to have been averred in the indictment, that Francis Cavendish Aberdeen, &c., filed their bill by the name of J. C. Aberdeen, &c., and although, after setting out the material parts of the bill, the words were added, "*as appears* by the said bill, filed of record;" 1 Stark. 518; 3 T. R. 601; 2 Campb. 139. In another case the indictment charged the alleged false evidence as given in the Palace Court, described the court as "the Court of the King's Palace, *at* Westminster," and it appeared from the record of the trial below, that it was called "the Court of the King's Palace *of* Westminster," it was held no variance; 3 D. & R. 234. So where it was averred that the cause in which the alleged perjury was committed, "came on to be tried, and was then and there duly tried by a jury of *the county*," and the record of the trial stated that the jury came of the neighbourhood of Westminster, it was held, that the cause was in fact so tried, and no county being mentioned in the record, it was no objection; *ib.* It has been held, that though there be two counts in the original proceeding, yet an averment that an *issue* came on to be tried will be no variance; Peake's R. 37.

In an indictment for perjury in taking a false oath before a regimental court of inquiry, the indictment ought to set forth of what number of officers the said court of inquiry consisted, and what was their respective rank, so as to enable the court to discern whether the said court of inquiry was constituted according to law; Com. *v.* Conner, 2 Va. Cases 30. Where an indictment charged the defendant with perjury in "a matter of traverse then and there tried, between the State of Tennessee and D., for an assault and battery," it was held that this was not a sufficient charge of the jurisdiction of the court before which the case was tried; Steinson *v.* State, 6 Yerg 531. Even if the plaintiff offer himself as a witness, is sworn, and testifies falsely, perjury may be assigned on the oath thus taken, though he was incompetent as a witness, provided the justice had jurisdiction of the subject matter; Montgomery *v.* State, Wilcox 220. Where the defendant is indicted for perjury, committed on the trial of an issue in a former indictment, the indictment must set forth the finding of the former indictment in the proper court of the proper county, and should also set forth

said, J. S., late of labourer, appeared as a witness for and on behalf of the said G. B. upon the said trial, and was sworn and took his corporal oath before the said J. M. and J. S., justices as aforesaid, on the holy gospel of God, to speak the truth, the whole truth and nothing but the truth, of, upon and concerning the matter then depending,(*c*) (they the said J. M. and J. S., justices as aforesaid, then and there having sufficient and competent power and authority to administer an oath to the said J. S. in that behalf),(*d*) whereupon it then and there became a material inquiry on the trial of the said issue, whether (*here state the several questions*):(*e*) and the said J. S. being

that indictment, or so much thereof as to show that it charged an offence in that county, and of which said court had recognizance, and also the traverse or plea of defendant in that indictment, whereon the issue was joined. Judgment on an indictment, defective in these particulars must be arrested; State *v.* Gallimore, 2 Iredell 374. On a conviction for perjury in Rutherford County, North Carolina, two reasons were assigned in arrest of judgment; 1st. That the indictment did not charge that the oath was taken in Rutherford County; 2d. Nor that the evidence was given to the court and jury, but to the jury only. The first reason was overruled, the indictment charging that "he, the said A. B. on the 16th of April, in the year aforesaid, in the county aforesaid, came before the said C. D., judge as aforesaid, and then and there, before the said C. D., did take his corporal oath." The part of the indictment immediately preceding stated that C. D. held the court as judge at that term in Rutherford County; the same county was inserted in the caption of the indictment, and there was none other mentioned in any part of it; the words "then and there," refer to the 16th of April and to the County of Rutherford. The second reason was overruled, as the indictment charged that the oath was taken before the judge, and the evidence was thereupon given to the jurors. This, it was held, was the proper way of stating the oath; State *v.* Witherow, 3 Murph. 153. Where the indictment alleged the false oath to have been taken *before* the board of inspectors, &c., (they being qualified to administer it), it is a sufficient averment of the fact that the oath was administered *by* the board; Campbell *v.* People, 8 Wend. 636. Where perjury was charged to have been committed in that which was in effect an affidavit on an interpleader rule, and the indictment set out the circumstances of the previous trial, the verdict, the judgment, the writ of *fieri facias*, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was obtained according to the provisions of the interpleader act; it was held, that the indictment was bad, as the affidavit did not appear to have been made in a judicial proceeding; R. *v.* Bishop, 1 C. & M. 302.

(*c*) It must appear that the defendant was *regularly sworn*. In case of an affidavit the jurat need not be set out; 9 East 437; nor need the affidavit be stated, or proved to have been affiled in, or exhibited to the court, or in any other manner used by the defendant or others; 7 T. R. 315. It is enough if it be stated that the defendant was in due manner sworn, though he took the oath according to the ceremonies of a particular religion; Peake N. P. 155; 12 Vin. Ab. T. 28; 2 Keb. 314. And if he were sworn twice, first in the usual form, and afterwards after his own method, to state that he was sworn on the holy gospel of God will suffice, though had he been sworn only in the latter way the variance would have been fatal; *ib.*; Cro. C. C. 7; *ib.* 575, n. *c.*; see State *v.* Whisenhunt, 2 Hawks 458. An indictment for perjury, which avers that the defendant 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; Res. *v.* Newell, 3 Yeates 407; see State *v.* Freeman, 15 Verm. 723; Montgomery *v.* State, Wilcox 220; *ante*, p. 278.

(*d*) This averment should always appear; Wh. C. L. 477. In an indictment for making a false affidavit, it is sufficient to state, that the defendant came before A. and took his corporal oath (A. having power to administer an oath), without setting out the nature of A.'s authority; Rex *v.* Callanan, 6 B. & C. 102; see State *v.* Ludlow, 2 South. R. 772; Campbell *v.* People, 8 Wend. 638; People *v.* Phelps, 5 Wend. 10; Rex *v.* Howard, M. & R. 187; State *v.* Gallimore, 2 Iredell 372.

(*e*) Materiality must be averred or implied; 1 T. R. 69; 5 T. R. 318; Comb. 461; Cro. Eliz. 428; Com. R. 43; 8 Ves. 35; 2 Bridgman's Index 395; 2 Ld. Raym. 889; Holt 535; Cro. C. C. 7th ed. 613, n. *a.*; 1 R. & M. 147; R. *v.* M'Kernon, 2 Russ. 541; Campbell *v.* People, 8 Wend. 636; Hinch *v.* State, 2 Mo. 8; Weathers *v.* State, 2 Blackf. 270; Com. *v.* Knight, 12 Mass. R. 274; State *v.* Hayward, 1 N. & M'C. 547; State *v.* Hattaway, 2 N. & M'C. 118; State *v.* Dodd, 2 Murph. 226; Rex *v.* Nicholl, 1 B. & Ad. 21; 2 Stark. Ev. new ed. 626; State *v.* Ammons, 2 Murph. 123; though all the circumstances which make

so sworn as aforesaid, wickedly contriving and intending to cause the said G. B. unjustly to be acquitted of the said felony, did then and there knowingly, falsely,(*f*) corruptly, wilfully and wickedly say,(*g*)

such materiality need not be stated, State *v.* Mumford, 1 Dev. 519; it being only necessary to say that they became and were so; 5 T. R. 318; see Ld. Raym. 889; though it will be proper to state any circumstances to which the assignment of perjury must afterwards refer; 1 T. R. 66. The express allegation of materiality may be properly omitted where the materiality of the question evidently appears on the record, as where the falsehood affects the very circumstances of innocence or guilt, or where the perjury is assigned in documents from the recital of which it is evident that the perjury was important; Campbell *v.* People, 8 Wend. 638, 639; see Trem. P. C. 139, &c., and 7 T. R. 315; 2 Stark. C. L. 423, n. Perjury may be assigned upon a man's testimony as to the credit of a witness; 2 Salk. 514. So, every question in cross-examination which goes to the witness' credit, is material for this purpose; Reg. *v.* Overton, 2 Mood. C. C. 263; C. & M. 655. Or he may be perjured in his answer to a bill in equity, though it be in matter not charged by the bill; 5 Mod. 348; *semble*, 1 Sid. 274, 106; see R. *v.* Dunston, R. & M. 109; R. *v.* Yates, C. & M. 132.

(*f*) It must be charged that the defendant *falsely* swore, &c., 2 M. & S. 385; and if the same person swears contrary ways at different times, it is necessary to aver on which occasion he swore wilfully, falsely or corruptly; 5 B. & Ad. 926; 1 D. & R. 578, S. C. The English cases tend to the doctrine that the word "wilfully," &c., is not necessary, it being implied from the words, "falsely, maliciously, wickedly and corruptly;" 1 Leach 71; see Rex *v.* Richards, 7 D. & R. 665; Rex *v.* Stevens, 5 B. & C. 246. But in this country an indictment charging that the defendant "being a wicked and evil disposed person, and unlawfully and unjustly contriving, &c., deposed," &c., and concluding that the defendant "of his wicked and corrupt mind did commit wilful and corrupt perjury," is defective even at common law, for not alleging that the defendant wilfully and corruptly swore falsely; State *v.* Carland, 3 Dev. 114. In another case, however, an indictment which stated that the defendant "did voluntarily and of his own free will and accord, propose to purge himself upon oath of the said contempt," negativing by express averments the truth of the oath, and concluding that the defendant "did knowingly, falsely, wickedly, maliciously and corruptly commit wilful and corrupt perjury," was held good; Res. *v.* Newell, 3 Yeates 407.

(*g*) The usual method of introducing the alleged false evidence is, that the defendant did falsely swear or say, &c., as in the text, 1 T. R. 64, or did swear "in substance and to the effect following," 2 Campb. 138; Cro. C. C. 7th ed. 573, n. *a*., and cases there cited; "or in manner and form following, that is to say," which allow of a greater latitude than "the tenor following," or words requiring a literal recital, People *v.* Warner, 5 Wend. 271; 1 Leach 192; Trem. P. C. 139; 1 T. R. 64; and then stating the precise words, with innuendoes, or the substance of what was sworn to; a variance, however, in the latter case, which alters the sense, will be fatal; 1 Leach 133. The same rigour as was noticed in another place, Wh. C. L. 89, 160, 480, has not been required in this country in the setting forth of the alleged false oath of the defendant, as under the statute of Elizabeth, was considered essential in England. Thus, it is said, that at common law it is only necessary to set out the substance of the oath, and when that is done, an exact recital is not necessary; and accordingly where the article "an" was substituted for the article "the," the variance was held immaterial; People *v.* Warner, 5 Wend. 271; State *v.* Ammons, 3 Murph. 123. Where the tenor of an affidavit is undertaken to be recited, and the recital be variant in a word or letter, so as thereby to create a different word, it is fatal. But where a statement of the substance and effect of an affidavit is sufficient, and nothing more is pretended to be done, evidence of the substance and effect is sufficient. Where the charge was in swearing to an affidavit, "to the substance and effect following," a variance, which consisted in using the words "suit" instead of "case," was deemed immaterial; State *v.* Coffee, N. C. Term. R. 272, S. C.; 2 Murph. 326.

Marcy J., in People *v.* Warner, 5 Wend. 271, examines with great fairness the degree of particularity necessary in setting forth the words. "If the public prosecutor," he said, "was bound to set forth with literal and perfect accuracy, the objection was well taken. Even if he has needlessly undertaken to state it *in hæc verba*, there are not wanting authorities, which declare that a failure in the slightest degree, in half a letter, to use a hyperbolical expression of Lord Mansfield, will be fatal.

"It was scarcely contended, on the argument, that it was absolutely necessary to set forth the oath in its exact words. The rule on this subject seems to be, that written instruments, where they form a part of the *gist* of the offence charged, must be set forth *verbatim*. In the case of forgery, the spurious instrument must be set forth in its very words and figures; Arch. C. P. 23; 1 East 180; Leach 721; but in perjury the rule is different.

depose and give in evidence, to the jurors of the jury then and there duly taken and sworn between the said state and the said G. B., before the said J. M. and J. S., justices as aforesaid, that he the said J. S. on the second day of K. races (meaning the twenty-sixth of July, in the year of our Lord one thousand seven hundred and seventy-five, being the second of three successive days on which certain horse races were run at K. in the said County of Chester, in that year),(*h*) was in a certain booth at K. aforesaid known by the sign of the bull's-head, kept by one R. G., and that he the said J. E. came into the said booth and sat down by him (meaning himself the said J. S.) on the left hand side; and that he (meaning himself the said J. S.) asked the said J. E. if he (meaning the said J. E.), was not ill, and that he (meaning the said J. E.) said, I (meaning himself the said J. E.) am well enough, I (meaning himself the said J. E.) have been playing at cards with a parcel of men and have lost a great deal of money; and that

'It is not necessary,' says Mr. Archbold, 'to set forth the affidavit, answer, &c., on which the perjury is assigned, *verbatim;* for the statute of 23 Geo. II., only requires the substance of the offence to be charged. Our *revised laws* of 1813, contain a provision similar to the act 23 Geo. II., and if it applies to this case, it was not necessary to state in the indictment more than the substance of the oath. If the *revised statutes* are applicable to this case (and that they are is settled by this court in the case of The People *v.* Phelps, decided at the last term), then no defect or imperfection in matter of form, which does not tend to the prejudice of the defendant, can be alleged against the indictment; 2 R. S. 728, s. 52. Whether we apply to this case the revised statute or the law as it stood previous to the last revision (and by one or the other it must be governed), it is quite evident that there was no necessity of setting forth the oath taken by the defendant, with absolute accuracy; yet if the pleader has heedlessly undertaken to do so, it may be, he should be holden to a strict performance.

"The indictment alleges that the oath on which the perjury is assigned, *is in substance and to the effect following, to wit,* &c. Whether it was intended in this case to set forth the oath *verbatim*, depends upon the true definition of the word '*effect.*' The word '*tenor*' has a technical meaning and requires an exact copy; and the defendant's counsel infers that because 'effect' is often used with it, a like meaning is to be put on that word. The inference does not strike me as conclusive or correct; because the *tenor* and *effect* require an exact copy, it is not to be inferred that *substance* and *effect* require as much. The ordinary meaning of the word '*effect*,' as well as judicial decisions thereon, refute the interpretation which the defendant's counsel has given to it. Where an instrument was alleged to be '*to the effect following*,' a literal copy was not required; Arch. C. P. 68. Even the words 'in manner and form following,' do not require a perfect copy; 1 Dougl. 193; 1 Leach 227. It is expressly said in King *v.* Bear, 2 Salk. 417, that the words *ad effectum sequentem* were loose and useless when joined to *juxta tenorem.* To my apprehension, the substance and effect of an instrument in writing cannot, either in common parlance or legal import, be understood to mean an exact copy of it. My conclusion is, that the law did not make it necessary, nor did the pleader attempt in this case to set forth the oath taken by the defendant literally, and that the variance between the oath produced in evidence and that set forth in the indictment, is wholly immaterial; all apprehensions therefore that the defendant, if sentenced and punished on this indictment, would be exposed to a second prosecution for the same offence, appear to me to be wholly imaginary; but if this application on his part should prevail, any further effort to bring him to punishment would probably be defeated by a plea of *autrefois acquit.*

"I am of opinion that the court below decided correctly in adjudging the variance to be immaterial, and that the exception to the decisions of that court is not well taken. The General Sessions are therefore advised to render judgment upon the conviction."

(*h*) The office of an innuendo will be discussed more fully in the preliminary notes to the chapter on libel, and it will be shown that it is a mode of explaining some matter already expressed, and serves to point and elucidate precedent matter, though it can never introduce charges, or add to or vary the sense of those already made; 1 Chit. C. L. 310; Stark. C. P. 126. It means nothing more than the words *id est, scilicet, aforesaid*, &c., being merely an explanation of what has gone before; *ib.*; Cowp. 684. Where the innuendo and the matter it introduces, are altogether impertinent and immaterial, they may be rejected as superfluous; 1 T. R. 65; 9 East 93; see 3 Campb. 461; 7 Price 544.

he the said J. S. said, man (meaning the said J. E.), I, (meaning himself the said J. S.), am very sorry for you (meaning the said J. E.); and that the said J. S. upon his oath aforesaid, before the said jury so taken between the said state and the said G. B. and the said J. M. and J. S., justices as aforesaid, did further say, depose, swear and give in evidence, that the said J. E. then and there took him the said J. S. by the hand, and said, I (meaning himself the said J. E.), will never play at cards any more; whereas in truth and in fact(*i*), the said J. E. did not sit down by the said J. S. in the said booth on the twenty-sixth day of July, and whereas in truth and in fact, the said J. S. did not ask the said J. E. whether he was well or not, and whereas, in truth and in fact, the said J. E. did not say to the said J. S. that he was well enough, and whereas in truth and in fact, the said J. E. did not say to the said J. S. that he the said J. E. had been playing at cards with a parcel of men and had lost a great deal of money, and whereas in truth and in fact, the said J. S. did not say to the said J. E. that he (meaning himself the said J. S.), was sorry for him (meaning the said J. E.), and whereas in truth and in fact, the said J. E. did not say to the said J. S. that he would never play at cards any more, and whereas in truth and in fact, the said J. E. had not, on the said day of any conversation whatsoever with the said J. S.;(*j*) and so the jurors aforesaid now here sworn

(*i*) The general averment that the defendant swore falsely, &c., upon the whole matter, will not be sufficient; the indictment must proceed by particular averments (or, as they are technically termed, by assignments of perjury), to negative that which is false. It is necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant. Sometimes it is also necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, though some of the circumstances had a real existence; but the word "falsely" does not import that the whole is false; and when the proper averments come to be made, it is not necessary to negative the whole, but only such parts as the prosecutor can falsify, admitting the truth of the rest; Wh. C. L. 480. "The object of the *assignment of perjury* is to falsify, by averments in the indictment, those parts of the defendant's allegations on oath, in which it is intended to charge him on the trial with having committed the offence in question;" 2 M. & S. 385 to 392. Where the party has sworn contrary ways at different times, it must be expressly shown in such case, which was the false oath; 5 B. & A. 922; 1 D. & R. 578, S. C. These should be specific and distinct, in order that the defendant may have notice of what he is to come prepared to defend; see *ib.*; and it would, therefore, be insufficient to aver generally and indefinitely that the defendant's oath was false. In many instances, however, the indictment may not be vitiated by the assignment being rather more comprehensive than the term of the defendant's evidence. Thus if the defendant swore "that he never did, at any time during his transactions with the victualling office, charge more than the usual sum per quarter, beyond the price he actually paid *for* any grain purchased by him for the said commissioners as their corn factor," and this assertion be contradicted by an averment that "he did charge more than the usual sum per quarter *for and in respect of* such malt or grain," the indictment will not be vitiated by the introduction of the words "and in respect of;" R. *v.* Atkinson, Cro. Circ. Assist. 437 to 451; Bac. Abr. Perjury, C.; 1 Saund. 249, a. note 1, S. C. It is enough where there are several assignments of perjury in one count, to prove one of them, and though some be bad, judgment will be given on the sufficient assignments; 2 Ld. Raym. 886; 2 Campb. 138–9; Cro. C. C. 7th ed. 622; State *v.* Hascall, 6 N. Hamp. R. 358; State *v.* Bishop, 1 Chap. 110.

(*j*) In negativing the defendant's oath, where he has sworn only to his belief, it is proper to aver that "*he well knew*" the contrary of what he swore. Thus, when the affidavit upon which the charge of perjury is founded, merely states the belief of the affiant that a larceny had been committed, the assignment of the perjury must negative the words of the affidavit, and it is not sufficient to allege generally that the persons charged committed not the larceny; it is necessary, when the defendant only states his belief, to aver that the fact was otherwise, and that the defendant knew the contrary of what he swore; State

upon their oath aforesaid, do say, that the said J. S. at the said court of session and goal delivery, &c., before the said J. M. and J. S. then being such justices as aforesaid, (and then and there having sufficient and competent power and authority to administer the said oath to the said J. S.) did in manner and form aforesaid, commit wilful and corrupt perjury,(*k*) against, &c. (*Conclude as in book* 1, *chap.* 3).

In swearing as to age in procuring money of the United States in enlisting in the navy of the United States.(*kk*)

That late, &c., on, &c., at, &c., wishing and intending to procure the expenditure of public money of the United States of America, and representing himself to be a citizen of the United States of America, and to be of full age, to wit, of the age of twenty-one years and upwards, did then and there come in his own proper person before , a in the navy of the United States of America, duly authorized and empowered to enlist persons in the naval service of the said United States, and did then and there apply to the said to enlist him the said as a in the naval service of the said United States, he the said then and there contriving and intending by means of such enlistment, so applied for by him as aforesaid, to procure and bring about the expenditure of public money of the said United States, and the payment of the sum of , being the amount paid by the said United States to on their enlistment in the naval service of the said United States, as he the said then and there well knew and understood, and that it being then and there material that the said should know and be informed, whether the said possessed the requisite qualifications for enlistment as aforesaid, and particularly whether or not the said was then and there a citizen of the United States of America, and was then and there of the full and lawful age of twenty-one years, he the said in pursuance of the regulations and requirments of the department of the navy of the said United States, required and directed the said to make oath and depose in writing in regard to the age and citizenship of him the said , before a notary public (*or otherwise*) dwelling in said City of New York, and duly authorized and empowered to administer oaths in the said City of New York, and having competent power and authority to administer an oath in the premises to the said .

And the jurors aforesaid, on their oaths aforesaid, do further say, that the said not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and intending to defraud the United States of America, did on the said day of in the year of our Lord one thousand eight hundred and

v. Lea, 3 Alabama 602. Thus an indictment against an insolvent debtor for perjury in swearing to a schedule which did not discover certain debts owing to him, was held bad on demurrer for not averring that he well knew and remembered, that the omitted debts were then justly due and owing to him; Com. *v.* Cook, 1 Robin. 729.

(*k*) The usual summing up of the indictment is "that so the defendant did commit wilful and corrupt perjury," 2 Leach 860; Stark. 495; but it seems that this allegation is immaterial, see 2 Leach 856; Wh. C. L. 232.

(*kk*) U. S. *v.* O'Brien, United States Circuit Court, New York, 1847.

in his own proper person go before the said at the City of New York, in the Southern District of New York aforesaid, he the said having then and there competent power and authority as aforesaid, to administer an oath to the said in that behalf, and the said was then and there in due manner sworn by the said , and took his oath before the said in due form of law, and did then and there falsely and corruptly say, depose, swear and make affidavit in writing, amongst other things in substance and to the effect following, that is to say, that he the said was born in and that he was a citizen of the said United States of America, and that he the said was of full age, to wit, of the age of twenty-one years and upwards, whereas, in truth and in fact, the said at the time he took his said oath and made his affidavit aforesaid, was not born in the state of one of the United States of America, and was not a citizen of the said United States of America, but was in truth and in fact born in some place out of the said United States of America, to the jurors aforesaid unknown, and was not of full age, to wit, of the age of twenty-one years, but was in truth and in fact under full age, and under the age of twenty-one years.

And the jurors aforesaid on their oath aforesaid, do say that the said by means of the false oath aforesaid, then and there procured himself to be enlisted in the naval service of the said United States, and then and there procured and brought about the expenditure of public money of the United States of America, and procured the payment to himself out of public money of the said United States of the sum of and so the jurors aforesaid do say that the said on the said day of in the year of our Lord one thousand eight hundred and at the City of New York, in the Southern District of New York aforesaid, and within the jurisdiction of this court before the said notary public (*or otherwise*), (he the said then and there having competent power and authority to administer the aforesaid oath), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely did swear touching the expenditure of public money of the said United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

At custom house, in swearing to an entry of invoice, intending to defraud the United States, &c., under act of March 1*st*, 1823.(*l*)

That late, &c., on, &c., at, &c., wishing and intending to enter by invoice, at the custom house, in said City of New York, certain goods, wares and merchandise, which before that time had been brought and imported in a certain called the whereof one then and there was master, from a foreign port or place, to wit, from the port of in the (*specify the place, whether kingdom or otherwise*), and which were subject to the payment of duties to the United States of America, on being so brought and imported,

(*l*) U. S. *v.* Frosch, United States Circuit Court, New York. The defendant in this case forfeited his recognizance.

did come in his own proper person, on, &c., at, &c., and did then and there produce and deliver to and before one a deputy collector of the customs of the Port and District of the said City of New York, duly appointed according to law, a certain entry, purporting to be an entry of the merchandise so as aforesaid imported by the said from the said port of in the said which said entry so produced and delivered as aforesaid, was duly signed and subscribed by him, the said in his own proper handwriting, * and the said then and there was sworn, and took his corporal oath, before the said in due form of law, touching and concerning the matters contained in the said entry, † so as aforesaid produced and delivered by him the said to him the said then and there being a deputy collector of the customs as aforesaid, he the said then and there having sufficient and competent power and authority to administer the said oath to the said in that behalf, which said oath so taken by him the said was required to be taken by him the said under and by virtue of an act of congress of the United States of America, approved on the first day of March, in the year one thousand eight hundred and twenty-three, entitled "an act supplementary to, and to amend an act, entitled 'an act to regulate the collection of duties on imports and tonnage,' passed on the second day of March, seventeen hundred and ninety-nine, and for other purposes," in a matter and proceeding at the custom house, at the said Port and District of the City of New York, on the said day of aforesaid, it then and there being material, that a just and true account of all the goods, wares and merchandise, so as aforesaid imported by him the said should be furnished to the officers of the customs in that behalf, at the custom house, in said City of New York, and should be set forth in said entry, so as aforesaid produced and delivered by the said to the said ††, and it being then and there material, that the said officers of the customs, acting in that behalf, should know and be informed, whether the said in the said entry had concealed or suppressed any thing, whereby the United States might be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise. And the jurors aforesaid, on their oath aforesaid, do further say, that the said then and there being so sworn as aforesaid, not having the fear of God before his eyes, and being moved and seduced by the instigation of the devil, being so sworn as aforesaid, did then and there, upon his oath aforesaid, touching and concerning the matters contained in the said entry, knowingly and willingly swear falsely, amongst other things, and make oath in writing and substance, and to the effect following, that is to say, that the said entry, so then and there delivered by him to the collector of New York (meaning thereby the entry, so as aforesaid produced and delivered by him the said to the said), contained a just and true account of all the goods, wares and merchandise imported by or consigned to in the called the whereof was master, from (meaning thereby the goods, wares and merchandise, so as aforesaid imported by him the said in said and consigned to), and that he the said in the said entry or invoice had not concealed or suppressed

any thing, whereby the United States of America might be defrauded of any part of the duty lawfully due on said goods, wares and merchandise; whereas, in truth and in fact, the said entry did not contain a just and true account of all the goods, wares and merchandise imported by him the said or consigned to in the said called the whereof said was then and there master as aforesaid, but on the contrary thereof, the account of the goods, wares and merchandise contained in the said entry, was then and there false, in this, that in and by the said entry, the said goods, wares and merchandise are and were set forth and represented to have cost the importer thereof, including charges, the sum of (*here insert the sum, in the currency of the country from whence the goods were exported*), meaning thereby so much money of the kingdom, (*or otherwise*), of when in truth and in fact, the said goods, wares and merchandise cost the importer thereof, including charges, a much greater and larger sum and price than the said sum of of the currency aforesaid; and whereas also, in truth and in fact, he the said in the said entry, had concealed and suppressed the true and actual cost and value of said goods, wares and merchandise, with intent thereby to defraud the said United States of America of some part of the duty lawfully due and chargeable on said goods, wares and merchandise, and whereby the said United States were defrauded of a large part of the duty lawfully chargeable on said goods, wares and merchandise. And so the jurors, &c., do say, that the said did on the said day of in the year, &c., in the matter and proceeding aforesaid, at the custom house in the said City of New York, take the said oath before the said he the said then and there being a deputy collector of the customs as aforesaid, having competent authority to administer such oath to the said as aforesaid, when an oath was required to be taken under and by a law of the United States of America, and under and by virtue of the revenue laws of the said United States, and upon the taking of said oath, by him the said as aforesaid, he the said did then and there knowingly and willingly swear falsely, in manner and form aforesaid, in a matter and proceeding when the aforesaid oath was required, by a law of the United States of America, to be taken by the said and was then and there guilty of perjury, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same as first down to *, *at which insert:*

and that the said did also then and there at the time of producing and delivering the said entry as aforesaid, produce and deliver to the said being then and there a deputy collector of the customs as aforesaid, duly appointed according to law, a certain invoice, purporting to be an invoice of the goods, wares and merchandise so as aforesaid imported by the said in the said called the from the said port of and included in the entry then and there as aforesaid produced and delivered by the said to the said and the said was then and there in due manner sworn, and took his oath before the said in due form of law, touching and concerning the matters contained in the said entry and

invoice, † (*here insert as much of first count as intervenes between* † *and* ††); and it being then and there also material, that a just and faithful account of the actual cost of the said goods, wares and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback or bounty but such as had been actually allowed on the same, should be furnished to the officers of the customs, acting in that behalf, at the custom house in the said City of New York, and set forth in said invoice, so as aforesaid produced by him the said and it being also then and there material, that the officers of the customs acting in that behalf, should know and be informed, whether he the said knew or believed in the existence of any invoice of the said goods, wares and merchandise, other than the invoice so as aforesaid produced and delivered by him the said also whether or not, the invoice so then and there produced and delivered by him the said was then and there in the state in which he the said had actually received the same, and it being also then and there material, that the said officers of the customs acting in that behalf, should then and there know and be informed, whether or not, he the said in the said entry, or the said invoice, had concealed or suppressed any thing, whereby the United States of America might be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise; and that the said not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and being so sworn as aforesaid, did upon his oath touching and concerning the matters contained in the said entry and invoice, knowingly and willingly swear falsely, and make oath in writing, in substance and to the effect following, that is to say, that the entry then delivered by him to the collector of New York (meaning thereby the entry so as aforesaid produced and delivered by him the said to the said), contained a just and true account of all the goods, wares and merchandise imported by or consigned to in the called the whereof was then and there master, from (meaning thereby the goods, wares and merchandise, so as aforesaid imported by him the said in said called the and consigned to and that the said invoice, so then and there as aforesaid produced by him the said contained a just and faithful account of the actual cost of the said goods, wares and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback or bounty but such as had been actually allowed on the same, and also that he the said did not know or believe in the existence of any invoice, other than that so as aforesaid then and there produced by him, the said and that the said invoice, so then and there produced and delivered, was in the state in which he the said had actually received the same, and also that he the said had not in the said entry or invoice concealed or suppressed any thing, whereby the United States of America might be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise); whereas, in truth and in

fact, the said entry so as aforesaid then and there produced and delivered, did not contain a just and true account of all the goods, wares and merchandise imported by him the said or consigned to in the said called the whereof the said was then and there the master as aforesaid, but on the contrary thereof, the account of said goods, wares and merchandise contained in the said entry was then and there false, in this, that in and by the said entry, the said goods, wares and merchandise are, and were set forth and represented to have cost the importer thereof, including commissions and charges, the sum of (*here insert the sum, in the currency of the country from whence the goods were exported*), meaning thereby so much of the currency of the kingdom of (*or otherwise*), when in truth and in fact, the said goods, wares and merchandise cost the importer thereof, including commissions and charges, a much larger sum and price than the said sum of of the currency aforesaid, and whereas also, in truth and in fact, the said invoice, so then and there as aforesaid produced to the said did not contain a just and faithful account of the actual cost of the said goods, wares and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback or bounty but such as had been actually allowed on the same, but on the contrary thereof, the account of the actual cost of the said goods, wares and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback or bounty but such as had been actually allowed on the same, was set forth and represented in the said invoice, to be the sum of (meaning thereby so much currency of the of), when in truth and in fact, the actual cost of the said goods, wares and merchandise, and of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback or bounty but such as had been actually allowed on the same, was a different and much larger sum than the said sum of of the currency aforesaid, so contained in the said invoice. And whereas also, in truth and in fact, he the said then and there well knew and believed in the existence of an invoice of said goods, wares and merchandise, other and greatly different from the said invoice so as aforesaid then and there produced by him the said in which said other invoice, the said goods, wares and merchandise were set forth and represented to have cost a much larger sum and price than was expressed in the said invoice so as aforesaid then and there produced and delivered by him the said to the said and whereas also, in truth and in fact, the said invoice so then and there produced as aforesaid, was not then and there in the state in which the same had been actually received by him the said but on the contrary thereof, the said invoice so then and there produced as aforesaid, had, after the receipt of the paper on which the said invoice was written, been greatly and materially altered and written upon by him the said and whereas also, in truth and in fact, he the said in the said entry and invoice, had concealed and suppressed the true and

actual cost and value of the said goods, wares and merchandise, with intent thereby to defraud the United States of America, of some part of the duties lawfully due on the said goods, wares and merchandise. And so the jurors aforesaid, on their oath aforesaid, do say, that the said on the said day of in the year, &c., before a deputy collector of the customs, at the said Port and District of the City of New York, duly appointed according to law, he the said having as aforesaid competent power and authority to administer said oath to the said did upon taking the said oath in a matter and proceeding at the custom house, in the said City of New York, when an oath was required to be taken under and by virtue of a law of the United States of America, knowingly and willingly swear falsely, in manner and form last aforesaid, and did then and there commit wilful and corrupt perjury, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present, that the Southern District of New York in the Second Circuit, is the district and circuit in which the said offences were committed, and in which the said was first apprehended for the said offences (*or as the case may be; see ante, p.* 17, 97 *n*, 123 *n*).

In justifying to bail for a party after indictment found, &c.(*m*)

That heretofore, to wit, on, &c., one (the person bailed), was duly committed for trial to a prison in the City of in the Southern District of New York aforesaid, for a certain felony (*or otherwise*), by him the said before that time alleged to have been committed against the said United States.

And the jurors aforesaid on their oath aforesaid, do further present, that at an additional session, (*or otherwise*), of the District Court of the United States of America, for the Southern District of New York, begun and held at the City of New York, within and for the district aforesaid, on, &c., the grand inquest of the United States of America, within and for the district aforesaid, found a true bill of indictment against the said (the first mentioned party), for having, on, &c., (*state particularly the offence or offences*).

And the jurors aforesaid on their oath aforesaid do further present, that the said was duly arraigned before the said district court, and that he pleaded not guilty to the said bill of indictment so found as aforesaid.

And the jurors aforesaid on their oath aforesaid, do further present, that on application of the said the said district court did thereupon order the said to find sufficient bail in the sum of dollars, with or more sureties for his appearance in the said district court to answer to the said indictment, and that in default of finding such bail the said should stand committed for trial upon said indictment.

And the jurors aforesaid on their oath aforesaid do further present,

(*m*) This form, in which the offence is stated in the several counts, was prepared in the office of Mr. Butler, United States District Attorney for New York.

that after the making of the order last aforesaid, the said district court was adjourned until the of in the year of our Lord one thousand eight hundred and then to be holden at the said City of New York, in and for the said Southern District of New York.

And the jurors aforesaid on their oath aforesaid do further present, that after the adjournment of the said district court as last aforesaid, one of the in the district aforesaid, on, &c., came before , and then and there offered himself to be and become one of the bail for the said , (he the said (the commissioner), then and there being one of the commissioners duly appointed by the Circuit Court of the United States of America for the Southern District of New York, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States pursuant to the provisions of the act of congress in that behalf), that he the said should personally appear in the said District Court of the United States on the said of in the year of our Lord one thousand eight hundred and at o'clock in the forenoon of that day, then and there to answer all such matters and things as should be objected against him the said and not depart the said court without leave, and thereupon the said was then and there at the said City of New York, on the said day of in due manner sworn by the said ,† and did make affidavit in writing, and take his corporal oath upon the holy gospel of God, before the said (the commissioner) touching and concerning the matters contained in his said affidavit (he the said then and there having sufficient and competent authority to administer an oath to the said on that behalf); and the said being so sworn as aforesaid, then and there, on, &c., at, &c., to prevent the said from knowing the true circumstances and property of him the said did, upon his corporal oath concerning the matters contained in the said affidavit, in writing, before the said (he the said then and there having sufficient and competent authority to administer an oath to the said on that behalf), then and there wilfully, corruptly and knowingly by his own act and consent commit perjury upon his oath aforesaid, in swearing to the said affidavit in writing (amongst other things) in substance and to the effect following, that is to say, that he the said (at the time of taking the said oath and making the said affidavit in writing meaning), was worth the sum of dollars, over and above all his the said just debts and liabilities. Whereas in truth and in fact at the time of taking the said oath and making the said affidavit in writing, he the said was not worth the sum of dollars over and above all his the said just debts and liabilities.

And the jurors aforesaid on their oath aforesaid do further present, that it then and there became necessary and material that the said (the commissioner) should know whether the said was, at the time of taking the said oath and making the said affidavit in writing, worth the sum of dollars, over and above all his the said just debts and liabilities.

And so the jurors aforesaid on their oath aforesaid do say, that the

said on, &c., before the said , (he the said then and there having such sufficient and competent authority as aforesaid), †† upon his oath aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in a matter depending in the said District Court of the United States, did wilfully and corruptly commit perjury, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said heretofore, on, &c., at, &c., came before (the commissioner), and then and there offered himself to be and become one of the bail for one , he the said then and there being in prison in in the Southern District of New York aforesaid, charged with a crime before that time committed against the United States of America, by him the said (the party bailed), in (*state the offence or offences with which he stood charged*), he the said (the commissioner), then and there having competent authority from the said Circuit Court of the United States, to take bail in that behalf), that the said (the party bailed) should personally appear in the said District Court of the United States, on, &c., at o'clock in the forenoon of that day, and then and there answer all such matters and things as should be objected against him the said and not depart the said court without leave, and thereupon the said (the bail) was then and there on the said day of at the said City of New York, in due manner sworn by the said * to make true answer to all such questions as should be demanded of him the said touching the sufficiency as bail for the said (he the said having then and there sufficient and competent authority to administer such oath to the said).

And the jurors aforesaid on their oath aforesaid do further present, that the said so being sworn as aforesaid, then and there, to wit, on, &c., at, &c., before the said was interrogated concerning the circumstances and property of him the said and thereupon he the said not having the fear of God before his eyes, &c., and to prevent the said from knowing the true circumstances and property of him the said on the said, &c., at, &c., wilfully, corruptly, knowingly and willingly, by his own act and consent upon his corporal oath, did swear falsely and make affidavit in writing before the said (he the said then and there having sufficient and competent authority to administer such oath to the said) in a proceeding where an oath was required to be taken by him the said under the laws of the United States (amongst other things), in substance and to the effect following, that is to say, that he the said (at the time of taking the said oath and making the said affidavit meaning), was worth the sum of dollars, over and above all his (the said meaning) just debts and liabilities; whereas in truth and in fact, at the time of taking the said oath and making the said affidavit in writing, he the said was not worth the sum of dollars over and above all his (the said meaning) just debts and liabilities.

And the jurors aforesaid on their oath aforesaid do further present, that it then and there became necessary and material that the said

should know whether the said was, at the time of taking the said oath and making the said affidavit in writing, worth the sum of dollars over and above all his the said just debts and liabilities.

And so the jurors aforesaid on their oath aforesaid do say, that the said on, &c., at, &c., before the said (he the said then and there having sufficient and competent authority to administer such oath to the said), upon his oath aforesaid, wilfully, corruptly, knowingly and willingly did make affidavit in writing and swear falsely in regard to material facts in a proceeding before the said , wherein an oath was required to be taken by him the said under the laws of the United States, and did commit wilful and corrupt perjury, against, &c. (*Conclude as in book* 1, *chap.* 3).

*Third count. Same as second count down to *, then proceed to introduce so much of first count as is contained between* † *and* ††, *and conclude*: upon his oath aforesaid knowingly and willingly did make affidavit in writing, and swear falsely in regard to material facts in a proceeding before the said , where an oath was required to be taken by him the said under the laws of the United States, and did commit wilful and corrupt perjury, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

That the said wickedly and corruptly intending to prevent the due course of justice, on, &c., at, &c., in his own proper person came before a Commissioner of the Circuit and District Courts of the United States of America, for the Southern District of New York, duly appointed according to law, and having competent power and authority to administer oaths and take the recognizances of bail in criminal cases pending in the said courts, except in cases where the punishment is death, and then and there before the said offered to be and become one of the bail for the appearance in the said district court of one against whom an indictment for (*state the offence for which he stood charged*), was then and there pending in the said District Court of the United States, on which said indictment he the said stood committed and charged, and upon which said indictment the said district court had before the said day of, &c., made an order that the said might be admitted to bail in the sum of dollars, with or more sureties; and so being there on the said day of in the year last aforesaid, before the said commissioner as aforesaid, and offering to be and become one of the bail of the said , it was, and became then and there material that the said commissioner as aforesaid, should know and be informed whether he the said was worth the sum of dollars, over and above all his just debts and liabilites, and that thereupon, then and there, he the said was in due manner sworn, and did take his corporal oath on the holy gospel of God, before the said (he the said then and there having a competent authority to administer an oath to said in that behalf), touching his sufficiency as one of the bail of said , and being so sworn, he the said not having the fear of God before his eyes, but being moved and seduced by the instigation of the

devil, did wilfully, corruptly and falsely swear and make his ** affidavit in writing (amongst other things), in substance and to the effect following, that is to say, that he (the said meaning), was worth the sum of dollars, over and above all his the said just debts and liabilities, whereas in truth and in fact, he the said at the time he so swore and made the said affidavit, was not worth the sum of dollars, over and above his the said just debts and liabilities, and whereas in truth and in fact, he the said at the time he so swore and made the said affidavit, was not worth any sum of money whatever (*or as the case may be*), over and above his just debts and liabilities.

And so the jurors aforesaid, on their oath aforesaid do say, that the said, &c. (*Conclude as before*).

Fifth count. Same as fourth count down to **, *and then proceed*: † deposition in writing pursuant to the laws of the United States of America (amongst other things), in substance and to the effect following, that is to say, that he (the said meaning) was worth the sum of dollars, over and above all his (the said meaning) just debts and liabilities, whereas in truth and in fact, he the said at the time he so swore and made the said deposition in writing, was not worth the sum of dollars, over and above all his the said just debts and liabilities, and whereas in truth and in fact, he the said at the time he so swore and made his said deposition in writing, was not worth any sum of money whatever (*if such is the case*), over and above his just debts and liabilities.

And the jurors aforesaid on their oath aforesaid, do say, that, &c., on, &c., before the said , so as aforesaid having a competent authority to administer the said oath to the said did wilfully and corruptly commit perjury in manner and form last aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

And the jurors aforesaid on their oath aforesaid, do further present, that the Southern District of New York is the district in which the said offence was committed, and in which the said was first apprehended for the said offence, (*see p.* 17, 97 *n*, 123 *n*).

In giving evidence on the trial of an issue on an indictment for perjury.(*n*)

That at the Supreme Judicial Court of the said commonwealth, begun and holden at B., within and for the County of S., on the first Tuesday of November, on, &c., before I. P., Esq., then chief justice of the said court, a certain issue, in due manner joined in the said court, between the commonwealth aforesaid and one C. D., upon a certain indictment then depending against the said C. D. for wilful and corrupt perjury, came on to be tried, and was then and there, in due form of law, tried by a certain jury of the country, in due manner returned, empanneled and sworn for that purpose; and that at and upon the trial of said issue, E. F., late of B., in the county aforesaid, labourer, did then and there appear, and was produced as a witness

(*n*) Altered by Mr. Davis, Precedents 210, from 2 Chit. C. L. 452, 453, note *n*.; 4 Went. 275, and 6 Went. 396.

for and on behalf of the said commonwealth, and against the said C. D., upon the trial of the said issue, and the said E. F. was then and there duly sworn, as such witness as aforesaid, before the said I. P., Esq., then chief justice as aforesaid, that the evidence which he should give to the court and jury, between the said commonwealth and the said C. D., the defendant, on the issue then depending, should be the truth, the whole truth and nothing but the truth (the said I. P., Esq., as the said chief justice of said court, then and there having sufficient and competent power and authority to administer the said oath to the said E. F. in that behalf); and the said E. F., being so sworn as aforesaid, it then and there, upon the trial of the said issue, became and was a material inquiry, whether (*here state the several material questions*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. F., maliciously and corruptly intending to injure and aggrieve the said C. D., and to cause and procure him to be convicted of the wilful and corrupt perjury whereof he then stood indicted as aforesaid, and to subject him to the pains, penalties and punishments of the laws of this commonwealth inflicted on persons convicted of that crime, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, then and there, on the trial aforesaid of the said issue, upon his oath aforesaid, before the said I. P., Esq., chief justice as aforesaid, having such competent authority to administer such oath as aforesaid, falsely, wickedly, knowingly, wilfully and corruptly did say, depose, swear and give evidence, to the said court and jury, amongst other things, in substance and to the effect following, that is to say, (*here set out the evidence*); whereas, in truth and in fact, the said C. D. did not (*here assign the perjury, by negativing the false evidence given by the witness*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. F. falsely, wickedly, wilfully and corruptly, by his own voluntary act and consent, and of his own wicked mind and disposition, did then and there, in manner and form aforesaid, commit wilful and corrupt perjury; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

On a trial in the Supreme Judicial Court of Massachusetts, on a civil action.(*o*)

That heretofore, to wit, at the Supreme Judicial Court, begun and holden at B., within and for the said County of S., on, &c., before I. P., then being chief justice of the same court, a certain issue duly joined in the said court, between one C. D. and one E. F., in a certain plea of trespass, came on to be tried in due form of law, and was then and there tried by a certain jury of the country, duly summoned, empanneled and sworn between the parties aforesaid; and that, upon the said trial, G. H. of said B., yeoman, appeared as a witness on the behalf of the said E. F., the defendant, and was duly sworn, and took his oath before the said I. P., chief justice as aforesaid, to speak the truth, the whole truth, and nothing but the truth, touching the mat-

(*o*) Davis' Prec. 211.

ters in issue on the said trial; he the said I. P., chief justice as aforesaid, having sufficient and competent power and authority to administer the said oath to the said G. H. in that behalf; and that at and upon the said trial, certain questions became and were material, in substance as follows, that is to say, (*here state the material questions*), and that the said E. F., being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, at and upon the said trial at the court aforesaid, then and there falsely, wilfully, voluntarily and corruptly did say, depose and swear, among other things, in substance and to the effect following, that is to say, (*here state the evidence with proper innuendoes*); whereas, in truth and in fact, (*here assign the perjury by negativing the evidence*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H. in manner and form aforesaid, did commit wilful and corrupt perjury; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Against an insolvent in New York, for a false return of his creditors and estate.(*p*)

That heretofore, to wit, on, &c., at, &c., one E. W., late, &c., labourer, presented to the honourable R. R., then being the Recorder of the City of New York, and authorized to receive petitions under an act of the legislature of the State of New York, entitled "an act to abolish imprisonment for debt in certain cases," passed April seventh, one thousand eight hundred and nineteen, and the several acts relative to insolvent debtors therein referred to, a certain petition of him the said E. W., (as well in his individual capacity, as in his capacity as the partner of one A. B. P.), therein represented as being actually then an inhabitant within the said city, setting forth and showing among other things, that from many unfortunate circumstances, he the said E. W. had become insolvent and utterly incompetent to the payment of his debts, and praying therefore that his estate might be assigned for the benefit of all his creditors, to be distributed among them in discharge of the debts of said petitioner so far as the same would extend, and that the person of said petitioner might be forever thereafter exempted from all arrest or imprisonment for or by reason of any debtor debts due at the time of making said assignment, or contracted for before that time, though payable afterwards, and also, if in prison, from his imprisonment agreeably to an act, entitled "an act to abolish imprisonment for debt in certain cases," (meaning the said act of the legislature of the State of New York), so passed as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further say, that the said E. W., on the said, &c., at the place aforesaid, pursuant to the directions of said last mentioned act, upon presenting his petition as aforesaid, to the said R. R. as aforesaid, delivered to the said R. R. certain papers, purporting to be a full and true account of all

(*p*) This indictment was sustained by the Supreme Court of New York, in People *v.* Warner, 5 Wend. 271. As to the reasoning of the court, see *ante*, p. 281.

the creditors of said E. W. (as well in his individual capacity as in the capacity of a partner of A. B. P.), therein represented to be an insolvent debtor, and the money them (meaning the money owing to them), respectively by the said alleged insolvent, the place of residence of each of his creditors to the best of his knowledge, information and belief, and the original and *bona fide* consideration of his debts, and also a full and just inventory of all the estate, both real and personal, in law and equity of him the said E. W. represented as last aforesaid, and of all the books, vouchers and securities (meaning of all the books, vouchers and securities relating to the same), as well in his individual capacity as in the capacity of the partner of A. B. P., and a list of debts due him the said alleged insolvent, as well in his individual capacity as in the capacity of the partner of A. B. P.

And the jurors aforesaid, upon their oath aforesaid, do further say, that the said E. W., &c., labourer, on, &c., at, &c., unlawfully, wickedly and maliciously intending and contriving to injure and aggrieve one J. H. and sundry other creditors of him the said E. W., and of him the said E. W. and said A. B. P., fraudulently and wrongfully and unlawfully to obtain the benefit of said act of the legislature of the State of New York, so passed April seventh, one thousand eight hundred and nineteen, upon presenting said petition as aforesaid to the said R. R., recorder as aforesaid, did then and there pursuant to the directions of the said last mentioned act, produce and exhibit to, and before the said R. R., recorder as aforesaid, a certain oath and affidavit in writing of him the said E. W., and then and there before the said R. R., was duly sworn, and took his corporal oath concerning the truth of the matters contained in the said oath and affidavit, (he the said R. R., recorder as aforesaid, then and there by virtue of the said last mentioned act, having a lawful and competent power and authority to administer the said oath to, and to take and receive the said affidavit of him the said E. W. in that behalf), and that the said E. W. being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and not regarding the said acts of the legislature aforesaid, but fraudulently and wickedly and corruptly devising to suppress and avoid a full and true disclosure of his estate and effects and to subvert the truth itself, did then and there, to wit, on the said, &c., at, &c., in and by his said oath and affidavit, upon his oath aforesaid, before the said R. R., so being such recorder as aforesaid (he the said R. R. having by virtue of said acts aforesaid, a lawful and competent power and authority to administer said oath to, and to take and receive said affidavit of the said E. W. in that behalf), falsely, corruptly, knowingly, wilfully, maliciously and wickedly did say, depose and swear (among other things), in substance and to the effect following, to wit, I, E. W., do swear that the account of my creditors (meaning the creditors of the said E. W.), and the place of their residence (meaning the place of the residence of his the said E. W.'s creditors), and the inventory of my estate (meaning the inventory of the estate of him the said E. W.), together with the evidences of my title thereto (meaning the evidences of his the said E. W.'s title thereto), which are both herewith delivered (meaning the said papers so purporting

as aforesaid, and together with the said petition and affidavit so delivered as aforesaid to the said R. R., being such recorder as aforesaid and in the said affidavit referred to), are in all respects just and true, and that I (meaning the said E. W.), have not at any time or manner whatsoever, disposed of or made over any part of my estate (meaning the estate of the said E. W.), for the future benefit of myself (meaning the said E. W.), or my family (of the said E. W.), or in order to defraud any of my creditors (meaning the creditors of the said E. W.), or settled with any of my creditors (meaning the creditors of the said E. W.), with a view to obtain the benefit of an act, entitled "an act to abolish imprisonment for debt in certain cases" (meaning the said acts of the legislature of the State of New York, so passed April seventh, one thousand eight hundred and nineteen), as by the said oath and affidavit and petition, with the papers so purporting as aforesaid thereto annexed, and in the said affidavit referred to, filed in the office of said R. R., recorder as aforesaid, at the City Hall of the City of New York, in the Sixth Ward of the City of New York aforesaid, in the County of New York aforesaid, more fully appears.

Whereas, in truth and in fact, the said papers so purporting as aforesaid, to be a full and true account of all the creditors of the said E. W., (as well in his individual capacity as in the capacity of a partner of A. B. P.), represented to be an insolvent debtor, and the money them (meaning the money owing to them), respectively by the said alleged insolvent, the place of residence of each of his creditors, to the best of his knowledge, information and belief, and the original and *bona fide* consideration of his debts, and also a full and just inventory of all the estate, both real and personal, in law and equity of the said E. W., represented to be an insolvent debtor, and of all the books, vouchers and securities (meaning of all the books, vouchers and securities relating to the same), as well in his individual capacity as in the capacity of a partner of A. B. P., and a list of debts due said supposed insolvent, as well in his individual capacity as in the capacity of a partner of A. B. P., and so produced and delivered by the said E. W. to the said R. R., recorder as aforesaid (and so referred to by the said E. W. in his said oath and affidavit), as containing an account of his creditors and the place of their residence, and the inventory of his estate, together with the evidences of his title thereto, were not in all respects just and true, as he the said E. W. well knew at the time he took and made said oath and affidavit in manner aforesaid.

And whereas, in fact and in truth, the said papers so produced and delivered as aforesaid, by the said E. W. to the said R. R., so purporting as aforesaid to be a full and just inventory of all the estate, both real and personal, in law and in equity of him the said E. W., represented to be an insolvent debtor, and of all the books, vouchers and securities (meaning of all the books, vouchers and securities relating to the same), as well in his individual capacity as in the capacity of the partner of A. B. P., and in the said oath and affidavit of the said E. W. referred to, was not a full and just inventory of all the estate and effects of which he the said E. W. was possessed, or in, or

to which he was interested or entitled individually, or in the capacity of the partner of said A. B. P., at the time when the said petition was so presented as aforesaid, and at the time the said oath and affidavit was taken, and the papers therein referred to, were delivered to the said R. R., recorder as aforesaid, as he the said E. W. well knew when he took said oath and affidavit and delivered said papers; for that the said E. W. then and there, at the time he presented said papers, referred to in said affidavit, and took said oath and affidavit and delivered said papers, for that the said E. W. then and there, at the time he presented said papers, referred to in said affidavit and took said oath, was interested in, and owned individually, and as the partner of said A. B. P., the following estate and property, to wit, three thousand five hundred dollars, in goods, wares and merchandise and money, in the hands of G., M. and Company, merchants in Philadelphia; also, sundry trunks of dry goods, jewelry and hardware and furniture, found in a dwelling house lately occupied by said A. B. P., in Elizabeth street, in said City of New York, of the value of one thousand dollars; also, sundry goods in a store in Chatham street, of the value of two thousand dollars, and also sundry trunks of dry goods, in the hands of one J. B. of Troy, in said state, of the value of nine hundred dollars; also, sundry notes of hand due from said B., of the value of nine hundred dollars, and sundry other goods, wares and merchandise and money, bonds, notes of hand, bills of exchange, and debts due said W., and said W. and P., of great value, to wit, of the value of one thousand dollars, all which was knowingly and fraudulently, by said E. W., left out of his aforesaid inventory and papers, referred to in his said oath and affidavit.

And whereas, in truth and in fact, the said last mentioned papers so purporting as aforesaid to be a full and just inventory of all the estate, both real and personal, in law and equity of him the said E. W., represented to be an insolvent debtor, and of all the books, vouchers and securities (meaning of all the books, vouchers and securities relating to the estate of him the said E. W.), as well in his individual capacity as in the capacity of the partner of A. B. P., and a list of debts due said alleged insolvent, as well in his individual capacity as in the capacity of the partner of A. B. P., and so produced and delivered as aforesaid, by the said E. W. to the said R. R., recorder as aforesaid, and in said affidavit and oath of the said E. W. referred to, was not a just and true inventory and account of all such parts of the goods, wares and merchandise, money, estate and effects of him the said E. W., in his individual capacity or in the capacity of the partner of said A. B. P., and of all books, vouchers and securities relating thereto, as were at the time when the said petition and affidavit and the said papers so purporting as aforesaid, and in the said oath and affidavit of the said E. W. referred to, were so produced and delivered, by the said E. W. to the said R. R., recorder as aforesaid, in the custody, possession, power or knowledge of him the said E. W.; for that said E. W. was then and there, to wit, at the time of presenting said papers and taking said oath, and presenting said affidavit, interested in a large part and proportion of the estate and property above enumerated, and other property, consisting of dry goods,

merchandise and debts due, to a large amount, to wit, one thousand dollars.

And whereas, in truth and in fact, the said E. W., at the time when the said papers as aforesaid, and in the said oath and affidavit of the said E. W. referred to, were so produced, presented and delivered by the said E. W. to the said R. R., recorder as aforesaid, to wit, on the said twenty-sixth day of October, in the year of our Lord one thousand eight hundred and twenty-nine, at the Second Ward of the City of New York aforesaid, in the County of New York aforesaid, for the future benefit of himself or his family, had disposed of and made over a part of his the said E. W.'s personal estate of great value, to wit, the money, notes of hand, bonds, acceptances, furniture and goods, wares and merchandise above enumerated, of the value of five thousand dollars, the same not being the necessary wearing apparel of himself or his family, or the beds or bedding of his the said E. W.'s family, with the intent to defraud some one or more of his the said E. W.'s creditors, and with a view to obtain fraudulently the benefit of the said act of the legislature of the State of New York, entitled "an act to abolish imprisonment for debt in certain cases," so passed as aforesaid, April seventh, one thousand eight hundred and nineteen.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. W., on, &c., at, &c., in his oath and affidavit aforesaid, before the said R. R., as such recorder as aforesaid, upon his oath aforesaid (he the said R. R., then and there having and possessing, by virtue of said acts of the legislature aforesaid, a lawful and competent power and authority to administer the said oath to him the said E. W. so as aforesaid, and then and there to take and receive the said affidavit of the said E. W.), by his own act and consent, and in form and manner aforesaid, did knowingly, falsely, maliciously, wilfully and corruptly commit wilful and corrupt perjury, in and upon points and things material to his obtaining the benefit of the said act of the legislature of the State of New York, entitled "an act to abolish imprisonment for debt in certain cases," to the great displeasure of Almighty God, in contempt of the said acts of the legislature aforesaid, to the evil example of all others in like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against an insolvent in Pennsylvania, for a false account of his estate.(*q*)

That I. L., late, &c., on, &c., being a person charged in execution for divers sums of money not exceeding in the whole the sum of one hundred and fifty pounds and contriving and intending to cheat and defraud a certain J. H. and others his creditors, of their just debts, upon the application and petition of him the said I. presented to the County Court of Common Pleas holden at Philadelphia in and for the County of Philadelphia, was brought up before the justices of the same court, agreeably to the directions of the act of assembly, entitled

(*q*) This indictment was drawn by Mr. Bradford, and found and sustained in 1787, under the laws then in force.

"an act for the relief of insolvent debtors within this province of Pennsylvania," and then and there in his petition aforesaid did affirm and assert, that he the said I. had no estate real or personal, and then and there before the justices of the same court, did take his corporal oath, administered according to law and the directions of the said act, by the said court, and then and there before the said court upon his oath aforesaid, falsely, corruptly and maliciously and wilfully did swear, depose and affirm that the account by him the said I. delivered, into the said court in his said petition to the said court, did contain a full and true account of all his real and personal estate, debts, credits and effects whatsoever, which he the said I. or any in trust for him then had, or at the time of his imprisonment had, or then was in any respect entitled to, in possession, remainder or reversion, except the wearing apparel and bedding for him or his family, and the tools or instruments of his trade or calling, not exceeding five pounds in value in the whole, and that he had not at any time since his imprisonment or before, directly or indirectly, sold, leased, assigned or otherwise disposed or made over in trust for himself, or otherwise, other than as mentioned in such account, any part of his lands, estate, goods, stock, money, debts or other real or personal estate, whereby to have or expect any benefit or profit to himself, or to defraud any of his creditors to whom the said I. was then indebted, whereas in truth and in fact, he the said I. then had and well knew that he had a certain debt amounting to the sum of seven pounds and ten shillings, due from a certain J. M. and payable to him the said I. L., and whereas in truth and in fact, the said I. L. then and there had and well knew that he had divers other debts, goods and chattels exceeding in value the sum of five pounds; and so the inquest aforesaid, upon their oaths and affirmations aforesaid, do say, that the said I. L., on the day and year aforesaid, at the city aforesaid, before the court aforesaid, in manner and form aforesaid, falsely, maliciously, wilfully and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For false swearing in answering interrogatories on a rule to show cause why an attachment should not issue for a contempt in speaking opprobrious words of the court in a civil suit.(r)

That at a Court of Common Pleas held at Chambersburg, in and for

(r) In Res. *v.* Newell, 3 Yeates 407, several exceptions were taken to this indictment in arrest of judgment, which are fully discussed by Smith J.:

"1. The first reason is, that the deposition on which the perjury is assigned, is stated to be on an interrogatory filed between the commonwealth and the defendant, on the part of the commonwealth; without stating any proceeding between the commonwealth and the defendant, in which the said deposition would be material.

"This objection was taken at the trial under another shape, and was overruled by the court. It was then said, that the interrogatories were wrongly entitled; that the plea was pending between James Taylor and Thomas Shirley, and the rule was entered in that cause; and inasmuch as the proceedings were on the civil side of the court until the attachment issued, the interrogatories should have been filed in that suit, and headed accordingly. To this point were cited 3 Term Rep. 253 and 6 Term Rep. 642, note, and the case of Caleb Wayne, lately decided in the Circuit Court of the United States, for the eastern district of Pennsylvania. The answer given was, that we had not adopted that nicety

the County of Franklin, before J. R., Esq., and his associates, judges of the said court, upon, &c., a certain plea was then and there pending between a certain J. T., plaintiff, and a certain T. S., defendant,

of form here, which was practised in England; but at the utmost, that the defendant should have taken advantage of the informality and showed to the court the grounds of his refusal to answer the interrogatories. He was now too late, after he had come in and voluntarily submitted to answer. The rule was entered in December term, 1799, that the defendant should show cause why an attachment should not issue against him, for treating the process of the court with contempt, and using opprobrious words respecting the court. This rule was grounded on due proof made of his improper conduct previous thereto. He was then actually *in contempt*. We considered the rule to show cause in such a case as wholly unnecessary. For contemptuous words spoken of a court, its rules or process, an attachment issues immediately of course; Sayer 114; 1 Stra. 185. The party must answer in custody, for it is to no purpose to serve him with a second rule, that has slighted and despised the first; it would expose the court to further contempt; 1 Salk. 84. The jurisdiction of the court on its criminal side grew out of the civil action, returned on the *certiorari* in the plea above stated, and the oath of the party became material. The issuing of the attachment is only for the purpose of bringing in the party to answer to the interrogatories, and if he can swear off the contempt he is discharged; 12 Mod. 348. If he deny all on oath, he is set at liberty; but he must be indicted for perjury if he forswear himself; 12 Mod. 511; 8 Mod. 81; Dougl. 498; Mosel. 250; 1 Stra. 444; Annal. 178; 4 Burr. 2106. When therefore Newell appeared in the Court of Common Pleas, to purge himself of the contempt charged against him, we viewed him in the same light as if his presence had been enforced by attachment, and were of opinion, that in either case, the interrogatories should be entitled in the same manner. We considered the rule to show cause stated in the indictment, as mere matter of inducement. An indictment for perjury at an assize, may allege the oath to have been taken before *one* of the judges in the commission, though the names of *both* are inserted in the caption; Leach 154.

"2. The second objection is, that it is not stated that the defendant took an oath on the holy gospel of God, or in the presence of Almighty God by uplifted hand. The indictment charges, that 'the said Robert Newell did then and there, in *due form of law*, take his *corporal oath*,' &c. This form was approved of by Lord Hardwicke, who says, the words *corporal oath* may stand for lifting up an arm or other bodily member. What is universally understood by an oath is, that 'the person who takes it, imprecates the vengeance of God upon him if the oath he takes is false;' 1 Atky. 20. In the great case of Omychund *v.* Barker, Ld. Chan. Baron Parker said, he did not think, *tactis sacris Evangeliis* were necessary words; for several old precedents are, that the party was *juratus generally*, or *debito modo juratus*; vide West's Symb. 2d part, under the head of Indictments and Offences, s. 160; 1 Atky. 43, 44. Lord Chief Justice Willes says, that *sacrosancta Evangelia* are not at all material words in indictments for perjury; *ib.* 46. Lord Chancellor Hardwicke asserts the same opinion, and observes that the framers of indictments are apt to throw in words, and to swell them out too much to no purpose; therefore the old precedents are the best; *ib.* 50. According to Lord Chief Justice Kenyon, an indictment for perjury is sufficiently certain, if it only states the defendant to have been *in due manner sworn;* Peake 156; vide *ib.* 23; Mee *v.* Reid, and Leach C. C. 348; Mildrone's case.

"3. The third reason in arrest of judgment is most material, and has obtained from us much consideration. It is this: that in the assignment of the perjury, it is not stated that the defendant did *falsely*, *corruptly* and *wilfully* swear, &c.

"If the indictment is considered as grounded on the statute 5 Eliz. c. 9, it is certainly defective; because the words *wilfully* and *corruptly* are inserted in the sixth paragraph, as material descriptions of the offence. And it is clearly settled, that in every prosecution on this statute, the words thereof must be exactly pursued; and therefore, that an indictment or action on the said statute, alleging that the defendant deposed such a matter *falsè and deceptivè* (2 Leon. 211; 3 Leon. 230; 1 Show. 190); or, *falsè et corruptivè* (Hill. 12; Cro. El. 147); or, *falsè and voluntariè*; (Sav. 43); without expressly saying that he did it *voluntariè et corruptè*, is not good, and that such a defect cannot even be supplied by adding the words *contra formam statuti*, or concluding *et sic voluntarium et corruptum commisit perjurium;* 2 Leon. 214; 1 Leon. 230; Hetl. 12; Savil. 43; Cro. El. 147; 1 Hawk. c. 69, s. 17.

"The present indictment concludes, 'contrary to the act of general assembly in such case made and provided.' But on examining our statute book it will be found, that the only law respecting this offence in courts of justice, was enacted on the 31st May, 1718, the 24th section whereof goes to subornation of perjury; and the 25th section extends the

upon a certiorari directed to R. N., Esq., and returned into the said court, and the said court did then and there make a rule of the said court in substance as follows, to wit: "Rule that R. N., Esq., show

English statute of 5 Eliz. c. 9, and declares, that this statute shall be put into due execution here; 1 St. Laws 143. The act of 5th April, 1790 (2 St. Laws 804), which was made perpetual by the act of 4th April, 1799 (4 St. Laws 399), prescribes fine and imprisonment, in lieu of the former infamous punishments of pillory and whipping. It will be further found, that this statute of 5 Eliz. c. 9, extends to no other perjury than that of a *witness;* and therefore no one can come within the statute, by reason of any false oath in an answer to a bill in chancery (Cro. El. 148; 2 Leon. 201; Dalis. 84; Yelv. 120), or in swearing the peace against another (2 Roll. Ab. 77, pl. 5), or by reason of a false wager of law (Noy. 7, 108), or for taking a false oath before commissioners appointed by the king, to make an inquiry concerning his title to certain lands; Moor 627; 1 Hawk. c. 69, s. 20). It therefore necessarily follows, that if the indictment had been framed with the utmost correctness, under the statute of 5 Eliz., the offence of the defendant was not punishable thereby, because he was not a witness, examined in a court of justice, in the usual course of proceeding.

"Perjury is defined by Lord Coke, to be a crime committed, when a lawful oath is administered in some judicial proceeding, to a person who swears *wilfully*, *absolutely* and *falsely*, in a matter material to the issue, or point in question; 3 Inst. 164; 4 Bl. Com. 137. And in 10 Mod. 195, it is laid down, that the oath must not only be *false*, but *wilful* and *malicious*, to make it perjury. Here the *legality* of the oath, and the *propriety* of the judicial procedure, are indisputable. The indictment states, that the defendant did 'then and there *voluntarily*, and of his own *free will* and *accord* propose to the said court, to purge himself upon oath of the said contempt alleged against him; that he was then and there duly sworn on his corporal oath, and then and there did answer and declare,' &c.; negativing by express averments the truth of his oath, with a conclusion, that 'he the said Robert Newell, the day and year aforesaid, at Chambersburg aforesaid, &c., &c., by his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner aforesaid, did *knowingly*, *falsely*, *wickedly*, *maliciously* and *corruptly* commit wilful and corrupt perjury,' &c.

"On the bare reading of the indictment, one would reasonably suppose that the *wilfulness*, *absoluteness*, *falsity* and *malice* of the oath were sufficiently asserted and charged against the defendant. But his counsel have ingeniously objected, that it does not pursue the course of the precedents, and that the offence is not laid in a manner known to the law.

"We hold ourselves bound by precedents. We flatter ourselves, we can say with Lord Chief Justice Kenyon, 'it is our wish and comfort to stand *super antiquas vias*;' 7 Term Rep. 668. In criminal cases, we will not intentionally inflict new hardships on any one, let our individual feelings be what they may. To satisfy our minds in this particular, my brother Yeates and I have made diligent and painful researches into the books of entries on the criminal law. The result of our inquiries has been as follow:

"In Rex *v.* Oates, 5 St. Tri. 4, the indictment for perjury charges him that he *falsely*, *voluntarily* and *corruptly* did say, &c. So on the second indictment against him; *ib.* 70. In Rex *v.* Sir Patience Ward, 3 St. Tri. 661, the information states that he *falsely* and *corruptly* did swear, &c. In Rex *v.* Elizabeth Canning, 10 St. Tri. 206, the indictment charges that she did *falsely*, *wickedly*, *voluntarily* and *corruptly* say, &c. In Tremaine's Pleas of the Crown, p. 136 to 167, there are thirteen indictments for perjury, all of which are laid with the epithets (or some of them) *falsely*, *corruptly*, *maliciously* and *voluntarily*, &c. In Stubb's Crown Circ. Comp. 308 to 334, there are seven indictments, with the same epithets, applied to the acts of swearing. So in Clift's Entries 399, 401, there are two informations for perjury at the assizes, that the defendant *maliciously*, *voluntarily* and *corruptly* swore, &c. And in Rex *v.* Greepe, 5 Mod 343, an information at common law for perjury in a trial at bar in replevin, charges the defendant, that he *falsely*, *maliciously*, *voluntarily* and *corruptly* on his oath, said, &c. In Co. Ent. 164, b. 357, a., there are two precedents of actions brought in debt, on the stat. 5 Eliz. c. 9, wherein it is laid, that the defendants *voluntarily* and *corruptly* swore, &c. And so in many other actions of debt in other books.

"On the other hand, in the same book, 165, b., there is a form in a deposition before commissioners on interrogatories in chancery, wherein the epithets are not used. So in Rast. Ent. 481, the declaration lays the swearing without those terms, *per quod idem R. voluntarie et corruptive commisit perjurium voluntarium.*

"In *Officium Clerici Pacis* (a book containing many excellent precedents), fol. 87, we find an indictment for perjury, in a deposition resembling the present case in all parti-

cause by the next term, why an attachment shall not issue against him for treating the process of this court with contempt, and using opprobrious words to a person who served upon him a copy of a rule of this court, while the person was engaged in that service."

And the jurors aforesaid do further present, that afterwards, to wit, upon &c., in the county aforesaid, and within the jurisdiction of this court, the said R. N., Esq., of the county aforesaid, did appear in his proper person, before the said Court of Common Pleas, held by the judges aforesaid, and did then and there voluntarily and of his own free will and accord propose to the said court to purge himself upon oath of the said contempt alleged against him, whereupon certain interrogatories were then and there drawn up in writing, and proposed to the said R. N., Esq., in substance as follows, to wit:

Pennsylvania against R. N., Esq.—In the Common Pleas of Franklin County.

Interrogatories exhibited on the part of the commonwealth. 1st. Did T. S. at any time previous to the last December term for this

culars. It states, that the defendant 'being sworn, said and upon his oath affirmed and deposed in manner following, &c. Whereas in truth and in fact, &c., voluntarily and corruptly committed voluntary and corrupt perjury,' &c. Again in West's Symbol, 119, b., s. 160, another form of the same kind occurs for perjury in a deposition before commissioners by commission out of the Court of Wards. But in the same book and page, s. 161, for perjury in a deposition before commissioners, by commission out of Chancery on the stat. of 5 Eliz., after the words in the indictment, 'whereas in truth the said H. S. did not cause, &c., neither, &c., (*negando effectum depositionis*), *prout prædict. W. falsè and corruptè deposuit et juravit, per quod*,' &c. And again, *ib.* 138, s. 241, an indictment for perjury committed in an answer, in the Exchequer at Chester, states, that the defendant on his oath, 'said, affirmed and swore these English words following, &c., and so the said R. in making and confirming his answers in that part aforesaid, the day of at, &c., voluntarily and corruptly committed voluntary perjury,' &c.

"It is evident therefore, that the forms of indictment *at common law* for perjury, are not uniformly the same; but the words *falsely*, *corruptly* and *wilfully*, as applied adjectively or adverbially to the act of swearing, are mere expletives *to swell the sentence*, in the language of Lord Hardwicke; 1 Atky. 50.

"We find *no* adjudged case or *dictum* in the books, that such words are appropriate terms of art, descriptive of the crime of perjury, at common law, as *murdravit* in an indictment for murder, *cepit* in larceny, *mayhemiavit* in mayhem, *feloniee* in felony, &c.; 2 Hawk. c. 25, s. 55. On the contrary, we do find it laid down by the judges, that an indictment for perjury at common law, does not require so much certainty as on the statute and that it need not be in a court of record, or matter material to the issue; 5 Mod. 348; 1 Sid. 106. And in Cox's case (Leach 69), it was agreed by ten judges unanimously, that the word *wilfully*, was not essentially necessary in an indictment for perjury at common law, though it was essential in an indictment for perjury under the stat. of 5 Eliz. c. 9, because the term *wilful* in the statute, is a material description of the offence. Still it is necessary, that it should appear by the indictment that the oath was *wilfully false*.

"It will readily be agreed, that all indictments must have a precise and sufficient certainty, and that the offences must be set forth with clearness and certainty; 4 Bl. Com. 305–6. Every person should be apprised of the distinct charge made against him, in order that he may come fully prepared for his defence. But in the words of the humane Lord Hale, 'the great strictnesses and unseemly niceties, required in some indictments, tend to the reproach of the law, to the shame of the government, to the encouragement of villainy, and to the dishonour of God;' 2 H. H. P. C. 193.

"4 The last reason offered in arrest of judgment, is, that the indictment is insensible and repugnant, and is defective both in form and substance. This objection being made in general terms, must necessarily refer to the supposed defects before particularly specified and already considered.

"Upon the whole, on the best consideration, which my brother Yeates and I have been capable of giving to the different reasons filed in arrest of judgment, our official duty constrains us to say, that they are not relevant in point of law, and that the commonwealth is entitled to judgment."

county, serve you with a copy of a rule of the Court of Common Pleas of Franklin County, to show cause why an attachment should not issue against you for a contempt of the said court? 2d. After having read the copy of the rule mentioned in the first interrogatory, did you say "Damn the court, they are a set of damned stool-pigeons," and say "If the court want a copy of my judgment, they may come for it?" or did you make use of any of the expressions above stated?

And the said R. N. did then and there in due form of law, take his corporal oath before the said court (they having sufficient and competent power and authority to administer an oath to the said R. N. in that behalf), that he the said R. N. would true answers make to the said interrogatories; and he the said R. N. being so sworn upon his corporal oath, on the matters contained in the said interrogatories did then and there answer and declare before the said court, in answer to the said second interrogatory, that he (himself the said R. N. meaning), did not make use of any of the expressions therein (the said interrogatory meaning), contained; whereas in truth and in fact, the said R. N. after having read the copy of the rule of the court aforesaid did say, "Damn the court, they are a set of damned stool-pigeons." And whereas in truth and in fact, the said R. N., after having read the copy of the rule last aforesaid, did say, "If the court want a copy of my judgment," (the judgment of him the said R. N. in the said cause between J. T. and T. S. meaning), "they may come for it." And so the jurors aforesaid, upon their oaths and affirmations aforesaid, respectively do say, that the said R. N. on the said third day of April, in the year last aforesaid at C. aforesaid, in the county aforesaid and within the jurisdiction of this court, upon his oath aforesaid, before the said Court of Common Pleas (the said Court of Common Pleas then and there having sufficient and competent power and authority to administer the said oath to the said R. N.), by his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner and form aforesaid did knowingly, falsely, wickedly, maliciously, wilfully and corruptly commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil and pernicious example of all others in like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

In charging J. K. with larceny before a justice of the peace.(*rr*)

That formerly, to wit, on, &c., at the county aforesaid, J. M'C., late, &c., came before J. S., Esq., then and yet being one of the justices of the Commonwealth of Pennsylvania assigned to keep the peace in and for the said County of Philadelphia, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county, and the said J. M'C. well knowing the premises, and wickedly devising and intending unjustly to aggrieve one I. K., and to procure him without any just cause to be imprisoned, and kept in prison for a long space of time, on the said twelfth day of December, in the year aforesaid, at the county aforesaid, the said J. M'C. then

(*rr*) Drawn in 1794 by Mr. Jared Ingersoll, attorney-general of Pennsylvania.

and there being present in his own proper person, before the said J. S., Esq., then and there being one of the justices of the commonwealth assigned to keep the peace in and for the said County of Philadelphia, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the same county, he the said J. M'C. did then and there take his solemn affirmation before the said J. S. (he the said J. S. then and there having sufficient and competent power and authority to administer the said affirmation to the said J. M'C. in that behalf), and that the said J. M'C. not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there before the said J. S. upon his affirmation aforesaid, falsely, maliciously, wickedly, wilfully and corruptly did say, depose, affirm and declare (among other things) in substance and to the effect following, that is to say, that he the said J. M'C. on the twelfth day of December in the year aforesaid, at the county aforesaid, was possessed of five silver dollars, and he the said J. M'C. being so possessed thereof, the said I. K. with force and arms, &c., at the county aforesaid, did take and carry away the said five silver dollars out of and from the possession of the said J. M'C., thereby meaning and intending that the said I. K. was guilty of larceny, and had with force and arms feloniously stolen, taken and carried away the said five silver dollars, against the peace of the commonwealth at the county aforesaid; whereas in truth and in fact, at the time he the said J. M'C. so took his solemn affirmation aforesaid, in form aforesaid, or at any other time, the said I. K. had not, with force and arms, taken and carried away the said five silver dollars out of the possession of the said J. M'C., nor had with force and arms and against the peace of the commonwealth feloniously stolen, taken and carried away the same, but the said J. M'C. at the time he so took the affirmation aforesaid, in form aforesaid, then and there well knew that the said I. K. had not with force and arms and against the peace of the commonwealth taken and carried away the said five silver dollars, out of the possession of the said J. M'C., nor feloniously with force and arms and against the peace and dignity of the commonwealth, stolen, taken and carried away the said five silver dollars; and so the jurors aforesaid, upon their oaths and affirmations aforesaid, do say, that the said J. M'C. on the twelfth day of December, in the year aforesaid, at the county aforesaid, before the said J. S., being such justice aforesaid (and then and there having sufficient and competent power and authority to administer the said affirmation to the said J. M'C.), and within the jurisdiction of this court, by his own act and consent and of his own wicked and corrupt mind and disposition, in manner and form aforesaid, did falsely, wickedly and wilfully and corruptly commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil and pernicious example of all others in the like case offending, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

In charging A. N. with assault and battery before a justice.(s)

That heretofore, to wit, on, &c., at, &c., K. M., late, &c., came before H. M'K., Esq., then and yet being one of the justices, &c., and then and there upon her oath charged one A. N. before the said H. M'K., the justice, &c., with having assaulted, stricken, &c., one H. M., being the husband of her the said K. M. And the jurors, &c., further present, that upon the examination of the said K. M., before, &c., upon

(s) State *v.* Mumford, 1 Dev. 519.

After a verdict for the state, the counsel for the prisoner moved in arrest of judgment, contending that the assignment of perjury was not sufficiently certain, and in effect was nothing more than a negative pregnant; his honour, the presiding judge, being of that opinion, arrested the judgment, whereupon, Taylor, Chief Justice, said: "The objection taken in arrest of judgment, is founded on the assumption that the only material inquiry before the jutsice, whether Noble had assaulted Mumford or not, on the day specified, and that whether he struck him on the back or not at the last wrestle, was irrelevant and unconnected with that question; that the assignment of perjury in the circumstances, is consistent with the belief that the defendant might have sworn truly as to the principal fact, viz. the assault. This presents two questions, whether the materiality of the inquiry is sufficiently stated in the indictment, and whether the assignment of perjury is properly and distinctly made?

"It is laid down as a rule, which I found nowhere controverted, that it should appear on the face of the indictment that the oath taken was material to the question depending, not by setting forth the circumstances which render it so in describing the proceedings of a former trial, but by a general allegation that the particular question became material. In Aylett's case, a leading one on this subject, it is stated that it became a material question on the hearing of the complaint, and the hearing of that is stated in general terms; (1 Term Rep. 66). In the King *v.* Dowlin, the question was much debated; it is there stated that the question became material on the trial, in the same general terms that it is stated here, and the trial is referred to in this manner, that 'at such a court J. R. was in due form of law tried upon a certain indictment, then and there depending against him for murder.' Dowlin was a witness against J. R. on that trial, and the perjury was assigned in his swearing, that 'he had never said that he would be revenged of the said J. R. and would work his ruin.' On this part of the case it was argued on behalf of Dowlin, that all those facts ought to be stated in the proceedings against J. R. which were necessary to show that the jurisdiction was competent, that there was something to be tried; the materiality of the question to that point, and the falsity of the oath. This objection is thus directly met by Lord Kenyon: 'But it has been objected that it was necessary to set forth in the indictment, so much of the proceedings of the former trial, as will show the materiality of the question on which the perjury is assigned. If it were necessary, and if the question arose on the credit due to the witness, the whole of the evidence given before must be set forth; but that has never been held to be necessary, it always having been adjudged to be sufficient to allege generally, that the particular question became a material question. But here it is averred, that the question on which perjury was assigned was a material question; the jury have found it so by their verdict;' (5 Term Rep. 319).

"In this indictment, the warrant and examination before the magistrate are stated, and the general allegation of the materiality of the question, is in conformity with the best forms, and considered in reference to the statute on this subject (Rev. ch. 383), appears to me unexceptionable.

"The matter sworn to by the defendant, is contradicted in the assignment of perjury, specially and particularly, and in the words in which it was sworn. A general averment upon the whole matter that the defendant falsely swore, is not sufficient; it should be specific and distinct, to the end that the defendant may have notice of what he is to come prepared to defend; (2 M. & S. 385). And the whole matter of the defendant's false testimony must be set forth, and if the least part of one entire assignment be unproved, she could not be convicted. The offence charged consists in the whole and not in any one part of the assignment. And this, in my opinion, obviates the necessity of any opinion as to how far perjury may be committed, if the false oath has a tendency to prove or disprove the matter in issue, although but circumstantially; or how far the fact sworn to, though not material to the issue, must have such a connexion with the principal fact, as to give weight to the testimony on that point. These views of the subject could in this case, only be properly presented to the court trying the cause. I think the conviction is right."

her oath aforesaid, touching and concerning the alleged assault by the said A. N. in and upon the said H. M., certain questions then and there became and were material, that is to say, whether A. N. did strike her husband H. M. with a stick across the back at the last time he and V. P. wrestled, and whether the blow across the back with a stick, was given immediately as he fell. And the jurors, &c., do further present, that the said K. M. wickedly devising and intending unjustly to aggrieve the said A. N. and procure him to be imprisoned, and kept in prison for a long space of time, on, &c., at, &c., before the said H. M'K. then being, &c., she the said K. M. did then and there take her corporal oath and was sworn upon the holy gospel of God before the said H. M'K., justice, &c., he the said H. M'K. then and there having sufficient and competent power and authority to administer an oath to the said K. M. in that behalf, and that the said K. M. not having, &c., but being moved, &c., then and there before the said H. M'K., justice, &c., upon her oath, &c., falsely, &c., did depose, say, swear, give and make information, among other things, in substance and to the effect following, that is to say, that N. (meaning the said A. N.), did strike her husband H. M. with a stick across the back, at the last time he (meaning the said H. M.) and V. P. (meaning a certain V. P.), wrestled, and the blow (meaning the blow with the stick across the back of the said H. M.), was given immediately as they (meaning the said H. M. and the said V. P.), fell, whereas in truth and in fact, the said A. N. did not strike her husband H. M. with a stick across the back, at the last time he the said H. M. and V. P. wrestled, and whereas in truth and fact the blow was not given as they (the said H. M. and the said V. P.), fell. And so the jurors aforesaid, &c., &c.

In false swearing by a person offering to vote, as to his qualifications when challenged.(*t*)

That on, &c., at an annual election held at the town of Porter, in the County of Niagara, for the choice of a senator from the eighth senatorial district of the State of New York, one member of assembly and a sheriff for said county and four justices of the peace for the town of Porter, held pursuant to the constitution and laws of the state before the board of inspectors of the said election then sitting at the house of, &c., in the town of Porter, which said board being then and there legally constituted and organized according to law to receive all legal or lawful votes or ballots for said officers to be elected as aforesaid, R. C., &c., appeared before the board and offered his vote or ballots for some or all of said officers, whereupon, before his vote or ballots were given in, he was duly challenged touching his right or legal ability to vote at said election for the said officers or either of them, and on being challenged he was then and there duly sworn and did take his corporal oath before the said board so constituted and sitting as aforesaid, the said board being then and there duly authorized and empowered to administer an oath to the said R. C. in that behalf; and he

(*t*) Campbell *v.* People, 8 Wend. 636. I have been unable to obtain the record in this case, but the report appears to give the substantial averments of the indictment.

the said R. C., being then and there sworn by and before said board, and not regarding the laws of the state, &c., did then and there falsely, wilfully and corruptly say, depose and swear to and before the board aforesaid, touching his right to vote and his qualifications as a voter at said election for the officers aforesaid, "in substance and effect as follows, among other things, that is to say, that he the said R. C. was a natural born or a naturalized citizen of the State of New York, or one of the United States of America; whereas in truth and in fact, he the said R. C. was not a natural born or naturalized citizen of the State of New York, or one of the United States of America; and so the jurors aforesaid say that the said R. C. on, &c., did commit wilful and corrupt perjury," &c.

In an affidavit to hold to bail, in falsely swearing to a debt.(*u*)

That A. B., of, &c., wickedly and maliciously contriving and intending one C. D. unlawfully to aggrieve and oppress, and the said C. D. to great expense of his moneys, wickedly and maliciously to put and bring, and also to cause the sum of , to be endorsed upon a process of the court of by virtue of which the said C. D. might be arrested to answer in the same court, at the suit of E. F., with intent that the said C. D. should be compelled to find bail for the aforesaid sum of on, &c., at, &c., came in his proper person before G. H., Esq., then being one of the justices of said court; and then and there in due form of law was sworn, and did take his oath before the said G. H., Esq., one of the justices of the said court as aforesaid (he the said G. H. then and there having sufficient and competent authority and power to administer an oath to the said C. D. in that behalf), and that the said C. D. being so sworn as aforesaid, then and there, before the said G. H., Esq., upon his oath aforesaid, falsely, wickedly, wilfully and corruptly did say, depose, swear and make affidavit in writing (among other things), in substance and to the effect following, that is to say, (*here insert that part of the affidavit that is false*), as by the same affidavit now filed in the court aforesaid, more fully appears; whereas in truth and in fact, the said C. D. (*here negative the facts alleged as false*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, did commit wilful and corrupt perjury, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

For false swearing to an affidavit in a civil cause, in which the defendant swore that the arrest was illegal, &c. The perjury in this case is for swearing to what the defendant did not know to be true.(*v*)

That before the making of the affidavit in this count mentioned, to wit, on, &c., a certain judgment was signed in her said majesty's

(*u*) Altered by Mr. Davis, Prec. 200, from 2 Chit. C. L. 323.

(*v*) R. *v.* Newton, 1 C. & K. 469. The defendant was acquitted, but as this is the only precedent that has been given in the books, of false swearing, not of what the defendant knows to be false, but of what he does not know to be true, it is here published.

"On this point," says the reporter, in a marginal note, "it is laid down by Lord Coke, 3 Inst. 166, that the law taketh a diversity between falsehood in express words, and that it

said Court of Exchequer at Westminster aforesaid, in a certain cause wherein the said E. H. was plaintiff, and the said A. N. defendant, whereby it was considered by the said Court of Exchequer, that the said E. H. should recover against the said A. N., as well a certain debt as also certain damages and costs, as by the record thereof still remaining in the said Court of Exchequer at Westminster, more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the signing of the said last mentioned judgment, and before and at the time of making of the arrest in this count mentioned, to wit, on, &c., at, &c., the said A. N. was the occupier of and did dwell in a certain dwelling house there situate, and that there then and there was a certain outer door at the back of the same dwelling house, and that, shortly before the making of the arrest in this count mentioned, to wit, on the day and year last aforesaid, at

is only within this statute (5 Eliz. c. 9), and falsehood in knowledge or mind, which may be punished, though the words be true. For example, damages were awarded to the plaintiff in the Star Chamber according to the value of his goods riotously taken away by the defendant. The plaintiff caused two men to swear the value of his goods that never saw nor knew them; and though that which they swear was true, yet because they knew it not, it was a false oath in them, for which both the prosecutor and the witnesses were sentenced in the Star Chamber; Gurneis' case, Star Chamber, Mich. 9, Jac. I., and herewith agreeth Bracton, lib. 4, fol. 289, that a man may swear the truth and yet be perjured. *Dicunt quidam verum et mentiuntur et perjerant eo quod contra mentum vadunt, ut si Judeus juraverit Christum notum ex virgine perjurium committit quia contra mentem vadit quia non credit ita esse ut jurat.*'

"In Oakley and Whitlesby's case, in K. B. 20, Jac. I.; Palmer's Rep. 294; it was resolved, that it is a misdemeanor and perjury at common law for one to swear without his knowledge, although it may be true; and in 2 Roll. Abr. 77, pl. 5, where this case is abridged, it is laid down that this is a false oath, punishable at common law, although it may not be within the statute (5 Eliz. c. 9). In the case of Allen *v.* Westly, in C. P. 4, Car. I., Hetley's Rep. 97, it is stated that in Style's case, it was agreed by the court 'that although a witness swears the truth, yet, if it be not truth of his own knowledge, as if he shows how one revoked a will by parol in his hearing, when the words were spoken to another in his absence, he does not swear truly, and it is a corrupt oath within the statute.'

"But in the case of Rex *v.* Hinton, 3 Mod. 122, in K. B. 2 and 3 Jac. II., the court says that 'there is a difference where a man swears a thing which is true in fact and yet he doth not know it to be so, and to swear a thing to be true which is really false; the first

"Mr. Sergeant Russell says (Russ. on Cr. and Misd. 1st ed. vol. ii. p. 1754, and Mr. Greave's
is perjury before God, the other is an offence of which the law takes notice.'
ed. vol. ii. p. 597), 'with respect to the falsity of the oath, it should be observed, that it has been considered not to be material whether the fact which is sworn be in itself true or false, for howsoever the thing sworn may happen to prove agreeable to the truth or not, yet, if it were not known to be so by him who swears it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true, which at the same time he knows nothing of and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition, which any stranger might take as well as he,' and for this the learned sergeant cites 1 Hawk. P. C. c. 69, s. 6, (1 Curw. Hawk. b. 1, c. 27, s. 6), and the case of Rex *v.* Edwards, *coram* Adams B., Shrewsbury Lent Assizes 1764, and subsequently considered by the judges (MS). And in the case of Rex *v.* Mawbey, 6 T. R. 619, which was an indictment for a conspiracy to pervert the course of justice by producing in evidence a false certificate of magistrates, that a road was in repair, Mr. Justice Lawrence said, 'It is not necessary that the defendants should have known that the road was out of repair; they are charged with conspiring to pervert the course of justice by producing in evidence a certificate that the road was in repair, and if the charge be established in fact, it is an offence of considerable magnitude against the administration of the justice of the country. This is not unlike the case of perjury where a man swears to a particular fact without knowing at the time whether the fact be true or false; it is as much perjury as if he knew the fact to be false and equally indictable.' We are not aware of any form of indictment in the printed collections for perjury, in swearing that which the party did not know to be true."

the parish last aforesaid, in the County of Gloucester aforesaid, the said G. W. went to the same dwelling house for the purpose of arresting the said A. N., and did then and there arrest the said A. N. in the same dwelling house, under and by virtue of a certain other writ of our said lady the queen, commonly called a capias ad satisfaciendum, before then issued out of the said Court of Exchequer at Westminster aforesaid, upon the said last mentioned judgment. And the jurors aforesaid, upon their oath aforesaid do further present, that the said A. N. was kept and detained in the said custody of the said sheriff of the said County of Gloucester, under and by virtue of the said last mentioned writ, from the time of making of the said last mentioned arrest, until and at and after the time of the making of the affidavit in this count hereafter mentioned, to wit, at the parish of Cheltenham aforesaid, in the County of Gloucester aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. N., contriving and maliciously intending to injure the said E. H., and to deprive him of the means of recovering the said debt, damages and costs last aforesaid, afterwards, to wit, on, &c., at, &c., in order to obtain a certain other writ, commonly called a habeas corpus, by means whereof he the said A. N. might be discharged out of the same custody of the said sheriff of the said County of Gloucester, as to the said last mentioned execution, on the ground that the said last mentioned arrest was illegal, did come in his own proper person before R. G. W., so being a commissioner, &c., (*setting out authority*), and did then and there, to wit, on the day and year last aforesaid, at the North Hamlet last aforesaid, in the County of Gloucester aforesaid, produce to and before the said R. G. W., so being such commissioner as aforesaid, a certain affidavit in writing of him the said A. N.; and that the said A. N. then and there by and before the said R. G. W., so being such commissioner as aforesaid, was duly sworn and did take his corporal oath upon the holy gospel of God, of and concerning the truth of the matter contained in the same affidavit (he the said R. G. W., then and there having sufficient and competent power and authority to administer the same oath to the said A. N. in that behalf). And the jurors aforesaid, upon their oath aforesaid, do further present, that at and upon the making of the same last mentioned affidavit, it then and there became and was a material question, whether the said A. N. then knew of his own knowledge that, on the occasion when the said G. W. so went to the same dwelling house as in this count mentioned, the said G. W. did, by great force and violence, or in any other manner succeed in bursting open the said outer door at the back of the same dwelling house; and that at and upon the making of the same affidavit, it then and there became and was a material question, whether the said A. N. then knew of his own knowledge that the said G. W., on the same occasion last aforesaid, burst open the same door; and that at and upon the making of the same affidavit, it then and there became and was a material question, whether the said A. N. then knew of his own knowledge, that the said G. W., on the same occasion last aforesaid, did, by great force and violence, or in any other manner, succeed in breaking away the lock-fastenings of the same door; and that at and

upon the making of the same affidavit, it then and there became and was a material question, whether the said A. N. then knew of his own knowledge, that the said G. W., on the same occasion last aforesaid, did break away the lock-fastenings of the same door. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. N. so being sworn as last aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, did, on, &c., at, &c., in, &c., in and by his said affidavit last aforesaid, upon his oath last aforesaid, before the said R. G. W., so being such commissioner as aforesaid, and having such competent power and authority as aforesaid, falsely, corruptly, knowingly, wilfully and maliciously depose and swear, amongst other things, in substance and to the effect following, that is to say, that he (meaning the said G. W.), then went round to the door of the back-kitchen of this deponent's (meaning the said A. N.'s) dwelling house, (meaning the same dwelling house as aforesaid), which is the only outer door of the same, and had been locked and well secured all the said day, and the key kept by deponent's (meaning the said A. N.'s) said wife; and that by great force and violence, the said G. W. (meaning the said G. W.), succeeded in breaking away the lock-fastenings of the said outer door, and in bursting open the said outer door; thereby meaning that he the said A. N. knew of his own knowledge, at the time of the making of the same last mentioned affidavit, that the said G. W. did, on the occasion aforesaid, when the said G. W. went to the same dwelling house, as in this count aforesaid, by great force and violence, succeed in breaking away the lock-fastenings of the said outer door at the back of the same dwelling house, and in bursting open the same outer door; and that the said G. W. did, on the same occasion, break away the same fastenings and burst open the same door; whereas in truth and in fact, the said A. N. did not at the time of making the said last mentioned affidavit, or at any other time, know of his own knowledge that the said G. W., on the same occasion last aforesaid, did by great force and violence, or in any other manner, succeed in breaking away the same lock-fastenings of the same outer door. And whereas in truth and in fact, the said A. N. did not, at the time of making the said last mentioned affidavit, or at any other time, know of his own knowledge, that on the same occasion last aforesaid, the said G. W. did by great force and violence, or in any other manner, succeed in bursting open the same outer door of the same dwelling house. And whereas, in truth and in fact, the said A. N. did not, at the time of the making of the said last mentioned affidavit, or at any other time, know of his own knowledge, that the said G. W. did, on the same occasion last aforesaid, break away the same fastenings of the same outer door. And whereas, in truth and in fact, the said A. N. did not, at the time of the making of the said last mentioned affidavit, or at any other time, know of his own knowledge, that the said G. W. did, on the occasion last aforesaid, burst open the same outer door. And the jurors aforesaid, upon their oath aforesaid, do further present, that all the said several matters and things so alleged to have been falsely sworn by the said A. N., as in this count aforesaid, were and each of them was material

for obtaining the said last mentioned writ of habeas corpus, and for obtaining the discharge of the said A. N. from the said last mentioned custody of the said sheriff of the said County of Gloucester, to wit, at the parish of Cheltenham aforesaid, in the said County of Gloucester. And so the jurors aforesaid upon their oath aforesaid, do say, that the said A. N., on the said, &c., before the said R. G. W., so being such commissioner as aforesaid, and so having such competent power and authority as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form last aforesaid, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our said lady the queen, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For perjury, in an answer sworn to before a master in chancery.(*w*)

That C. D. of, &c., heretofore, to wit, on, &c., at, &c., did exhibit his bill of complaint in writing, against one E. F. therein described, of said B., yeoman, in the Supreme Judicial Court of this commonwealth, begun and held at W., within and for the County of W., on the Tuesday of in the year of, &c.; and the said C. D., in and by his said bill of complaint, among other things, stated and alleged in substance, and to the effect following, to wit, (*here insert that part of the bill concerning which the perjury was committed*), as in and by the said bill of complaint of the said C. D. remaining filed of record in the said Supreme Judicial Court, amongst other things, more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. F., the defendant in the said bill of complaint, afterwards, that is to say, on the day of, &c., at said B., in the County of S., did come in his own proper person, before G. H., Esq., then and there being one of the masters in chancery of the said Supreme Judicial Court, and then and there did exhibit and produce to the said G. H., Esq., the answer in writing of him the said E. F. to the said bill of complaint of the said C. D., entitled, "the answer of E. F., the defendant, to the bill of complaint of C. D., complainant;" and the said E. F. was then and there sworn in due form of law, and took his corporal oath, touching and concerning the matters contained in his said answer by and before the said G. H., Esq., he the said G. H. so then being one of the masters in chancery in the said Supreme Judicial Court, and then and there having sufficient and competent power and authority to administer an oath to the said E. F. in that behalf; and that the said E. F., being so sworn as aforesaid, and being then and there lawfully required to declare and depose the truth in a proceeding in a course of justice, did, upon his oath aforesaid, concerning the matters contained in his said answer, before the said G. H., Esq., then as aforesaid being one of the masters in chancery of the said Supreme Judicial Court, then and there swear, that so much of the said answer of him the said E. F., as related to his own acts and deeds, was true; and that the said E. F., being so sworn as aforesaid, intending unjustly to aggrieve the

(*w*) Altered by Mr. Davis, Prec. 202, from 2 Chit. C. L. 411.

said C. D., the said complainant as aforesaid, in his answer aforesaid, before the said G. H., Esq., he being then as aforesaid one of the masters in chancery in the said Supreme Judicial Court (and having sufficient and competent authority as aforesaid), falsely, knowingly, wilfully and corruptly, by his own act and consent, upon his oath aforesaid, did answer, swear and affirm, amongst other things, in substance as follows, that is to say: "and this defendant (meaning himself the said E. F.), says," (*here insert verbatim that part of the answer relative to and comprising the part in which the perjury is alleged to have been committed*), as by the said answer of him the said E. F. still remaining in the Supreme Judicial Court aforesaid, at B. aforesaid, in the County of S. aforesaid, amongst other things will appear; whereas in truth and in fact (*then go on to negative the answer in the words of it, and in every part of it which is alleged to be false*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. F. falsely and wickedly, wilfully and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great damage of him the said C. D.; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Before a grand jury.(*x*)

That heretofore, to wit, at the General Quarter Sessions of the Peace of our sovereign lady the queen, held at the shire hall in Shrewsbury, in and for the County of Salop, on Monday in the first week after the twenty-eighth day of December, to wit, on, &c., before the honourable T. K., Sir B. L., baronet, J. A. L., Esq., and others their associates, her majesty's justices, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors in the same county done and committed, a certain bill of indictment against T. H., late of the parish of Whitechurch, in the County of Salop, labourer, and F. P., wife of R. P., labourer, late of the parish of Whitechurch, in the county aforesaid, was then and there in due form of law, exhibited to (*naming the grand jurors*), good and lawful men of the said County of Salop, then and there sworn and charged to inquire for our said lady the queen, and the body of the said county; which said bill of indictment then and there was as followeth, that is to say (*setting out the indictment verbatim, which was against T. H. for stealing three tablecloths, the property of R. H., and against F. P. for receiving them knowing them to have been stolen*).

And the jurors first aforesaid, upon their oath aforesaid, do further present that, to wit, on, &c., at, &c., and before the said good and lawful men, who were so sworn and charged to inquire as aforesaid, had the said bill of indictment exhibited to them as aforesaid, and before the said good and lawful men had inquired as by law they ought to do, touching the matters stated and mentioned in the said bill of indictment, and touching the truth of the matters stated and contained in the said bill of indictment, M., the wife of R. H., late of

(*x*) R. v. Hughes, 1 C. & K. 519; verdict, not guilty.

the parish of Whitechurch, in the County of Salop, labourer, appeared before the Court of General Quarter Sessions of the Peace holden as aforesaid, before the said justices, and the said others their associates as aforesaid, as a witness in support of the said bill of indictment, and was then and there, at the said General Quarter Sessions of the Peace holden as last aforesaid before the said justices, and the said others their associates, duly sworn, and took her corporal oath, upon the holy gospel of God, before the said honourable T. K., Sir B. L., baronet, J. A. L., Esq., and the said others their associates, so being such justices as aforesaid, at the said General Quarter Sessions of the Peace holden as aforesaid, that the evidence that she the said M. H. should give before the grand jury (meaning before the said good and lawful men so sworn and charged as aforesaid to inquire as aforesaid), on the said bill of indictment, should be the truth, the whole truth and nothing but the truth (they the said honourable T. K., Sir B. L., baronet, J. A. L., Esq., and the said others their associates so being such justices as aforesaid, at the said General Quarter Sessions of the Peace holden as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said M. H. in that behalf).

And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the parish of St. Chad, in the borough of Shrewsbury, in the said County of Salop, the said good and lawful men being so sworn and charged as aforesaid to inquire as aforesaid, did in due form of law and according as they were so sworn and charged as aforesaid, inquire touching the matters and touching the truth of the matters stated and contained in the said bill of indictment so exhibited to them as aforesaid.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that upon the said inquiry, by and before the said good and lawful men so as aforesaid sworn and charged to inquire as aforesaid, it then and there became and was a material question, whether three tablecloths which were then and there produced before the said good and lawful men, were the property of R. H., the husband of the said M. H., and that upon the said inquiry it then and there also became and was a material question, whether the said three tablecloths were the property of the said T. H.; and that upon the said inquiry it then and there became and was a material question, whether the said three tablecloths had at any time belonged to the mother of the said M. H.; and that upon the said inquiry it then and there became and was a material question, whether the said three tablecloths had at any time been the property of the said T. H.; and that upon the said inquiry it then and there became and was a material question, whether the said three tablecloths had at any time been the property of the said R. H.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the parish of St. Chad, in the borough of Shrewsbury aforesaid, in the County of Salop, the said M. H. being so sworn as aforesaid, contriving and intending to pervert the due course of justice, went before

the said good and lawful men so sworn and charged as aforesaid to inquire as aforesaid, and before the said good and lawful men, upon the said inquiry by and before the said good and lawful men, touching the matters and touching the truth of the matters stated and contained in the said bill of indictment, and that she the said M. H., then and there upon her oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously, before the said good and lawful men so sworn and charged as aforesaid to inquire as aforesaid, upon the said inquiry did depose and swear amongst other things, in substance and to the effect following, that is to say, that the three tablecloths which were then and there, to wit, at the time and place last aforesaid produced, then were her son's (meaning were the property of the said T. H.), and that the said tablecloths had belonged to the mother of the said M. H., and were to be divided amongst her the said M. H.'s children, of whom the said T. H. was one; whereas in truth and in fact, the said tablecloths then were not her the said M. H.'s son's, as she the said M. H. then and there well knew; and whereas in truth and in fact, the said tablecloths were not then the property of the said T. H., as she the said M. H. then and there well knew; and whereas in truth and in fact, neither of the said tablecloths ever had been the property of the said T. H.; and whereas in truth and in fact, the said tablecloths then were the property of the said R. H., as she the said M. H. then and there well knew; and whereas in truth and in fact, the said tablecloths and each of them were, at the time last aforesaid, and for twenty years and more before that time, the property of the said R. H., as she the said M. H. then and there well knew; and whereas in truth and in fact, the said tablecloths never did belong to the mother of the said M. H., as she the said M. H. then and there well knew; and whereas in truth and in fact, the said tablecloths were not to be divided amongst the children of the said M. H.; and whereas in truth and in fact, the mother of the said M. H. was a married woman at the time of the death of her the said mother, and had been so for twenty years and more before the time of her said death; and the said T. H. and the other children of the said M. H. were not born at the time of the decease of the said M. H.'s mother, as she the said M. H. then and there well knew.

And so the jurors first aforesaid, upon their oath aforesaid, do say, that on the said, &c., at, &c., before good and lawful men so sworn and charged as aforesaid to inquire as aforesaid, upon their inquiry aforesaid touching the matters and touching the truth of the matters stated and contained in the said bill of indictment, by her own act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully and corruptly did commit wilful and corrupt perjury, in contempt of our lady the queen and her laws, to the evil example of all others in like case offending, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

In answer to interrogatories exhibited in chancery.(*y*)

That one C. D. heretofore, to wit, on did exhibit certain interrogatories, in writing, in the Supreme Judicial Court of this commonwealth begun and holden at B., within and for the County of S., on, &c., in a certain case before that time commenced by bill of complaint, and then pending and at issue in the same court, after certain pleadings and proceedings had been had therein; in which said suit one E. F. was complainant, and the said C. D. was respondent, in order that the said interrogatories might be administered, according to the course and practice of the said court in its chancery jurisdiction, to certain witnesses to be produced, sworn and examined in the said cause, on the part and behalf of the said C. D., the said defendant therein, touching and concerning a certain written paper, purporting to contain an agreement for the lease of a certain house and premises therein mentioned, from the said E. F. to the said C. D.; and that it became and was a material question in the said cause between the said parties, and to be deposed to by the said witnesses in answer to the said interrogatories, whether the said E. F. had declared that he would release the said C. D. from the said agreement, or had released him from the performance thereof; and in and by one of the interrogatories exhibited as aforesaid, the said witnesses were interrogated as follows, that is to say, (*here copy the interrogatories with necessary innuendoes*). And the jurors aforesaid upon their oath aforesaid, do further present, that G. H. of in the county of yeoman, and one of the witnesses to whom the interrogatories in the said cause were to be, and were accordingly, afterwards, to wit, on, &c., at, &c., administered, then and there came in his own proper person before the said Supreme Judicial Court, and having seen and understood the said interrogatories, so exhibited in the said court as aforesaid, then and there, before I. P., Esq., Chief Justice of the said Supreme Judicial Court, he the said I. P., Esq., as chief justice as aforesaid, then and there having sufficient and competent power and authority to administer an oath to the said G. H. in that behalf, was duly sworn before the said court by the said I. P., Esq., chief justice as aforesaid; and the said G. H. then and there, on his said oath before the said court, being then and there required to depose the truth in a proceeding in a course of justice, did swear that he would make true answers to all such questions as should be asked him by the said court or their order, upon the interrogatories aforesaid, at the time of his examination, and that he would speak the truth, the whole truth and nothing but the truth, without favour or affection to the said parties in the said cause; and that the said G. H. afterwards, to wit, on the day of was duly examined in the said court upon the said interrogatories; and that the said G. H. intending unjustly to aggrieve the said E. F., the complainant aforesaid, did then and there, in his answer to the said fourth interrogatory, falsely, knowingly, wilfully and corruptly, by his own act and consent, amongst other things, answer, swear and affirm, in writing, as follows, that is to say,

(*y*) Altered by Mr. Davis, Prec. 202, from 2 Chit. C. L. 397.

(*here state the answer with necessary innuendoes*), as by the said answer of the said G. H. to the said fourth interrogatory remaining filed in the court aforesaid, will, amongst other things, fully appear; whereas, in truth and in fact, (*then go on to negative the answer in all its parts, comprehending what is alleged to be false*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H. then and there, knowingly, wickedly, falsely, wilfully and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Perjury committed at a writ of trial.(z)

That heretofore, to wit, on, &c., a certain action of debt for a certain debt and demand, was depending in the court of our said lady the queen, before her justices at Durham, that is to say, in our said lady the queen's Court of Pleas at Durham, wherein one J. N. was plaintiff, and one F. S. was defendant, and wherein the sum of money sought to be recovered and endorsed on the writ of summons, did not exceed twenty pounds, and that heretofore, to wit, on, &c., at, &c., before E. S., Esq., then and still being sheriff of the said County of Durham, a certain issue before then joined between the said J. N. and F. S., in the said action, came on to be tried in due form of law and according to the form of the statute in such case made and provided, and was then and there by virtue and in pursuance of a writ of our said lady the queen, directed to the said sheriff of the said County of Durham in that behalf, in due form of law and according to the form of the statute in such case made and provided, duly tried before the said E. S., Esq., so then being such sheriff as aforesaid, and by a jury of the said County of Durham, in that behalf duly summoned, taken and sworn between the parties aforesaid.

And that upon the said trial of the said issue, one W. D., late of the parish of St. Aswald, in the said County of Durham, labourer, then and there appeared, and was produced as a witness for and on behalf of the said F. S., and was then and there duly sworn and took his corporal oath upon the holy gospel of God, before the said E. S., so then and there being such sheriff as aforesaid, that the evidence which he the said W. D. should give to the said sheriff and to the said jury so sworn as aforesaid, touching the matter in question between the said parties, should be the truth, the whole truth and nothing but the truth (he the said E. S., so then and there being such sheriff as aforesaid, and then and there having sufficient and competent authority to administer the said oath to the said W. D. in that behalf); and that at and upon the said trial of the said issue so joined between the said parties as aforesaid, to wit, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, it then and there became and was a material question, whether the said F. S. had paid to the said J. N. divers, or any sums or sum of money in the whole amounting to a large sum of money, to wit, the sum of

(z) R. v. Dunn, 1 C. & K. 730. The defendant was convicted and sentenced.

nine pounds eighteen shillings and sixpence, in full satisfaction of a certain sum of money, to wit, the sum of nine pounds eighteen shillings and sixpence, theretofore due and owing from the said F. S. to the said J. N., and also whether the said F. S. had paid or delivered to the said J. N. any sum or sums of money, or any promissory note or promissory notes in payment or satisfaction, or in part payment or satisfaction, of a certain sum of money, to wit, the sum of nine pounds eighteen shillings and sixpence, theretofore due and owing from the said F. S. to the said J. N.

And that the said W. D., having been sworn as aforesaid, not having the fear of God before his eyes, not regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to prevent the due course of law and justice, and unjustly to aggrieve the said J. N., the said plaintiff in the said action, and to deprive him of the benefit of the said suit then in question, and to subject him to the payment of sundry heavy costs, charges and expenses, then and there on the said trial of the said issue, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously, before the said jurors so sworn to try the said issue as aforesaid, and before the said E. S., Esq., so then and there being such sheriff as aforesaid, did depose and swear (amongst other things) in substance and to the effect following, that is to say:

"I saw S.'s wife bring out some money and give it to her husband (thereby meaning that the said W. D. had seen the wife of the said F. S. bring out some money and give it to the said F. S. her husband); S. took the five pound note and laid it on the table (thereby meaning that the said F. S. took a promissory note for the payment of five pounds, and laid it on a table), shoved it along (thereby meaning that the said F. S. shoved a promissory note for the payment of five pounds, along a certain table to the said J. N.), and said to N. (thereby meaning that the said F. S. said to the said J. N.), 'Look at that' (meaning such promissory note as aforesaid), and also five sovereigns (thereby meaning that the said F. S. had also shoved along the said table to the said J. N. five pieces of the current coin of the realm called sovereigns, of the value of one pound each); and the said J. N. returned five shillings for the good of the company.

"It would be near eleven o'clock on the Friday when we went into S.'s house. This was the week before Blanchland Fair (thereby meaning a fair holden at Blanchland on the twenty-fourth day of August, in the year eighteen hundred and forty-two)." He the said W. D., by so deposing and swearing in manner aforesaid, then and there meaning that the said F. S. had given and delivered and paid to the said J. N. a promissory note for the payment of five pounds, and five pieces of the said current coin called sovereigns, as and for a payment in money, and in payment, satisfaction and discharge of the said sum of money so theretofore due and owing from the said F. S. to the said J. N. as aforesaid; and that the said F. S. had offered and delivered and paid to the said J. N. a promissory note for the payment of five pounds and five pieces of the said current coin called sovereigns, as and for a payment in money; and so that, by means thereof and by the acceptance by the said J. N. of such note and five

pieces of the said current coin called sovereigns, and of a competent part thereof in value, to wit, nine pounds eighteen shillings and sixpence, part thereof, as and for a payment in money, and in payment, satisfaction and discharge of the said sum of money so heretofore due and owing from the said F. S. to the said J. N. as aforesaid, the same sum of money so theretofore due and owing from the said F. S. to the said J. N. as aforesaid might and would be paid, satisfied and discharged.

Whereas in truth and in fact, the said F. S. did not, on the Friday in the week before the said Blanchland Fair was so holden as aforesaid, shove a promissory note for the payment of five pounds, along a table to the said J. N.; and whereas in truth and in fact, the said F. S. did not then, on the said Friday in the said week before the said Blanchland Fair was so holden, as aforesaid, say to the said J. N., "Look at that;" and whereas in truth and in fact the said F. S. did not, on the said Friday in the said week before the said Blanchland Fair was so holden as aforesaid, shove along a table to the said J. N., five pieces of the said current coin called sovereigns; and whereas in truth and in fact, the said F. S. did not give or deliver, or pay then, or at any other time, to the said J. N., a promissory note for the payment of five pounds, and five pieces of the said current coin called sovereigns, as and for a payment in money, or otherwise in payment or satisfaction or discharge of the said sum of money so theretofore due and owing from the said F. S. to the said J. N. as aforesaid; and whereas in truth and in fact, the said F. S. did not then, or at any other time, offer or deliver or pay to the said J. N., a promissory note for the payment of five pounds, and five pieces of the said current coin called sovereigns, as or for a payment in money or any other promissory note or notes, or the sum of nine pounds eighteen shillings and sixpence, or any other moneys; so that by means thereof, or by acceptance by the said J. N. of such promissory note, and five pieces of current coin called sovereigns, or of any part thereof, as or for a payment in money or otherwise, or of any such other promissory note or notes or moneys, or any part or parts thereof, in payment, satisfaction or discharge of the said sum of money so theretofore due and owing from the said F. S. to the said J. N. as aforesaid, or any part thereof, the same sum of money so due and owing from the said F. S. to the said J. N. as aforesaid, or any part thereof, might or could or would be paid or satisfied or discharged. And so the jurors aforesaid do say, that the said W. D., on, &c., at, &c., before the said E. S., Esq. (so then and there being such sheriff as aforesaid, and then and there having such power and authority as aforesaid), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, knowingly, wilfully and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our lady the queen and her laws, to the evil example, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Falsely charging the prosecutor with beastiality at a hearing before a justice of the peace.(*a*)

That the said R. G., wickedly and maliciously intending to aggrieve one A. B., &c., on, &c., came before A. T. R., Esq., then and yet being one of the justices of our lady the queen, assigned to keep the peace of our said lady the queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county, the said A. T. R., Esq., then and there having a lawful power and authority to administer the oath and to receive the information hereinafter mentioned, and then and there before the said justice, was in due form of law sworn and took his corporal oath upon the holy gospel of God, the said justice having such lawful power and authority as aforesaid to administer the said oath to the said R. G. in that behalf, and to receive the information hereinafter mentioned, and that the said R. G. being so sworn as aforesaid, not having the fear of God before his eyes, but, &c., then and there before the said justice (he, the said justice having then and there the power and authority as aforesaid), falsely, corruptly, wilfully and maliciously did say, depose, swear, charge and give the said justice to be informed, that the said A. B., upon a certain day, to wit, on the ninth day of July, in the year aforesaid, in the county aforesaid, then and there had a venereal affair with a certain animal called a donkey, and that the said A. B., then and there, against the order of nature, carnally knew the said donkey, and then and there feloniously and against the order of nature, did commit and perpetrate that detestable and abominable crime of buggery with the said donkey; and further, (it being then and there material to the inquiry into the said charge and information to know the state of the said A. B.'s dress at the time the alleged offence was so charged to be committed as aforesaid), that the said R. G. then and there saw that the said A. B., then and there had the flap of his the said A. B.'s trowsers unbuttoned and hanging down, and that he the said R. G. then and there saw the inside of the said flap; whereas in truth and in fact, the said R. G. did not then and there, or at any time, or in any place see the said A. B., nor was the said A. B. at any time in the act of having a venereal affair with a donkey, or with any other animal whatsoever, nor did the said A. B. then, or at any time, or in any place, or in any manner commit,

(*a*) R. v. Gardener, 8 C. & P. 737. An arrest of judgment was moved for on three grounds, 1st. That the indictment did not sufficiently show any judicial proceeding pending before the magistrate, and that it ought to have averred in direct terms that a charge was pending, and on this point he cited the case of Rex v. Pearson, *ante*, p. 321. 2d. That the flap of the trowsers being unbuttoned, or even the existence of any flap, did not appear on the face of the indictment to be material, and that there was no sufficient averment of materiality; and 3d. That the assignment of perjury on the main charge was too large, because it denied all animals, all times and all places, and he submitted that although it was not necessary to prove every assignment of perjury contained in a count, yet that the proof of part of any one assignment of perjury would not be sufficient. Mr. Justice Patteson reserved the points for the consideration of the fifteen judges.

In the ensuing term, the case was considered by the judges on all the points made at the trial, and their lordships held the conviction right, and their lordships were unanimously of opinion that the indictment sufficiently showed that there was a legal proceeding pending before the magistrate, and that the averment of materiality as to the state of the dress was sufficient.

nor was the said A. B. at any time, or in any place or in any manner in the act of committing that detestable and abominable crime of buggery. And whereas in truth and in fact, the said R. G. did not then and there see the flap of his the said A. B.'s trowsers unbuttoned or hanging down, nor was the flap of the said A. B.'s trowsers then and there unbuttoned or hanging down; nor did the said R. G. then and there see the inside of the flap of the said trowsers. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said R. G., on, &c., before the said justices, then and there having such power and authority as aforesaid, by his own act and consent and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our lady the queen and her laws, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Subornation of perjury in a prosecution for fornication, &c.(*b*)

That C. B., late of the said city, yeoman, being a wicked and evil disposed person, minding and intending great injury to one J. L., a good and valuable citizen of the said commonwealth, and unjustly to cause and procure him the said J. L. to be put to great charge and expense of his moneys and to give security for the maintenance of a child, of which one C. S., spinster, was, on, &c., pregnant, and which by the laws of this commonwealth was likely to become a bastard, did on the same day and year aforesaid, at the city aforesaid, and within the jurisdiction of this court, unlawfully and wickedly solicit, investigate and as much as in him the said C. B. lay, endeavour to persuade the said C. S. to go before M. H., Esq., then and there being one of the aldermen of the City of Philadelphia, and then and there to take her corporal oath and swear before the said M. H., Esq., (the said M. H., Esq., then and there having sufficient and competent authority to administer the said oath to the said C. S. in that behalf), among other things in substance and to effect following, that is to say, that J. L., a seaman, was the father of a bastard child, of which she the said C. was then pregnant. And the said C. S. did accordingly and in pursuance of the solicitation, instigation and persuasion of the said C. B., then and there go before the said M. H., Esq., then and there being one of the aldermen of the said City of Philadelphia, and did then and there take her corporal oath and swear before the said M. H., Esq., (he the said M. H., Esq., then and there having sufficient and competent power and authority to administer the said oath to the said C. S. in that behalf), among other things in substance and to the effect following, that is to say, that she the said C. was then pregnant with child, which child when born would be a bastard, and like to become chargeable to the public, and that the aforesaid J. L., a seaman, was the father of the said child (when as in truth and in fact, he the said C. B., at the time when he so endeavoured to persuade, solicit and instigate the said C. S. to make oath and swear as

(*b*) This indictment was found and sustained in Philadelphia Quarter Sessions, in 1801.

aforesaid, then and there well knew that he the said J. L. would be put to great charge and expense of his moneys if the said C. would swear as aforesaid; and whereas in truth and in fact, he the said C. B. at the said time when he so endeavoured to persuade, solicit and instigate the said C. S. to make oath and swear as aforesaid, had no reasonable or probable cause whatsoever to suspect or imagine that the said J. L. was the father of such child, but on the contrary thereof the said C. B. was then and there informed by the said C. S. that he the said C. B. was the father of such child of which she the said C. was so pregnant as aforesaid; and whereas in truth and in fact, she the said C. never told or informed the said C. B. that the said J. L. was the father of such child; and whereas in truth and in fact, he the said C. B. so wickedly and unlawfully endeavoured to persuade, solicit and instigate the said C. S. to swear as aforesaid, in order that he the said C. B. might be exonerated, freed and discharged from divers expenses which might accrue to him, as being the father of such child, after the same should be born of the body of her the said C. S., in contempt of the laws of this commonwealth, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Subornation of perjury, on a trial for robbery, where the prisoner set up an alibi.(c)

That at the Supreme Judicial Court of said commonwealth, holden at, &c., on, &c., before the justices of said Supreme Judicial Court, a certain indictment was presented and returned in due course of law by the grand jury for the said county against one A. B., in the form following, to wit, (*here insert the indictment*); and that afterwards such proceedings were had, as that the said A. B. was duly and legally arrested and brought into said court, and being duly and legally arraigned upon said indictment, pleaded to the same that he was not guilty thereof; upon which issue, such proceedings were had, that afterwards, to wit, at the said Supreme Judicial Court, so held as aforesaid, a trial was had and held by the jury aforesaid, between the said commonwealth and the said A. B. upon the said indictment; upon which said trial, evidence was given on behalf of said commonwealth against the said A. B., that the felony and robbery, in the said indictment specified and charged, was committed by the said A. B., on at . And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., late of being a person of an evil and wicked mind and disposition, and devising and intending as much as in him lay, to pervert the due course of law and justice, and to cause and procure the said A. B. to be entirely acquitted of the said felony and robbery charged on him by the said indictment, and to escape unpunished for the same, did, before the said trial, to wit, on at unlawfully and wickedly solicit, incite and endeavour to persuade one E. F. to appear as a witness on the said trial so as aforesaid had, for and on behalf of the said A. B., and on the said trial, falsely to depose, say and give evidence upon his oath

(c) 2 Chit. C. P. 478, 479; Davis' Prec. 220.

to the court and jury aforesaid, that the said A. B., (*here insert the evidence given by the said E. F., to prove the alibi*); whereas in truth and in fact, the said E. F. did not, (*here negative the testimony given by the said E. F.*); and whereas in truth and in fact, at the time when the said C. D. did so solicit, invite and endeavour to persuade the said E. F. to give such evidence upon his oath as aforesaid, he the said C. D. well knew that the said E. F. would not give his evidence according to the truth, and that the same evidence so to be given, was false, feigned and altogether fictitious; to the evil example, &c., against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Subornation of perjury in an action of trespass.(*d*)

That heretofore, to wit, at, &c., a certain issue was joined in the court of our lady the queen, before the queen herself (the said court then and still being holden at Westminster, in the County of Middlesex), between one J. L. and one J. W. in a certain plea of trespass and assault, in which the said J. L. was plaintiff, and the said J. W. defendant. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and before the trial of the said issue as hereinafter mentioned, and whilst the same was depending, to wit, on, &c., J. S., late, &c., not having the fear of God before his eyes, but, &c., and wickedly contriving and intending to pervert the due course of law and justice, and wickedly and maliciously contriving and intending unjustly to aggrieve the said J. L., the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges and expenses, then and there, to wit, on, &c., at, &c., unlawfully, corruptly, wickedly and maliciously did solicit, suborn, instigate and endeavour to persuade one J. N. to be and appear as a witness at the trial of the said issue, for and on behalf of the said J. W. the defendant in the said issue, and upon the said trial falsely to swear and give evidence to and before the jurors which should be sworn to try the issue aforesaid, certain matters, material and relevant to the said issue, and to the matters therein and thereby put in issue, in substance and to the effect following, that is to say, that (the said J. W. (meaning the defendant in the issue aforesaid), did, on a certain day then past, to wit, on the tenth day of April, in the year aforesaid, beat, wound and bruise the said J. L., (meaning the plaintiff in the issue aforesaid), and did knock him the said J. L. down, and with a large stick did then and there beat, wound and bruise and greatly disfigure the said J. L. whilst he was so down).

And the jurors first aforesaid upon their oath aforesaid, do further present, that afterwards, to wit, at the sittings at nisi prius, holden after trinity term aforesaid at Westminster, in the county aforesaid, before the right honourable T. L. D., her majesty's chief justice assigned to hold pleas in the court of our said lady the queen before the queen herself, to wit, on the day and year aforesaid at Westminster aforesaid, in the county aforesaid, the issue aforesaid came on to

(*d*) Arch. C. P. 5th Am. ed. 681.

be tried, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid, upon which said trial the said J. N. in consequence and by means, encouragement and effect of the said wicked and corrupt subornation and procurement of the said J. S., did then and there appear as a witness for and on behalf of the said J. W., the defendant in the plea above mentioned, and was then and there duly sworn and took his corporal oath upon the holy gospel of God, before the said T. L. D., her majesty's chief justice as aforesaid, that the evidence which he, the said J. N. should give to the court there, and to the jury so sworn as aforesaid, touching the matter then in question between the said parties, should be in truth, the whole truth and nothing but the truth, (he the said T. L. D., chief justice as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said J. N. in that behalf), and that at and upon the trial of the said issue so joined between the said parties as aforesaid, it then and there became and was a material question whether the said J. W. assaulted and beat the said J. L., and the said J. N. being so sworn as aforesaid, then and there at the trial of the said issue, upon his oath aforesaid, falsely, corruptly and wilfully, before the said jurors so sworn and taken between the said parties as aforesaid and before the said T. L. D., chief justice as aforesaid, did depose and swear (amongst other things), in substance and to the effect following, that is to say, that (*here set out J. N.'s evidence, in substance the same as above stated where the subornation is charged*); whereas in truth and in fact, the said J. W. did not, &c., (*so proceeding to assign the perjury as in the precedent ante, p.* 278, &c.); and whereas in truth and in fact, the said J. S. at the time he so solicited, suborned, instigated and endeavoured to persuade the said J. N. falsely and corruptly to swear as aforesaid, well knowing that, &c., (*pursuing the words in the assignment of perjury*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the said third day of July, in the fourth year of the reign aforesaid, at the parish aforesaid in the county aforesaid, did unlawfully, corruptly, wickedly and maliciously suborn, and procure the said J. N. to commit wilful and corrupt perjury in and by his oath aforesaid, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said T. L. D., chief justice as aforesaid (the said T. L. D. then and there having sufficient and competent power and authority to administer the said oath to the said J. N.), to the great displeasure of Almighty God, the evil and pernicious example of all others in the like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Corruptly endeavouring to influence a witness in the U. S. courts.(e)

That heretofore, to wit, on, &c., at, &c., a certain J. H. Y. was bound in recognizance with a certain J. P. V. in the sum of four thousand dollars, before A. D. K. T., an alderman and justice of the peace

(e) This indictment was drawn in 1839, by John M. Read, Esq., then District Attorney in Philadelphia, but was never tried.

for the County of Philadelphia, conditioned that the said J. H. Y. should personally appear at the next Circuit Court of the United States of America, for the Eastern District of Pennsylvania, to be holden at Philadelphia in the eastern district aforesaid, on the eleventh day of October in the year aforesaid, and then and there to answer for one manslaughter committed by the said J. H. Y. upon one F. upon the high seas. And the grand inquest aforesaid do further present, that on the said fourth day of September in the year aforesaid, at the district aforesaid, and before the said A. D. K. T., alderman and justice of the peace as aforesaid, a certain T. P. was then and there bound in a recognizance in the sum of two hundred dollars, conditioned that he the said T. P. should personally appear at the said Circuit Court of the United States for the district aforesaid, to be holden as aforesaid on the said eleventh day of October in the year aforesaid, and then and there give evidence on behalf of the United States of America, against the said J. H. Y., for the said manslaughter by him the said J. H. Y. committed upon the said F. upon the high seas as aforesaid.

And the grand inquest aforesaid do further present, that afterwards, to wit, on, &c., at, &c., one J. P. V., late of the district aforesaid, yeoman, did then and there corruptly endeavour to influence the said T. P., then and there being a witness as aforesaid in the said Circuit Court of the United States of America for the eastern district aforesaid, in the discharge of his duties as a witness as aforesaid, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Endeavouring to entice a witness to withdraw himself from the prosecution of a felon.(*f*)

That whereas, a certain S. S. and J. M'K., late, &c., on, &c., at, &c., were arrested and brought before W. C., Esq., then one of the justices of this commonwealth, the peace in the said county to keep assigned, the said S. S. and J. M'K. being charged upon the oath of G. F. with a certain felony and robbery by them committed; whereupon the same justice made his warrant in writing under his hand and seal, in due form of law directed to the keeper of the gaol of the said county, commanding him to receive said S. and J. into the said gaol, and them safely to keep until discharged by due course of law, by virtue of which said warrant the said S. and J. were committed to the gaol of the said county and into the custody of the keeper thereof; and the jurors aforesaid upon their oaths and affirmations aforesaid, do further present, that A. W. and M. R., both late of the county aforesaid, yeomen, not being ignorant of the premises, but well knowing the same, and contriving and intending the due course and execution of justice to obstruct and prevent, on the twentieth day of October in the year aforesaid and at the county aforesaid, unlawfully, corruptly and wickedly did entice, solicit and endeavour to persuade the said G. F. to abandon and withdraw himself from the further accusation and prosecution of the said S. S. and J. M'K., to the evil example of all others in the like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*f*) Drawn by Mr. Bradford in 1780.

Persuading a witness not to give evidence against a person charged with an offence before the grand jury.(*g*)

That heretofore, to wit, on, &c., A. B., of, &c., (*here state the authority of the government by which the attendance of the witness was compelled, whether a summons or a recognizance*). And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of taking said recognizance, (*or the service of said summons, as the case may be*), and from then until and upon the said day of therein mentioned, the evidence of the said A. B. was material and necessary to have been given in before the said grand jury, on the subject matter then to be heard and considered by them; which said grand jury were then and there duly and legally convened on that behalf, and were legally authorized and had competent authority to consider and decide upon the subject matter then and there by them to be heard; and that the said term of said court, (*here describe the court*), a bill of indictment was prepared against the said A. B. for the offence aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., of, &c., contriving and intending the due course of justice to obstruct and impede, on at unlawfully and unjustly dissuaded, hindered and prevented the said A. B. from appearing before the justices of said court, and before the said grand jury, to give evidence before the said grand jury on the bill of indictment preferred as aforesaid against the said and that in consequence thereof the said A. B. did not appear and give evidence according to his duty in that respect, against, &c. (*Conclude as in book* 1, *chap.* 3).

Inducing a witness to withhold his evidence as to the execution of a deed of trust, in Virginia.(*h*)

That J. F., inn-keeper, late, &c., on, &c., at, &c., did offer a contempt to the Supreme Court of Law, held in and for Wythe County, in this, that he the said J. F. did use means to prevent, and did then and there prevent one S. W. from attending as a witness to give evidence to prove the execution of a deed of trust, which deed of trust was executed by the said J. F. to J. D., after he the said S. W. had been duly summoned to attend said court as a witness to prove said deed of trust, on the fourth day of October term, one thousand eight hundred and twelve, by virtue of a summons issued by the clerk of said court, who was duly authorized to issue said summons, which act

(*g*) Davis' Prec. 219. "This," says Mr. Davis, "is an offence at common law, for which see Hawk. b. 1, c. 21, s. 15. The mere attempt to stifle evidence, though it does not succeed, is criminal; 6 East 464; 2 East 5, 21, 22; 2 Str. 904; 2 Leach 925.

(*h*) Com. v. Feeley, 2 Va. Cases 1. On the usage joined on this information, the jury found the defendant guilty, and assessed his fine at twenty dollars.

The defendant moved the court to arrest the judgment, for the following reasons: 1. because the offence is not specified with sufficient certainty; 2. because there is no criminal offence stated, the subpœna stated in the information not being legal process. The questions arising on this motion were adjourned to the General Court.

The decision of this court was as follows: "*Ordered*, That it be certified, &c., that the offence is stated in the information with sufficient certainty; that it is a criminal offence, for which an information will lie; and that there exists on the face of the record no cause for arresting the judgment."

of the said J. F. is contrary to the laws and usages of this commonwealth, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Endeavouring to suborn a person to give evidence on the trial of an action of trespass, issued in the Supreme Judicial Court of Mass.(*i*)

That at the Supreme Judicial Court, begun and holden at B., within and for the County of S., on the Tuesday of in the year of our Lord one thousand eight hundred and two, before I. P., Esq., then the chief justice of the said court, a certain issue duly joined in the said court between one C. D. and one E. F., in a certain plea of trespass, wherein it was alleged, in substance, that the said E. F. had, with force and arms, assaulted, beat, bruised, wounded and ill-treated the said C. D., in which the said C. D. was plaintiff, and the said E. F. was defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country in that behalf duly summoned, taken, empanneled and sworn between the parties aforesaid; and that before the trial of the said issue, and during the time the same was pending, to wit, on the day of at B. aforesaid, in the county aforesaid, G. H. of in the county aforesaid, grocer, wickedly contriving and intending, as much as in him lay, to prevent justice and pervert the due course of law, and intending unjustly to aggrieve the said E. F., the defendant above named, and wickedly to cause and procure the said E. F. to be found guilty of the premises alleged against him in the said issue, and thereby to subject him to the payment of large sums of money for the payment of damages and costs to be recovered against him in the suit aforesaid, then and there, on the same day and year last aforesaid, at B. aforesaid, in the said County of S., did unlawfully and wickedly solicit, instigate, and, as much as in him lay, wilfully and corruptly endeavour to persuade and procure one I. J. to be and appear as a witness on the part and behalf of the said C. D., the plaintiff aforesaid, at the trial of said issue so as aforesaid joined, and, upon the same trial, to commit wilful and corrupt perjury, by falsely swearing and giving in evidence to and before the jurors of the jury aforesaid, so sworn between the parties aforesaid to try the said issue, in substance and to the effect following, that is to say, (*here insert the evidence which the party was instigated to give, with proper innuendoes if necessary*); whereas in truth and in fact, (*here assign the perjury intended to be committed, by negativing the false evidence intended to be given*), in manifest subversion of justice, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Soliciting a woman to commit perjury, by swearing a child to an innocent person, the attempt being unsuccessful.(*j*)

That A. B., late of, &c., being a wicked and evil disposed person,

(*i*) This precedent, says Mr. Davis, is drawn on the statute of Massachusetts of 1812, c. 143, but it concludes also at common law; Prec. 268. See also 2 Chit. 482, which cites the above precedent from Cro. C. C. 587, 6th ed.

(*j*) To solicit or attempt to persuade a witness to swear falsely, though such solicitation be ineffectual, is a misdemeanor at common law; R. *v.* Edwards, cited in Schofield's case Cald. 400; Dickinson's Q. S. 6th ed. 450. For a successful attempt to commit the same offence, see *ante*, p. 321.

and minding and intending great injury to one C. D., of, &c., a good and valuable subject of our said lady the queen, and unjustly to cause and procure him to be put to great charges and expense of his moneys, and to give security for the maintenance of a child, of which one E. F., spinster, was, on, &c., pregnant, and which by the laws of this realm was likely to become a bastard, did on the same, &c., aforesaid, at, &c., aforesaid, unlawfully and wickedly solicit, instigate, persuade and procure the said E. F. to go before one of the justices of our said lady the queen, assigned, &c., and that she the said E. F., in consequence of such solicitation, instigation, persuasion and procurement, did go in her own proper person before G. H., one of the justices of our said lady the queen, assigned, &c., and then and there did, &c. (*state the filiation*); whereas in truth and in fact, he the said A. B., at the time when he so endeavoured to persuade, solicit and instigate the said E. F. to make oath and swear as aforesaid, then and there well knew that the said C. D. would be put to great charges and expense of his moneys, if she the said E. F. would swear as aforesaid; and whereas in fact and in truth, he the said A. B., at the said time when he so endeavoured to persuade, solicit and instigate the said E. F. to make oath and swear as aforesaid, had no reasonable or probable cause whatsoever to suspect or imagine that the said C. D. was the father of such child, of which she the said E. F. was so pregnant as aforesaid; and whereas in truth and in fact, she the said E. F. never told or informed him the said A. B., that the said C. D. was father of such child; and whereas in truth and in fact, he the said A. B. so wickedly and unlawfully endeavoured to persuade, solicit and instigate the said E. F. to swear as aforesaid, in order that he the said A. B. might be exonerated, freed and discharged from divers expenses which might accrue to him as being the father of such child, after the same should be born of the body of her the said E. F., against, &c. (*Conclude as in book* 1, *chap.* 3).

Soliciting a witness to disobey a subpœna to give evidence before the grand jury.(*k*)

That on, &c., a certain writ of our said lady the queen, called a subpœna ad testificandum, had been and was duly issued and tested by and in the name of P. Q., of, &c., at, &c., the same day and year aforesaid, the said P. Q. then and there being custos rotulorum in and for the said county, which said writ was directed to B. B. and D. D., by which said writ our said lady the queen commanded, &c., (*recite the writ*). And the jurors, &c., that a copy of the said writ was, on, &c., at, &c., duly served on the said H. H., who then and there had notice to appear and give evidence according to the exigency of such writ, and that the evidence of the said H. H., at the time of issuing the said writ, and from thence until and upon the said, &c., therein mentioned, was material and necessary to have been

(*k*) This is an offence indictable at common law; Hawk. b. 1, c. 21. The mere attempt to stifle evidence is criminal, though the persuasion should not succeed, on the general principle that an incitement to commit any crime is itself criminal; R. *v.* Phillips, 6 East R. 464; Dickinson's Q. S. 6th ed. 451.

given before the said grand jury on the said bill of indictment, so to be preferred against the said A. B. as aforesaid, and that at the Sessions of the Peace holden at, &c., in and for the said county on, &c., aforesaid, such bill of indictment was preferred against the said A. B., to and before a certain grand jury then and there duly assembled in that behalf. And the jurors, &c., that A. B., late of, &c., being an evil disposed person, and contriving and intending to obstruct and impede the due course of justice, on, &c., at, &c., unlawfully and unjustly solicited, persuaded and prevailed upon the said H. H. to absent himself from the said Sessions of the Peace, holden as aforesaid, and not to appear there before the justices then and there assembled, to testify the truth and give evidence before the said grand jury on the said bill of indictment so preferred against the said A. B. as aforesaid (and the said H. H., in consequence of such solicitation and persuasion, did not so appear and give evidence according to the exigency of said writ), to the great obstruction, hinderance and delay of public justice, in contempt, &c., to the evil, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the said, &c., a certain other writ of our said lady the queen had duly issued, directed to the said B. B. and D. D., by which said last mentioned writ, our said lady the queen commanded the said B. B. and D. D., that, &c., (*recite the writ*). And the jurors, &c., that the evidence of the said H. H., at the time of issuing the said last mentioned writ, and from thence until and upon the said, &c., therein mentioned, was material and necessary to have been given before the said grand jury in the said bill of indictment so to be preferred against the said A. B. as aforesaid. And the jurors, &c., that the said A. B. being an evil disposed person, &c., (*same as first count, saying*, "endeavoured to dissuade," &c., *and omitting the allegations that the solicitation was successful*).

CHAPTER II.

CONSPIRACY.(*a*)

First count. Unexecuted conspiracy.

That A. B., late of, &c., yeoman, and C. D., late of, &c., yeoman,(*b*) being persons of evil minds and dispositions, together with divers other evil disposed persons, whose names are to this inquest as yet unknown, (*see note b*), wickedly devising and intending to (*setting out the intent*),(*c*) on, &c., at the county aforesaid,(*d*) and within the jurisdiction of the said court, fraudulently, maliciously and unlawfully did conspire, combine, confederate and agree together,(*e*) between and amongst themselves, by(*f*) (*setting forth the means*), unlawfully to(*g*) (*setting forth the party to be injured, or the object to be attained*), against, &c. *Conclude as in book* 1, *chap.* 3).

Second count. Conspiracy with overt act.

That the said defendants, being such persons as aforesaid, and devising and intending as aforesaid, afterwards, to wit, on, &c., at, &c., fraudulently, maliciously and unlawfully did conspire, combine, confederate and agree together, between and amongst themselves, &c., (*as in first count, and proceed to state overt act, as follows*): And the inquest, &c., on their oath aforesaid, do further present, that the said defendants, together with the said evil disposed persons, in execution of the said last mentioned premises, and in pursuance of the said conspiracy, combination and agreement, between and amongst them as aforesaid, afterwards, to wit, on, &c., at, &c., did(*h*) (*setting forth overt act*), against, &c. (*Conclude as in book* 1, *chap.* 3).

(*a*) Before proceeding to examine the requisites of an indictment for conspiracy, there are one or two features of the offence generally which it is worth while to consider. "The offence of conspiracy," says Mr. Sergeant Talfourd, "is more difficult to be ascertained precisely than any other for which an indictment lies; and is indeed rather to be considered as governed by positive decisions than by any consistent and intelligible principles of law. It consists, according to all the authorities, not in the accomplishment of any unlawful or injurious purpose, nor in any one act moving towards that purpose; but in the actual concert and agreement of two or more persons to effect something, which *being so concerted or agreed*, the law regards as the object of an indictable conspiracy. When parties have once agreed to cheat a particular person of his money, though they may not then have fixed on any means for that purpose, the offence of conspiracy is complete; per Bayley J., R. *v.* Gill *et al.*, 2 B. & Al. 205; see however, p. 348, n. (*k*); as to R. *v.* Gill, see Reg. *v.* King, 13 L. J. (M. C.) 119 (E. 1844); R. *v.* Blake and Tye, *ib.* 131 (T. 1844). There are two classes of cases in which the criminality of such agreement is perfectly intelligible and obvious; first, where the object proposed would, if accomplished, be a criminal offence in all parties acting in it—to which class the power of sessions in many cases yet extends; and second, where though the ultimate object may be lawful, the means by which the parties conspirators propose to effect their purpose, necessarily involve in them an indictable offence. "An indictment for conspiracy ought to show, either that it was for an unlawful purpose, or to effect a lawful purpose by an unlawful means;" per Ld. Denman, R. *v.* Seward, 1 A. & E. 711; 3 N. & M. 557; but he is reported to have since said, that "this antithesis is not very correct;" Reg. *v.* Peck, 9 A. & E. 690; 1 Per. & Dav. 508. However, where the indictment was for conspiring to indict and prosecute G. for a crime liable to capital punishment, and then stated, that "according to the conspiracy" the defendants did afterwards falsely indict him, it was held unnecessary to lay

a conspiracy to indict falsely, as the conspiracy was completely formed and actually carried into execution; R. *v.* Spragge and others, 2 Burr. 999; cited by Ld. Denman, 3 N. & M. 562; 1 A. & E. 714. Of the first kind are conspiring to commit a felony, or conspiring to obtain money under false pretences, &c.; where the object, if carried into effect, would be a substantive offence, and where, therefore, *concert* is indictable as an *act* in itself tending to produce it. Of this second kind is a conspiracy to support a cause, in itself just, by false testimony; and the same principle would apply here; for, whether the concerted offence be the end or the means, it is equally an offence which, if consummated, would subject the offenders to the visitation of criminal justice. But it is not easy to understand on what principle conspiracies have been holden indictable, where neither the end nor the means are in themselves regarded by the law as criminal, however reprehensible in point of morals. *Mere concert is not in itself a crime*, for associations to prosecute felons, and even to put laws in force against political offenders, have been holden legal; R. *v.* Murray and others, tried before Abbott C. J., at Guildhall, 1823. If, then, there be no indictable offence in the object, no indictable offence in the means, and no indictable offence in the concert, in what part of the conduct of the conspirators is the offence to be found? Can several circumstances, each perfectly lawful, make up an unlawful act? And yet such is the general language held on this subject, that at one time the immorality of the object is relied on; at another the evidence of the means; while at all times the concert is stated to be the essence of the charge; and yet that concert, independent of an illegal object or illegal means, is admitted to be blameless.

The utmost limit of the modern doctrine of conspiracy seems to be reached in the decisions respecting concerted disapprobation of a performer or a piece at the theatre. The case of Macklin is well known, on whose prosecution several persons were committed for hissing him on his appearance in one of Garrick's favourite characters; and in accordance with this precedent, Sir James Mansfield is said to have expressed himself in the case of Clifford *v.* Brandon, 2 Campb. 369, in the following terms: "The audience have certainly a right to express by applause or hisses the sensations of the moment; and nobody has ever hindered or would ever question the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or damning a piece, there can be no doubt such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment." In this case the act is lawful; the means are lawful; the motive may be even laudable, as if a notoriously immoral piece were announced, and the parties determined to oppose it; and yet the concert alone makes the crime. It is extremely difficult to understand this, unless concert be a crime; and still more difficult to reconcile it, or many other of the cases, to the decision of the King's Bench in 1811, R. *v.* Turner and others, 13 East 228, cited by Taunton J., in R. *v.* Seward *et al.*, 1 A. & E. 711, to show that it is not the combining to do *any* wrongful act which constitutes a conspiracy; where it was holden that an indictment would not lie for a conspiracy to enter a preserve for hares, the property of another, for the purpose of ensnaring them in the night time, and with offensive weapons, Ld. Ellenborough observing, "I should be sorry to have it doubted, whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment." Here the object was as much *illegal* as any object can be which is not in itself indictable, and the act concerted, that of going armed at night to destroy game, so dangerous to the public, that it has since been made punishable with transportation; and yet this, according to the doctrine laid down, was not the subject of an indictable conspiracy, because it was only a civil trespass. On the principle of this decision, it is difficult to understand how many of the cases of conspiracy can be sustained, as that of conspiracy to seduce a young lady; for the object in itself, however immoral, would be only the subject of an action on the case at the suit of the father; R. *v.* Ld. Grey and others, 3 St. Tr. 519; 1 East P. C. 460. And yet this has been holden indictable, although no artifice was employed, and the lady was a willing participator in the elopement planned by the defendants; *ib.*; see also R. *v.* Delaval and others, 3 Burr. R. 1434.

"The great difficulty," say the commissioners for revising the statutes of New York, "in enlarging the definition of this offence, consists in the inevitable result of depriving the courts of equity of the most effectual means of detecting fraud, by compelling a discovery under oath. It is a sound principle of our institutions, that no man shall be compelled to accuse himself of any crime, which ought not to be violated in any case. Yet such must be the result, or the ordinary jurisdiction of courts of equity must be destroyed, by declaring any private fraud, when committed by two, or any concert to commit it, criminal." This view, it is true, is contested by Stebbins, senator, in Lambert *v.* The People, 9 Cow. 669. "But the court is not thereby ousted of its jurisdiction. Because a defendant is not bound to answer certain facts, the plaintiff is not precluded from proving those facts by witnesses, nor is the court precluded from administering the proper relief when the facts are shown. The settled law of that court has always been, that a demurrer to the

discovery sought, is no bar to that part of the bill which prays relief; 3 Johns. Ch. R. 471; 5 *ib.* 186. The amount of the objection then is this: if conspiracies to commit private frauds are criminal, a defendant in equity is not bound to confess such crime. The plaintiff must prove his case by other means than the defendant's confession, and then the court stands ready to relieve him. Surely there is no great hardship in this. It is simply putting the plaintiff upon proof of his cause in that court, in the same manner as he is bound to prove it in every other court."

(*b*) A conspiracy must be by two persons at least; one cannot be convicted of it, unless he has been indicted for conspiring with persons to the jurors unknown; 1 Hawk. c. 72; Turpin *v.* State, 4 Blackf. 72; People *v.* Howell, 4 Johns. 296; State *v.* Allison, 3 Yerg. 428; R. *v.* Kinnersley, 1 Stra. 193; 1 Ld. Raym. 484; R. *v.* Ludbury, 12 Mod. 262; 13 East 412; 2 Salk. 593. So in an indictment for conspiracy against two, the acquittal of one is the acquittal of the other; State *v.* Tom, 2 Dev. 569. But where three persons were engaged in a conspiracy, and one was acquitted and the other died before trial, it was held that the third could nevertheless be tried and convicted; R. *v.* Nichols, 2 Str. 1227; R. *v.* Kennedy, 1 Str. 193; People *v.* Olcott, 2 Johns. Ca. 301. A man and his wife, being in law but one person, cannot be convicted of the same conspiracy, unless other parties are charged; but where the defendant is charged with conspiracy with persons unknown, it is good, notwithstanding the names of the persons unknown must necessarily have transpired to the grand jury; People *v.* Mather, 4 Wend. 231. Where an indictment charged a man and his wife with conspiring with a person unknown, to extort hush money, &c., it was held that A., though alleged by the prosecution to be the person unknown, covered by the indictment, was admissible as a witness for the defence, he not appearing to be a party on the record; Com. *v.* Wood, 7 Law Rep. 58. The jury may find all or some of the defendants guilty of conspiring to effect one or more of the objects specified upon a count charging one conspiracy, and one only, against all the defendants therein named, to effect several illegal objects; O'Connell *v.* Reg., 11 Cl. & Fin. 155; 9 Jur. 25.

It is not necessary that the same co-conspirators should be continued through all the counts. If the proof should make the change prudent, the names may be varied.

(*c*) Where the intent is susceptible of proof, it is prudent specially to aver it.

(*d*) The venue may be laid in the county in which an act was done by any of the conspirators, in furtherance of their common design; R. *v.* Brisac, 4 East 164.

(*e*) It is questionable, whether an allegation that the defendants conspired together for the purpose of doing an act, is equivalent to an allegation that they conspired to do it; see R. *v.* Seward, 3 N. & M. 557; 1 A. & E. 706, S. C.

(*f*) Conspiracies in reference to this part of the indictment, may be classed under the following heads:

I. Conspiracies to commit an indictable offence.

1st. Conspiracies to commit felonies.

2d. Conspiracies to commit misdemeanors, under which division will be treated:

(1). Conspiracies to violate the false pretence laws.

(2). Conspiracies to violate the lottery laws.

(3). Conspiracies to violate the laws making it penal in a debtor to secrete his property with intent to defraud his creditors.

(4). Conspiracies to commit breaches of the peace.

(5). Conspiracies to produce abortion.

(6). Conspiracies to utter forged notes.

(7). Seditious conspiracies.

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

III. Conspiracies to do an act the commission of which by an individual is not indictable, but the commission of which by two or more in pursuance of a previous combination, is calculated to effect either of the following objects:

1st. To defraud an individual by fraudulent and indirect devices.

2d. To commit an immoral act, such, for instance, as the seduction of a young woman.

3d. To prejudice the public generally, as for instance by unduly elevating or depressing the price of wages, of toll or of any merchantable commodity, or endeavouring to defraud the revenue.

4th. To falsely accuse another of crime, or use other improper means to injure his reputation, or to extort money from him.

5th. To impoverish another in his trade or profession.

6th. To prevent the due course of justice.

I. *Conspiracies to commit an indictable offence.*

1st. *Conspiracies to commit felonies.*

Where an indictment charges a conspiracy to commit a felony, using the same words

to set forth the object of the conspiracy as would have been used to charge the commission of the offence itself, no possible exception as to form can be taken. But this is often impracticable, and if it were not, it would be absurd to charge A. and B. with conspiring "with one knife, of the value of one shilling, which he the said A. in his right hand was then and there to have and hold, him the said C. feloniously, &c., to strike," or with conspiring to rob the prosecutor of half a dozen distinct articles which he happened to have in his pocket, but of the value and character of which it would be irrational to suppose the defendant to have been beforehand acquainted. It is enough, therefore, for the pleader to set out the offence aimed at by such apt words as will describe it as a conclusion of law. Thus it is sufficient to say, that the defendants conspired "feloniously, wilfully and of their malice aforethought, to kill and murder," &c., without describing the weapon to have been used; State *v.* Dent, 3 Gill & Johns. 8; or that they conspired "certain goods and chattels of great value, &c., then belonging to and on the person of the said A. B., feloniously to steal," without going on to mention what those goods and chattels were; Com. *v.* Rogers, 5 S. & R. 463; see R. *v.* Higgins, 2 East 5. This liberality, in fact, is extended to every case where an attempt is made to commit an offence itself indictable, whether by one or by a confederacy; Arch. C. P. 5th Am. ed. 262, 485, 487, 458; People *v.* Bush, 4 Hill N. Y. R. 133; Wh. C. L. 80.

Care must be taken in preparing an indictment for this branch of conspiracy, to charge the offence as merely an unconsummated attempt. If either in an overt act or in the body of the count, the commission of the actual offence be charged, the conspiracy merges in the felony, and the indictment is incapable of supporting a conviction; People *v.* Mathers, 4 Wend. 265; Com. *v.* Kingsbury, Mass. 106; Com. *v.* Parr, 5 W. & S. 345.

The policy of our courts, in a kindred line of offences, has permitted a joinder of counts which, though originally discountenanced in England, can work no injustice to the prisoner, and may save great expense and loss of time. Thus, counts for robbery and for attempts to rob; for rape and attempts to ravish; for burglary and attempts to commit burglary, as has been seen, are frequently joined; *ante*, p. 13; Harman *v.* Com., 12 S. & R. 69; Burk *v.* State, 2 Har. & J. 426; State *v.* Coleman, 5 Port. 52; State *v.* Montague, 2 M'C. 287; State *v.* Gaffney, Rice 431; State *v.* Boise, 1 M'M. 190. When the defendant is tried on the two charges together, he has the advantage of bringing to bear on the lighter offence the full number of challenges awarded to him on the heavier; nor can he be said to be embarrassed in the preparation of his defence, as precisely the same evidence which would disprove the attempt, would disprove the consummation. The only difference is, that instead of after an acquittal of the felony being subjected to another binding over and trial on the constituent misdemeanor, the two charges are tried at the same time when the evidence on each side is fresh and at hand, and when neither can take advantage of a discovery of the antagonist case. That this practice extends as properly to conspiracies to commit indictable offences, as to attempts or assaults with intent to commit the same, may be urged with great reason. By such a course the difficulty of merger will be avoided; for if the attempt was completed, the verdict attaches to the felony; if not, to the conspiracy.

2d. *Conspiracies to commit misdemeanors.*

As the law is, that where the object is illegal it is not necessary to set out the means at large; R. *v.* Eccles, in note to R. *v.* Turner, 13 East 230; 2 Russ. on Crimes 687, 691; Wh. C. L. 499; it has become a favourite practice in this country, in preparing an indictment for a misdemeanor, the description of which is attended with any difficulties, to insert a count for a conspiracy. When the evidence of the prosecution is finished, the court will compel it, in a proper case, to state on what class of counts it relies; and when this discretion is judiciously exercised, it is hard to see how the defendant can be embarrassed in management of his defence. Where he is shown to have acted conjointly with others, he cannot justly complain if he is charged with having conspired with them in producing the particular result; and even when his co-conspirators are not brought to the notice of the grand jury, the courts have tolerated counts for conspiracy, in which he is charged with conspiring with persons unknown. This practice of joining counts for conspiracy with counts for the constituent misdemeanor, is strongly illustrated by Com. *v.* Gillespie, 7 S. & R. 469. The defendants were charged in one set of counts with the sale of a lottery ticket, and in another with a conspiracy to sell it; the law being that in an indictment for the offence, the ticket should be particularly set out, and as the ticket is perhaps purposely of a very complex character, it is very convenient for the pleader to back up a count for the individual offence with a count for a conspiracy "to sell and expose to sale and cause to be sold and exposed to sale" (reciting the words of the statute), "a lottery ticket and tickets in a lottery not authorized by the laws of this commonwealth." This was the language of the count, which was sustained by the Supreme Court after a new trial in consequence of a variance in the count purporting to set forth the ticket, and an arrest of judgment for want of particularity in the counts charging the sale of the ticket without an attempt to set it out. After showing that such a generality of statement as appeared in the latter counts could not be

tolerated, Duncan J. proceeded: "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly in the power of the prosecutor to lay with certainty. The conspiracy here was to sell prohibited lottery tickets, any he could sell, not of any prohibited lottery but of all. The conspiracy was the *gravamen*, the *gist* of the offence." The same liberality in the construction of counts for conspiracies to effect objects *per se* illegal, having prevailed in England, 1 Russ. on Crimes 691, the same practice of joining conspiracy counts with counts for the constituent misdemeanor, is there sanctioned; 3 M. & S. 550; 1 Chit. C. L. 255.

A difficulty, however, was started in Massachusetts, in Com. *v.* Kingsbury, 5 Mass. 106, which, had it been generally recognized, would have destroyed this branch of conspiracy. A conspiracy, it was said, to commit either a misdemeanor or felony, merges in the overt act, when such overt act appears to have been consummated. The case before the court was one of a conspiracy to commit a felony, and as no one doubts that in such case the attempt merges in the consummation, the principle announced by the court was properly applied. But to extend it to cases of misdemeanors, is in conflict with the English text books, where such a doctrine is never broached, as well as with the books of precedents, where forms constantly occur of conspiracies to commit misdemeanors to which the overt act is attached. In Massachusetts, in fact, the application of the doctrine of merger to cases of misdemeanor, has been intercepted by Rev. Stat. c. 137, s. 11; Com. *v.* Drum, 19 Pick. 479; Com. *v.* Goodhue, 2 Metc. 193. In New York, Maine and Pennsylvania, the contrary opinion has been justified by express decisions; People *v.* Mather, 4 Wend. 265; Marcy J.; Com. *v.* Hartmann, 5 Barr 60; State *v.* Murray, 15 Maine R. 100; and throughout the Union it has been tacitly acquiesced in by the verdicts which have been sustained in the numerous cases where counts for conspiracy to commit misdemeanors (*e. g.* obtaining goods by false pretences or the sale of lottery tickets), have been supported by evidence of the actual commission of the constituent offence. "It is supposed," said Marcy J., 4 Wend. 265, "that a conspiracy to commit a crime is merged in the crime where the conspiracy is executed. This may be so where the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and where its object is only to commit a misdemeanor, it cannot be merged. Wherever crimes are of equal grade there can be no technical merger. This court had this question under consideration in the case of Bruce, and there intimated an opinion that a conspiracy to commit a misdemeanor, was not merged in the misdemeanor when actually committed."

In those states where conspiracy is made a statutory felony, great difficulty may however arise in trying misdemeanors in all cases where two or more persons are proved to have joined in the commission of the offences. If there was joint action, must there not have been joint concert, and if so, must there not have been a conspiracy, and is not the misdemeanor merged?

Under this class of conspiracies will be treated:

(1). *Conspiracies to violate the false pretence laws.*

The leading case on this point is R. *v.* Gill, 2 B. & Al. 204, in which an indictment which will appear in the text, (p. 344), was sustained, which merely charged the defendants with conspiring "by divers false pretences and subtle means and devices, to obtain and to acquire to themselves, of and from P. D. and G. D., divers large sums of money, of the respective moneys of the said P. D. and G. D., and to cheat and defraud them respectively thereof." This was broad doctrine, as there are few conspiracies to defraud, which could not be forced into the form thus sanctioned, and it is evident that under it the defendant has scarcely any notice of the offence which he is about to meet. So strongly was this objection felt, that notwithstanding the remarks of Ld. Mansfield, that no other form could be had for an undigested conspiracy to obtain goods in this manner, the courts over and again lamented the latitude of the precedent, and attempted in particular cases to so far restrain it as to prevent its working an injury to the defence. Thus in R. *v.* Parker, 11 Law J. N. S. 102, M. C.; 3 Q. B. R. 202; 2 G. & D. 709, Williams J., declared that, "it has been always thought that in Rex *v.* Gill, the extreme of laxity was allowed." In R. *v.* Peck, 9 A. & E. 686, 1 Per. & D. 508, an indictment was held bad from want of a due specification of the means, which charged the defendants with "unlawfully conspiring to defraud divers persons, who should bargain with them for the sale of merchandise, of great quantities of such merchandise, without paying for the same, with intent to obtain to themselves money and other profit." So also a count which alleged that the defendants conspired "by divers false, artful and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve and impoverish E. W. and T. W., and to cheat and defraud them of their moneys," was pronounced by the Court of King's Bench incapable of sustaining a verdict; R. *v.* Biers, 1 A. & E. 327; see also, R. *v.* Parker, 11 Law J. N. S., M. C. 192; King *v.* R., 7 A. & E. 721; cited in Arch. C. P. 798; and R. *v.* Richardson, 1 M. & Rob. 402. In none of

these cases, however, was the object of the conspiracy an offence *per se* indictable, and though in each of them the court animadverted with great pungency upon a laxity of pleading which gave the defendant no notice of what he was to be tried for, yet there was an express recognition of the distinction between a conspiracy to commit an indictable offence, where the means need not be set out, and a conspiracy to commit an act unindictable, where the means must appear. In R. *v.* King, decided in the King's Bench, and afterwards in the Exchequer, in 1844, 7 A. & E. 721, the principle of R. *v.* Gill was broadly affirmed to be good by the several judges; and though the case was reversed in the Exchequer on another point, viz. that the particular parties sought to be defrauded should have been set out (a point which will be noticed in the next note), the judges who gave the opinion in the latter court, yielded a tacit acquiescence in the sufficiency of the allegation in controversy. In the King's Bench, Ld. Denman said: "I am of opinion that this count is sufficient. The general form used in Rex *v.* Gill, 2 B. & Al. 204, has constantly been held good. Holroyd J., says there: 'The conspiracy is the offence, and it is quite sufficient to state only the act of conspiring and the object of the conspiracy in the indictment. Here it is stated that the parties did conspire, and that the object was to obtain by false pretences, money from a particular person. Now a conspiracy to do that would be indictable, even where the parties had not settled the means to be employed.' He does not lay it down that a conspiracy must be alleged to defraud a person described by name. And there are many cases where parties may conspire to injure others, without anticipating who the particular persons will be. I am not prepared, therefore, to say that the first part of this count is not good. But, if it were not so, Rex *v.* Spragge, 2 Burr. 999, shows that the overt acts may support it. The objection, that the individuals mentioned to have been affected by them are not shown to be those against whom the defendants conspired, is answered by the remark made before, that, in the conspiring, particular individuals may not have been contemplated. It was argued that the overt acts limit the allegation in the first part of the indictment, and that, even if that showed a criminal conspiracy, the statements afterwards reduce it to something not indictable. But I think that result does not follow, even if the overt acts alleged are innocent; the only object of those being to give information of the particular facts by which it is proposed to make out the conspiracy, and the mode in which the prosecutor asserts that it was carried into effect. As to the last paragraph, I think it does not contain any distinct charge, but is only an unnecessary summing up."—Patterson J.: "I also think that the count is good. The general rule as to naming parties, laid down by Mr. Starkie, applies only where, from the nature of the case, there is a person to be named; in conspiracy, for example, where the defendants have conspired to injure some given person; but, if the conspiracy is to cheat any persons out of all mankind, the rule cannot be applied. In Rex *v.* De Berenger, 3 M. & S. 67, no one could know who would be the purchasers of stock of a future day. So, here, it was not known whose goods would be obtained in pursuance of the conspiracy; and it appears by the overt acts that the defendants obtained certain goods of A., B. and C., and other goods from 'divers other tradesmen, the liege subjects,' &c., 'whose names are to the jurors unknown,' &c. Therefore, I think that the part of the indictment charging the conspiracy is good, though it does not name the persons to be defrauded. That it does not particularly specify the means, is no objection, according to Rex *v.* Gill. So the indictment stands, independently of the overt acts. As to these, when the present motion was made, I understood the objection to be rather that the overt acts were not consistent with the general charge, than that they were insufficient to support a charge of conspiracy. It is contended that false pretences are alleged, and the pretences not negatived. But no false pretence, in the sense alluded to, is laid throughout the indictment. In the ordinary case of indictable false pretences, the pretence is laid as having been made to the person whose goods are obtained; but that is not so here; the averment is only that some of the defendants pretended that debts were due to two of them from a third, in whose possession the goods were, and then that, in pursuance of the conspiracy, and for the purposes stated, the two commenced actions against the third for such fictitious debts, and obtained judgment and execution, under which the goods were removed before the times of credit had expired. That is a complete allegation of a fraud upon the sellers; and the argument that no such fraud appeared was founded upon a fallacy, the defendant's counsel arguing upon each alleged act without reference to its being laid as done in pursuance of the conspiracy." See also remarks of Ld. Denman C. J., in R. *v.* Kenrick, *post*, p. 344, n. (*j*).

But in a case decided in December, 1846, R. *v.* Gompertz, 11 Jurist 204 (the material portions of which are printed in 6 Pa. L. J. 377, and the indictment in which, and the reasoning of the court upon it, are substantially given *post*, p. 351), the Court of King's Bench, by solemnly affirming R. *v.* Gill, has put to rest the question of the propriety of the indictment in the latter case. There were eight counts in the indictment in R. *v.* Gompertz, the latter of which, as will be observed, charged the defendants with conspiring "by divers false pretences and indirect means to cheat and defraud the said S. P. R. of his moneys, to the great damage, fraud and deceit of the said S. P. R., to the evil example," &c. There

was a verdict for the crown on each of the counts, before Ld. Denman C. J., at the Middlesex sittings, and on December 17, 1846, a motion for a new trial was argued before the court in banc. "First, we think," said Ld. Denman, in giving the opinion of the court, "that there is no ground for arresting the judgment in this case; one count is good, on the authority of R. *v.* Gill (2 B. & Al. 204), never overruled, but founded on excellent reason, and always recognized, though not without regret, because that form of indictment may give too little information to the accused. A fair observation was made upon the manner in which that precedent was treated in R. *v.* Biers (1 A. & E. 327), but, even from the expressions there used, and much more from what has been said in later cases, it appears plainly that the court has never doubted the correctness of the decision in R. *v.* Gill." It is clear, therefore, that in England it is sufficient to charge the defendants with a conspiracy to defraud the prosecutor of his moneys, "by divers false pretences and indirect means;" and the only positive qualifications which have been grafted on the principle, are, *first*, that it must appear from the indictment that the property sought to be obtained was not the property of the defendant; R. *v.* Parker, 11 Law J. N. S. 102, Mag. C.; 3 Q. B. 292; 2 G. & D. 709; and *secondly*, that if the indictment be general, the court will order the prosecutor to furnish a particular of the charges to be relied on, though it will not compel him to state the specific acts to be proved and the time and place at which they are alleged to have occurred; R. *v.* Hamilton, 7 C. & P. 448 (see *post*, p. 351, where the indictment and proceedings in the latter case are given).

In this country, though on the subject of the pleading in conspiracy there has been peculiar fluctuation of judicial sentiment, there is no case which weakens the authority of R. *v.* Gill, but on the contrary, the few decisions which touch the same subject matter, go a great way to confirm it. It is true, that no indictment following the phraseology of R. *v.* Gill, has received judicial notice, but as will be seen when we proceed to examine the subsequent subdivisions of conspiracies to cheat, a degree of latitude has been permitted which can leave but little doubt that the precedent in R. *v.* Gill would be upheld in most of the states, as sufficiently stringent. Thus in Com. *v.* M'Kisson, 8 S. & R. 420, the Supreme Court of Pennsylvania went to the perilous extreme of sustaining a count which merely charged the defendants with conspiring "to cheat and defraud the said J. S. of the aforesaid heifer;" and though recently the same court showed an inclination to retrace its footsteps, yet the last mentioned case rested on the construction of another statute, and will not probably be hereafter extended to cases other than those to which it was originally applied; Com. *v.* Hartmann, 5 Barr 60, cited in full by Judge Lewis in his valuable Treatise on Criminal Law, p. 222.

In Com. *v.* Hartmann, the indictment charged the defendants with conspiring to violate that section of the act of 1842, abolishing imprisonment for debt, which made it a misdemeanor for a debtor to secrete his property with intent to defraud his creditors. How far the indictment shrank below the statutory standard, will be in a few moments examined, the inquiry now being whether there was any thing in the reasoning of the court which would divert the application of the English doctrine to our own practice. After noticing the inadequacy of this indictment to sustain a conviction for the statutory offence, independent of the conspiracy, Gibson C. J. said: "Now, though it may not be necessary in an indictment for conspiracy, so minutely to describe the unlawful act where it has a specific name, which indicates its criminality, yet where the conspiracy has been to do an act prohibited by statute, the object which makes it unlawful can be described only by its particular features, and without doing so, it cannot be shown that the confederates had an unlawful purpose. It may be said that the form of a criminal purpose, meditated but not put in act, can seldom be described; but it can be as readily laid as proved." It is true, that in a preceding passage exception was taken to the omission of the indictment to describe the place where the secreted goods were kept, or the person who had them in custody, or the time and place of the transaction, and it was urged that as a conspiracy to secrete goods abroad, having for its object no infraction of the laws of Pennsylvania, would not be criminal *in* Pennsylvania, such an hypothesis should be distinctly excluded by the record. But it will be no difficult matter to frame a count for a conspiracy, in such a way as to meet these difficulties, without essentially varying from the precedent in R. *v.* Gill. By charging that the defendants conspired "by divers false pretences and indirect means, then and there to cheat and defraud the said A. B. of his goods," &c., describing them as exactly as possible, it is submitted that the technical obstacles arising from Com. *v.* Hartmann, may be surmounted. Certainly, when the exceeding liberality of pleading is considered, which was recognized by the Supreme Court in Com. *v.* Eberle, 3 S. & R. 9; Com. *v.* M'Kisson, 8 S. & R. 420; Com. *v.* Gillespie, 7 S. & R. 469; Com. *v.* Collins, 3 S. & R. 220; Com. *v.* Clary, 4 Barr 210; Com. *v.* Mifflin, 5 W. & S. 461—cases which will be examined more fully under their appropriate heads—the precedent given in R. *v.* Gill, with the qualifications which have been just noticed, must be treated as of as yet unimpaired validity in Pennsylvania.

In Massachusetts, Com. *v.* Ward, 1 Mass. 473; Com. *v.* Tibbetts, 2 Mass. 536; Com. *v.*

Warren, 6 Mass. 72; in Maryland, State *v.* Buchanan, 2 Har. & J. 317; and in South Carolina, State *v.* Dewitt, 2 Hill 282, the reasoning of R. *v.* Gill is virtually recognized. From the action of the Supreme Court of New Jersey in State *v.* Rickey, 4 Halst. 293, a contrary doctrine, it is true, is sometimes attempted to be drawn; but it will appear, first, that in State *v.* Rickey, the indictment was constructed on a different principle from that in R. *v.* Gill, and secondly, that the reasoning of the court in State *v.* Rickey rested principally on the assumption that the revised statutes of New Jersey limited conspiracies to the single act of getting an innocent man *indicted* by malice and false evidence. The indictment charged that the defendants conspired "to obtain large sums of money and bank bills, the property of the President, Directors and Company of the State Bank at Trenton, by means of the several checks and drafts of the said" defendants "respectively, to be drawn on the cashier of the said the President, Directors and Company of the State Bank at Trenton, when they, the said" defendants "had no funds in said bank for the payment of the said checks and drafts." Overt acts followed, none of them showing a specific misdemeanor; and with so lax a statement of the cause of prosecution, there is no ground for surprise that the court thought proper to quash the indictment, even had the statutory objection not obtained. There is no averment that the defendants *knew* they had no funds in the bank; there is no averment that they were to have no funds ready at the time the checks were presented. The indictment was to be treated in the same way as if it had charged the defendants with an attempt to "defraud" an individual by drawing bills on him when they had no funds in his hands. To make the offence a misdemeanor, it would be necessary to introduce averments showing that by some fraudulent means the bank was to be induced to believe that the defendants really *had* funds in its custody. Now it is plain that unless the drawing checks on a bank where the drawer has no funds, is made penal by statute in New Jersey, the indictment in State *v.* Rickey was too broad. It showed a conspiracy to effect an object neither *per se* indictable, nor a misdemeanor at common law. If such had been the case, the indictment, on the ruling of R. *v.* Gill, would have been good. The same reasoning may be applied to Lambert *v.* People, 7 Cowen 167, 9 Cowen 578, where the indictment was even more general, it merely charging the defendants with conspiring "*wrongfully, injuriously and unjustly, by wrongful and indirect means to cheat and defraud*" the prosecutors "of their goods and chattels and effects," &c. This is certainly loose pleading, but bad as it was, it was sustained in the Supreme Court, and the judgment on it only reversed in the Court of Errors, after a vigorous struggle, by a majority of one. An examination of the American as well as the English cases, in conclusion, goes to establish the doctrine of R. *v.* Gill, that in a jurisdiction where the statute of false pretences exists, it is enough to charge the defendants with conspiring "by divers false pretences" to obtain the prosecutor's goods. Strong to this point is the celebrated case of State *v.* Buchanan, 5 Har. & J. 317, where the pleading of conspiracy is reviewed with remarkable ability and elegance; as well as the earlier cases in Massachusetts, Pennsylvania and South Carolina, which have been already cited. (*See two following heads*).

(2). *Conspiracies to violate the lottery laws.*

The only cases in the books, of conspiracies of this class, arise in Pennsylvania, and were produced by the rigour with which the courts in that state applied the doctrine of variance to the setting out of lottery tickets. When the intentional complexity of lottery tickets is taken into consideration, it is no wonder that the pleader, under the pressure of a rule which held "Burrill" for "Burrall" to be a fatal variance in the setting forth of the ticket, should insure before hand against any vices in the statutory count, by adding to it a count for conspiracy. This device was countenanced by the Supreme Court, in Com. *v.* Gillespie, 7 S. & R. 469, a case virtually resting on the authority of R. *v.* Gill, discussed in the previous paragraph. The defendants in Com. *v.* Gillespie were charged, in eight out of nine counts, with the statutory offences of selling lottery tickets, offering them for sale and advertising them—some of the counts setting out tickets in full, others merely charging the sale of "a lottery ticket," &c., in the language of the act. The first count was for a conspiracy to "sell and expose to sale, and cause and procure to be sold and exposed to sale, a lottery ticket and tickets, in a lottery not authorized by the laws of the commonwealth;" therein precisely following the statute. On motion for new trial, and in arrest of judgment, the court held, 1. that the counts, stating the offence in the words of the statute without setting forth the ticket, were bad from want of sufficient particularity; 2. that there must be a new trial on the count setting forth the ticket, in consequence of a variance between the ticket and the indictment; but 3. that the conspiracy count was enough to sustain a conviction at common law. This was in 1822; and in 1827, on a conviction in both classes of counts, on an indictment of the same character (except that there was but one defendant, who was charged with conspiring with others to the grand jury unknown), the court inflicted the statutory punishment, being a fine to the Union Canal Company, on the statutory counts, and a fine at common law on the conspiracy counts; Com. *v.* Sylvester, 6 Pa. L. J. 283. Two points may be extracted from these cases;

1. that though under the lottery statute in force at the time, the indictment must go inside of the words of the statute and set out the tenor of the ticket, yet for a conspiracy to effect the sale of such a ticket, it is enough to pursue the statute alone, without the specification of detail; 2. that the conspiracy, when properly pleaded, absorbs the constituent misdemeanor, and will be punished as a common law offence, without reference to the statutory penalty. The first point is abundantly demonstrated in the argument of Duncan J. After showing, that to transcribe the language of the act was not the proper way to frame a count for the individual misdemeanor, he proceeded to recognize the distinction indicated by Ld. Mansfield in R. *v.* Eccles, between a conspiracy to commit an offence and its actual commission. "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly within the power of the prosecutor to lay with certainty. The conspiracy here was, to sell prohibited lottery tickets, any that he could sell, not of any particular lottery, but of all. The conspiracy was the *gravamen*, the *gist* of the offence;" 7 S. & R. 476. The second point is established by the fact, that though at the time the cases in question were determined, the statutory punishment on the sale of lottery tickets, *was a fine to the Union Canal Company*, the sentence imposed on the conspiracy counts was a fine at common law to the state. This position, however, may be considered as qualified, in Pennsylvania, by Com. *v.* Hartmann, 5 Barr 60, by which it is determined that a conspiracy to commit a statutory offence, is never to be punished more heavily than the offence itself.

(3). *Conspiracies to violate the laws which make it penal in a creditor to secrete his goods with intent to defraud his creditors.*

The 26th section of the New York act "abolishing imprisonment for debt," Sessions Laws of 1831, p. 402, provides that "any person who shall remove any of his property out of any county, with intent to prevent the same from being levied on by any execution, or who shall secrete, assign, convey or otherwise dispose of any of his property with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and any person who shall receive such property with such intent," &c., "shall, on conviction, be deemed guilty of a misdemeanor." This section so far as it goes, was literally transcribed and enacted by the legislature of Pennsylvania in the act of 12th of July, 1842, section 20, but not until it had received, so far as the pleading apart is concerned, a definite construction by New York courts in the case of People *v.* Underwood, 16 Wend. 546. That case (which is given in substance *ante*, p. 229), sanctioned the form of indictment previously in use, which has been placed in the text; *ib.* In New York, therefore, a conspiracy to violate the provisions of this act would be good which follows the language of the precedent given *ante*, p. 229. In Pennsylvania, under Com. *v.* Hartmann, which was noticed in the last section of the present note, the same particularity is required, it being held that an indictment charging the defendant with "removing and secreting divers goods and merchandises of the value of $5000, the description, quantity and quality of the said merchandises being yet unknown," is bad. "Neither time, place nor circumstances," said the chief justice, "is given, and the goods are not attempted to be described by the place where they were kept or by the person who had them in custody. They may even not have been in the state, and a conspiracy to secrete them abroad, having for its object no infraction of our laws, would not be criminal at home. It is not averred even that the defendants had any merchandise at all, here or elsewhere; and unless they had it, a conspiracy to conceal it would have been a conspiracy to do what was impossible. It might be inferred from the motive imputed, that they had it; but Hawkins says (b. 2, c. 25, s. 60), that 'in an indictment, nothing material shall be taken by intendment or implication.' Nor are all the creditors named whom the defendants are charged with having conspired to defraud. The prosecutors are named 'with divers other persons' not named; but, unless the additional clause were rejected as surplusage at the trial, the accused would be called upon to defend themselves in the dark."

(4). *Conspiracies to commit breaches of the peace.*

An indictment for this character will be found in the text, and perhaps indirectly within the same general class may be regarded cases which will be subsequently considered in another relation, viz. conspiracies to hiss an actor from the stage, Clifford *v.* Brandon, 3 Campb. 369, and to prevent by violent means the introduction of the English language into a church; Com. *v.* Eberle, 3 S. & R. 9.

(5). *Conspiracies to produce abortion.*

Counts falling under this head, which were sustained by the Supreme Court of Pennsylvania in Com. *v.* Demain, 6 Pa. L. J., will appear in the text. In consequence of the immorality of the overt act, which would make a conspiracy to commit it in any of its phases indictable, it is unnecessary to aver specifically in what stage of pregnancy was the mother, or what were the instruments to be used. Perhaps, however, if the conspiracy was unexecuted, it would be better, as in all cases of unexecuted conspiracies, on a principle which will be discussed more fully hereafter, for the grand jury to aver that they are unable to set out the particulars of the plan, because it was never carried into execution.

(6). *Conspiracies to publish forged notes.*

An indictment for a conspiracy of this nature was sustained in Clary *v.* Com., 4 Barr 210, and will appear hereafter in the text. Such an indictment on the authority of this case is good where the bank is foreign and no overt act is stated.

(7). *Seditious conspiracies.*

This branch of conspiracies will be fully examined under the head of treason and sedition.

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

This class is here separately mentioned because it has usually been placed under a distinct head by text writers, though on principle it is difficult to distinguish it from cases where an offence conspired to be committed is the direct and immediate object of the conspiracy. In one case the defendants conspire to commit an indictable offence for the sake of itself, in the other they conspire to commit it for the sake of some other object; but where the cases usually put under the first head are analyzed, they will be found, many of them, to fall under the second. Thus in a conspiracy to produce the marriage of a young woman by coercion, to procure an appointment by corruption, to make a change in government by seditious means, together with many parallel cases, the end is indifferent, but the means constitute the offence. It is enough to say, therefore, that as the conspiracy rests in each case on the alleged indictability of the constituent misdemeanor, such misdemeanor must in every instance be expressed with the same degree of accuracy; see 1 Leach 38; 3 Burr. 439; 1 Wils. 41; 8 Mod. 321.

III. *Conspiracies to do an act, the commission of which by an individual is not indictable, but the commission of which by two or more in pursuance of a previous combination, is calculated—*

1st. *To defraud an individual by fraudulent and indirect devices; Wh. C. L.* 494, *et seq.*

2d. *To commit an immoral act, such for instance as the seduction of a young woman; Wh. C. L.* 488.

3d. *To prejudice the public or the government generally, as for instance, by unduly elevating or depressing the prices of wages, of toll, or of any merchantable commodity, or by defrauding the revenue; Wh. C. L.* 488, *et seq.*

4th. *To falsely accuse another of crime, or use other improper means to injure his reputation, or extort money from him; Wh. C. L.* 486.

5th. *To impoverish another in his trade or profession; Wh. C. L.* 487, *et seq.*

6th. *To pervert the course of justice.*

Indictments falling under each of these heads will be found in the text, and the authorities arising under them will be presently examined. There are, however, one or two general principles, extracted from the authorities, which it is desirable to consider in advance.

1. Where the conspiracy is executed, it is better that the facts should be stated specially, so that not only will the record present a graduated case for the sentence of the court, but the case when it goes to the jury, will not be open to the objection that where the grand jury have it in their power from the examination of the witnesses for the prosecution, to find specially the agency through which the conspirators were to work, they confined themselves to a general finding of an unexecuted conspiracy. It is not pretended that any of the cases go so far as to prescribe this doctrine, nor is it denied that very frequently, especially in the earlier cases, the courts sustained counts for unexecuted conspiracies (*e. g.* as in cases of conspiracies "to cheat"), where on the trial it turned up that the supposed naked conspiracy had been fully executed, and had resolved itself into an independent misdemeanor. But the judges have lately been veering to the doctrine, as will presently appear, that not only ought the defendant to receive all practicable notice, but that between an attempt or a conspiracy to commit an offence, and the offence itself, there may be a variance; and if so, it will be more prudent for the pleader when he has before him a case of consummated conspiracy *to commit an offence not per se indictable*, to set forth the facts specially. This is fully done in some of the precedents in the text, especially in the cases arising under the Bank of the United States' prosecutions in Baltimore. (*See post, p.* 354).

2. Where the conspiracy is unexecuted, and nothing more is likely to appear in evidence than a mere undigested confederacy on the part of the defendants to do the particular act, it would seem prudent to explain the fact of the non-setting out of the features of the offence, by stating that it never was consummated, and that thereby the jury were uninformed of its particular character. Thus for instance, after considering the cases which will presently be examined, as well as those which have already been cited, no one can doubt that a conspiracy to cheat A. B., or to cheat the citizens of the state or city, is indictable, notwithstanding there is nothing disclosed on the part of the conspirators by which the particular agency through which they were to operate can be pleaded. But in the recent case of R. *v.* King, 7 A. & E. 807, Tindal C. J. very pointedly intimates that where the prosecutor is shown to have had it in his power to describe any of the objects of the conspiracy, a failure to do so is a sensible defect; and the leaning of his reasoning is to the position that

where a material gap exists, the pleader should aver specially the reasons why the description of the offence is not complete. That this course is pursued in indictments for forgery, where the grand jury are unable to describe the possession of the forged instrument from the fact of its loss or destruction, is shown *ante*, p. 132; and perhaps the same reasoning applies to the present case with equal exactness. At all events, it would seem more prudent in cases of unexecuted conspiracy, where the object is a thing not *per se* indictable, to excuse by proper averments the non-setting forth of the ingredients of the offence. Whenever the court deem it necessary, a bill of particulars will be ordered which will supply the defendant with the facts on which the prosecution rests to establish the general offence; see R. *v.* Kenrick, per Ld. Denman C. J., *post*, p. 344, n. (*j*). (*See for form of same, post, p.* 351, n. (*n*).)

The learning on the subject is luminously exposed by Shaw C. J., in Com. *v.* Hunt, 4 Metc. 125: "Several rules," he said, "upon the subject, seem to be well established, to wit, that the unlawful agreement constitutes the gist of the offence, and therefore that it is not necessary to charge the execution of the unlawful agreement; Com. *v.* Judd, 2 Mass. 337. And when such an execution is charged, it is to be regarded as proof of the intent, or as an aggravation of the criminality of the unlawful combination.

"Another rule is a necessary consequence of the former, which is, that the crime is consummate and complete by the fact of the unlawful combination, and, therefore, that if the execution of the unlawful purpose is averred, it is by way of aggravation, and proof of it is not necessary to conviction; and therefore the jury may find the conspiracy, and negative the execution, and it will be a good conviction.

"And it follows as another necessary legal consequence, from the same principle, that the indictment must, by averring the unlawful purpose of the conspiracy, or the unlawful means by which it is contemplated and agreed to accomplish a lawful purpose, or a purpose not of itself criminally punishable, set out an offence complete in itself without the aid of any averment of illegal acts done in pursuance of such an agreement; and that an illegal combination, imperfectly and insufficiently set out in the indictment, will not be aided by averments of acts done in pursuance of it.

"From this view of the law respecting conspiracy, we think it an offence which especially demands the application of that wise and humane rule of the common law, that an indictment shall state, with us much certainty as the nature of the case will admit, the facts which constitute the crime intended to be charged. This is required to enable the defendant to meet the charge and prepare for his defence, and, in case of acquittal or conviction, to show by the record the identity of the charge, so that he may not be indicted a second time for the same offence. It is also necessary in order that a person charged by the grand jury for one offence, may not substantially be convicted on his trial of another. This fundamental rule is confirmed by the declaration of rights, which declares that no subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally described to him.

"From these views of the rules of criminal pleadings, it appears to us to follow, as a necessary legal conclusion, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offence, which is intended to be charged, consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood or other criminal or unlawful means, such intended use of fraud, force, falsehood or other criminal or unlawful means, must be set out in the indictment. Such, we think, is, on the whole, the result of the English authorities, although they are not quite uniform; 1 East P. C. 461; 1 Stark. C. P. 1, (2d ed). 156; opinion of Spencer, senator, 9 Cow. 586, *et seq.*

"In the case of a conspiracy to induce a person to marry a pauper, in order to change the burden of her support from one parish to another, it was held by Buller J., that, as the marriage itself was not unlawful, some violence, fraud or falsehood, or some artful or sinister contrivance must be averred, as the means intended to be employed to effect the marriage, in order to make the agreement indictable as a conspiracy; Rex *v.* Fowler, 2 Russ. on Crimes (1st ed.) 1812; S. C. 1 East P. C. 461.

"Perhaps the cases of The King *v.* Eccles, 3 Dougl. 337, and The King *v.* Gill, 2 B. & Al. 204, cited and relied on as having a contrary tendency, may be reconciled with the current of cases, and the principal on which they are founded, by the fact, that the court did consider that the indictment set forth a criminal, or at least an unlawful purpose, and so rendered it unnecessary to set forth the means, because a confederacy to accomplish such purpose, by any means, must be considered an indictable conspiracy, and so the averment of any intended means was not necessary.

"With these general views of the law, it becomes necessary to consider the circumstances of the present case, as they appear from the indictment itself, and from the bill of exceptions filed and allowed.

"One of the exceptions, though not the first in the order of time, yet by far the most important, was this:

"The counsel for the defendants contended and requested the court to instruct the jury that the indictment did not set forth any agreement to do a criminal act, or to do any lawful act by any specified criminal means, and that the agreement therein set forth did not constitute a conspiracy by any law of this commonwealth. But the judge refused so to do, and instructed the jury that the indictment did, in his opinion, describe a confederacy among the defendants to do an unlawful act, and to effect the same by unlawful means; that the society, organized and associated for the purposes described in the indictment, was an unlawful conspiracy against the laws of this commonwealth; and that if the jury believed, from the evidence in the case, that the defendants or any of them, had engaged in such a confederacy, they were bound to find such of them guilty.

"In setting forth specially conspiracies of this class, enough must appear to enable the court to determine the offence to be contrary to the policy of the law.

"An indictment for conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained, is also bad for generality; R. *v.* Richardson, 1 M. & Rob. 402. A conspiracy 'to defraud the creditors of W. E.' is too general; R. *v.* Fowle, 4 C. & P. 492. Where a count for an indictment charged the defendants with conspiring to deceive and defraud divers of her majesty's subjects who should bargain with them for the sale of goods, of great quantites of such goods, without making payment or satisfaction for the same, with intent to obtain profit and emolument to defendants (not stating with particularity what the defendants conspired to do), it was held bad, as not showing that the conspiracy was for a purpose necessarily criminal; R. *v.* Peck, 9 A. & E. 686. A count charging that the defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emoluments to themselves, is bad, for omitting to show in what respect the deed was false and fraudulent; R. *v.* Peck, 9 A. & E. 686. An indictment stating merely that the defendants conspired 'by false, artful and deceitful stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve and impoverish' the prosecutor, was too general and indefinite; R. *v.* Biers, 3 N. & M. 475; 1 A. & E. 327, S. C. But an indictment charging that the defendants conspired 'by divers false pretences and subtle means and devices, to obtain and to acquire to themselves, of and from P. D. and C. D., divers large sums of money of the respective moneys of the said P. D. and C. D., and to cheat and defraud them respectively thereof,' was held sufficient, for the gist of the offence being the conspiracy, if that fact and its object be stated, the particular means and devices need not be set out; R. *v.* Gill, 2 B. & Al. 204. A count for a conspiracy which charged that T. and B. conspired to cause certain goods which had been and were imported and brought into the port of London, from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to the queen, to be carried away from the port and delivered to the owners without payment of a great part of the duties, with intent thereby to defraud the queen, not further describing the goods or the means of effecting the object of the conspiracy, was held sufficient on motion in arrest of judgment; Reg. *v.* Blake, 6 Q. B. R. 126. So an indictment charging conspiracy 'to defraud J. W. of divers goods, and in pursuance of the conspiracy defrauding him of divers goods, to wit, of the value of £100,' is good, without specifying such goods; 1 Chit. Rep. 698; and the court in such case will not, according to the English practice, call upon the prosecutor to deliver a particular of such goods; and an indictment for conspiracy to defraud divers persons seems sufficient without stating their names; R. *v.* Biers, 1 A. & E. 337; R. *v.* De Berenger, 3 M. & S. 75; 3 N. & M. 475; 4 C. P. 492. The third count of an indictment to obtain money on false pretences, charged the offence in general terms as a conspiracy to cheat the prosecutor of his money, without setting out the false pretences. The evidence was that the prosecutor was told by the defendant that the horses in question had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horse-dealer, &c. All these statements were false, the defendants knowing that nothing but a belief of their truth would have induced the prosecutor to make the purchase. The conspiracy was proved; it was held that this count was sufficient, and that it charged an indictable offence; Reg. *v.* Kenrick, 12 Law J. N. S., M. C. 135. The fourth and fifth counts of the same indictment charged the obtaining of money by false pretences; the evidence was that the defendant in order to induce the prosecutor to make the contract of purchase, made the false pretence aforesaid respecting the horses sold, and thereby induced him to buy; and it was held that these counts were good, and that the liability to an action did not of itself furnish any answer to the indictment; *ib.* In O'Connell's case, a count charging in substance a conspiracy 'to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining by means of the exhibition and demonstration of great physical force

at such meetings, changes in the government, laws and constitution of this realm,' was held by all the judges not to show with sufficient certainty the object of the defendants to be illegal; R. *v.* O'Connell, 11 Cl. & Fin. 15; 9 Jurist. 30. So in Maryland, an indictment charging first, an executed conspiracy, falsely, &c., by wrongful and indirect means to cheat, defraud, &c., the Bank of the United States; and secondly, charging a conspiracy only (as before), where one of the defendants was president of the office of discount, &c., of the bank, and another the cashier of the office, and another a director of the mother bank, was held to allege sufficiently in each count, a punishable conspiracy at common law; State *v.* Buchanan, 5 Har. & J. 317. The same doctrine, in two instances, was held in Pennsylvania; Collins *v.* Com., 3 S. & R. 220; Com. *v.* M'Kisson, 8 S. & R. 420. But the case which goes further is one in Pennsylvania, in which the Supreme Court sustained a count which merely averred that the defendants conspired 'to cheat and defraud J. S. of the aforesaid heifer.' 'There may be confederacies,' said Gibson J., in giving the opinion of the court, 'which are lawful, and you must therefore set forth some object of the confederates which it would be unlawful for them to attain either singly, or which, if lawful singly, it would be dangerous to the public to permit to be attained by the combination of individual means; for it is the object that imparts to the confederacy its character of guilt or innocence; and of the nature of each object, and the bearing which the various kinds of it may have on the question in different cases, it is at present necessary to say no more than that where it is the doing of an act which would be indictable, it would undoubtedly render the confederacy criminal. But in stating the object, it is unnecessary to state the means by which it is to be accomplished, or the acts that were to be done in pursuance of the original design; they may in fact not have been agreed on. You need not set forth more of the object than is necessary to show it from its general nature, to be unlawful; for that is all that is necessary to determine the character of what is in truth, essentially and exclusively the crime, the confederating together; and this is proved by the precedents produced on the part of the commonwealth;' Com. *v.* M'Kisson, 8 S. & R. 420."

Where the act only becomes illegal from the means used to effect it, so much must be stated as will show its illegality, and charge the defendant with a substantive offence. In an indictment for a combination to marry paupers, in order to throw the burthen of maintaining them on another parish, it is necessary to show that some threat, promise, bribe or other unlawful device was used, because the act of marriage being in itself lawful, the procuring it requires this explanation in order to be charged as a crime; 1 A. & E. 706, S. C.; R. *v.* Fowler, 1 East's P. C. 461, 462; R. *v.* Seward, 3 N. & M. 557. In such case it is essential to show the intent of the combination, by stating that the husband was a pauper, and the wife legally settled in the parish from which she was taken; R. *v.* Tanner, 1 Esp. Rep. 306, 307; R. *v.* Edwards, 8 Mod. 320.

Where an indictment charged the defendants with conspiring to cause goods which had been imported, &c., and in respect of which certain duties of customs were payable to the queen, to be carried away from port without payment of duties, with intent to defraud the queen in her revenue of customs, and there were also counts charging the defendants generally, with conspiring to defraud the queen of duties, by false and fraudulent representations of the value and nature of the goods; it was held, that the gist of the indictment being the conspiracy, the indictment was sufficiently certain, without showing what the goods were, or what duties were payable on them; R. *v.* Blake, 13 Law J. N. S., M. C. 131.

(*g*) It is important to set forth the names of the parties to be injured, unless a good reason be given for their non-specification. Thus in R. *v.* King, 7 A. & E. 806, Tindal C. J., said: "The second and more important objection was, that the indictment itself was bad; and we are all, upon consideration, of opinion that this objection must prevail. Mr. Pashley for the plaintiffs in error, argued that the indictment was bad because it contained a defective statement of the charge of conspiracy; and we agree that it is defective. The charge is, that the defendants below conspired to cheat and defraud *divers* liege subjects, being tradesmen, of their goods, &c.; and the objection is that these persons should have been designated by their christian and surnames, or an excuse given, such as that their names are to the jurors unknown; because this allegation imports that the intention of the conspirators was to cheat certain indefinite individuals, who must always be described by a name or a reason given why they are not; and, if the conspiracy was to cheat indefinite individuals, as for instance those whom they should afterwards deal with or afterwards fix upon, it ought to have been described in appropriate terms, showing that the objects of the conspiracy were, at the time of making it, unascertained, as was in fact done in the case of Rex *v.* De Berenger, 3 M. & S. 67, and The Queen *v.* Peck, 9 A. & E. 686; and it was argued that, if, on the trial of this indictment, it had appeared that the intention was not to cheat certain definite individuals, but such as the conspirators should afterwards trade with or select, they would have been entitled to an acquittal; and we all agree in this view of the case, and think that the reasons assigned against the validity of this part of the indictment are correct."

Conspiracy to rob.

That defendants being persons of evil minds and dispositions (with divers others, &c.), on, &c., at, &c., unlawfully and wickedly did conspire, combine, confederate and agree together in and upon one A. B., in the peace of God and of the commonwealth then and there being, feloniously to make an assault, and him the said A. B. in bodily fear and danger of his life then and there feloniously to put, and the goods and chattels, moneys and property of the said A. B., from the person and against the will of the said A. B., then and there feloniously and violently to steal, take and carry away, to the evil example, &c.

Conspiracy to murder, with an attempt to induce a third party to take part in the same.(*i*)

That H. D., late of, &c., and J. S., late of, &c., not having the fear of God before their eyes, but being moved and seduced by the insti-

(*h*) It is usual to set out the overt acts, that is to say, those acts which may have been done by any one or more of the conspirators, in pursuance of the conspiracy, and in order to effect the common purpose of it; but this is not absolutely requisite, if the indictment charge what is in itself an unlawful conspiracy; R. *v.* Seward, 1 A. & E. 706; 3 N. & M. 557, S. C.; and see R. *v.* Gill, 2 B. & Al. 204; 1 East P. C. 461. The offence is complete on the consummation of the conspiracy, and the overt acts, though it is the practice to set them forth, may be either regarded as matters of aggravation, or discharged as surplusage; O'Connell *v.* R., 11 Cl. & Fin. 15; Collins *v.* Com., 3 S. & R. 220; State *v.* Buchanan, 5 Har. & J. 317; State *v.* Cawood, 2 Stew. 360.

How far the overt acts can be taken in to aid the charging part, was considered by Tindal C. J., in the Exchequer Chamber, in King *v.* R., 7 A. & E. 807.

"But it was then urged by the learned counsel for the crown that, supposing these objections to be well founded, this defect in the allegation of the conspiracy was cured by referring to the whole of the indictment, the part stating the overt acts as well as that stating the conspiracy; and Rex *v.* Spragge, 2 Burr. 999, was cited as an authority, that the whole ought to be read together. The point decided in that case appears to have been merely this, that, in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet, if the rest of the indictment contains a good charge of a misdemeanor, the indictment is good. Ld. Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without probable cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient; and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common law misdemeanor; King *v.* R., 7 A. & E. 806, 808.

"But if we examine the allegations in this indictment, there is no sufficient description of any act, done after the conspiracy, which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and, if it is that, because it is averred to have been done in pursuance of the conspiracy before mentioned, it must be taken to be an equivalent to an averment that the conspiracy was to cheat the named individuals of their goods; the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A., in the execution of an ulterior purpose to cheat B. of his goods. And, secondly, another answer is, that, if the averment is to be taken to be equivalent to one, that the goods were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named individuals of their goods, it would still be defective as not containing a *direct and positive* averment that he did conspire to cheat and defraud those persons, which an indictment for a conspiracy, where the conspiracy itself is the crime, ought certainly to contain. The averment describing the offence ought to be direct and positive."

(i) From Mr. Bradford's precedents.

gations of the devil, on, &c., at, &c., did intend, combine, conspire and agree together a certain F. M., in the peace of God and this commonwealth then and there being, feloniously to kill and murder; and the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said H. D. and J. S., in the prosecution of such their wicked and diabolical intention and agreement, at the day and year aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, did labour, instigate, solicit, entice and endeavour to persuade a certain T. O. to aid, assist and abet them the said H. and J. in accomplishing and fulfilling their said wicked intentions, and in the felony and murder by them intended to be committed. And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said H. D., on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, in the further prosecution of such his wicked intentions aforesaid, did offer and promise to give unto the said T. O., a new suit of wearing apparel and six hundred dollars, if he the said T. would admit him the said H., secretly and in the night time, into the dwelling house of the said F. M., that he the said H. might then and there feloniously kill and murder the said F. M., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiring to cheat prosecutor by divers false pretences and subtle means. First count.(*j*)

That T. K. the elder, late of, &c., horse-dealer, and T. K. the younger, late of, &c., horse-dealer, being evil disposed persons, and

(*j*) R. *v.* Kenrick, 5 A. & E. N. S. 49. This count, which is substantially the same with that of R. *v.* Gill, 2 B. & Al. 204, is fully discussed in the note at the foot of page 334. In the present case, Ld. Denman said: "This was an indictment for a conspiracy, containing five counts. Of these the two last were given up by the counsel for the prosecution, on account of an objection wholly unconnected with that made to the others now to be considered. The third ran in the following form. (His lordship then read the third count). The fourth and fifth charged the defendants with obtaining money by false pretences, which were set forth.

"It was contended, in the first place, that the third count was bad by reason of uncertainty, as giving no notice of the offence charged. The whole law of conspiracy, as it has been administered at least for the last hundred years, has been thus called in question; for we have sufficient proof that during that period any combination to prejudice another unlawfully, has been considered as constituting the offence so called. The offence has been held to consist in the conspiracy, and not in the facts committed for carrying it into effect; and the charge has been held to be sufficiently made in general terms describing an unlawful conspiracy to effect a bad purpose.

"This form of indictment was formally questioned in Rex *v.* Gill, 2 B. & Al. 204, and was, upon discussion, held good; nor has that decision been overruled. The indictment in Rex *v.* Eccles, stated in a note there, is equally general.

"There have not been wanting occasions when learned judges have expressed regret that a charge so little calculated to inform a defendant of the facts intended to be proved upon him, should be considered by the law as well laid. All who have watched the proceedings of courts are aware that there is danger of injustice from calling for a defence against so vague an accusation; and judges of high authority have been desirous of restraining its generality within some reasonable bounds. The ancient form, however, has kept its place, and the expedient now employed in practice of furnishing defendants with a particular of the acts charged upon them, is probably effectual for preventing surprise and unfair advantages. Doubts have also been expressed how far an indictment for conspiracy may be maintained where the object of it was of a very trivial nature, or where the whole matter might be thought to sound in damage, not in crime. Ld. Ellenborough

seeking to get their living by various subtle, fraudulent and dishonest practises, on, &c., with force and arms, at, &c., together with divers other evil disposed persons, unlawfully, fraudulently and deceitfully did combine, conspire, confederate and agree together, by divers false pretences and subtle means and devices to obtain and acquire to themselves, of and from one G. W. F., divers large sums of money, of the moneys of the said G. W. F., and to cheat and defraud him thereof, to the great damage of the said G. W. F., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

Like the first, except that the conspiracy, &c., was alleged to be "to obtain and acquire to the said T. K. the elder" (only), of and from the said G. W. F., &c.

Third count.

(*Like the second, only substituting*): "T. K. the younger," *for* "T. K. the elder."

Conspiracy to defraud by means of false pretences and false writings in the form and similitude of bank notes; the overt act being the uttering a note purporting to be a promissory note, &c., and to have been signed, &c.(*k*)

That the defendants on, &c., at, &c., falsely, unlawfully and wickedly did conspire, combine, confederate and agree among them-

in Rex *v.* Turner, 13 East 228, would not permit parties to be convicted of a conspiracy for effecting so slight an object as a trespass by following the game on another's land. The same learned judge, in Rex *v.* Pywell, 1 Stark. N. P. C. 402, stopped the case on the trial of an indictment for a conspiracy, where the fraud to be accomplished appeared to be such as would more properly be the foundation of a civil action on the warranty of a horse. But if, in the case of Rex *v.* Turner, 13 East 228, the meditated injury, instead of ending with a trespass, had been planned for the purpose of seizing the land-owner, or driving him from the country, we have no reason to think that the learned judge would have condemned an indictment for a conspiracy to effect that object. In the case of Rex *v.* Pywell, 1 Stark. N. P. C. 402, the acquittal was directed, not because an action might have been brought on a warranty, but because one of the two defendants, though acting in the sale, was not shown to have been aware that a fraud was practised. His lordship said, 'that no indictment in a case like this could be maintained without evidence of concert between the parties to effectuate a fraud.' Ld. Tenterden also is supposed to have thrown some doubt on the common form of indictment for conspiracy in Rex *v.* Fowle, 4 C. & P. 592; but the indictment there departed from the common form, charging a conspiracy 'to cheat and defraud the just and lawful creditors' of F., but not saying, 'of their moneys,' or of any thing. This objection could not have escaped that learned judge, though two others only, and those less weighty, are ascribed to him by the reporter; that it does not state what was to be done, or who was to be defrauded. Even that indictment, however, he permitted to be tried; and the defendants were acquitted for want of evidence. If they had been convicted, and the judgment arrested, the case of Rex *v.* Gill, 2 B. & Al. 204, would have remained untouched. Nor does Ld. Tenterden say anything which indicates his dissatisfaction with it. The indictments in Rex *v.* Richardson, 1 M. & Rob. 402, and Regina *v.* Peck, 9 A. & E. 686, which were held bad, were satisfactorily distinguished in the argument, from that in Rex *v.* Gill, 2 B. & Al. 204."

(*k*) Collins *v.* Com., 3 S. & R. 220.

Tilghman C. J.: "It is said, that it is no offence, to conspire to defraud people by notes purporting to *have been* promissory notes, and *to have been signed*, &c.; because nobody could be imposed on, unless the note purported *to be* a promissory note at the time of passing it. This is a nice distinction. It would have been more proper to have said, purporting *to be* a promissory note, &c.; but, as to the expressions, *to have been signed*, &c., they are strictly proper, because the act of signing was previous to the act of passing, and therefore, when passed, the notes did in truth purport *to have been signed*. But there are

selves to deceive and defraud, and to cause to be deceived and defrauded, divers of the citizens of the Commonwealth of Pennsylvania, of great sums of money, by means of false pretences and false, illegal

other expressions charging an unlawful conspiracy; the plan is described, as an agreement, confederacy, &c., to defraud by means of false pretences and false writings, in the *form and similitude of bank notes*, &c., so that upon the whole, it sufficiently appears, that there was an unlawful conspiracy. Besides, the overt act is charged with strict propriety; the note uttered and paid to Preston, is described as purporting *to be a promissory note*, &c., and *to have been signed*, &c. But it is objected, that the passing of this note was the act of Collins alone, for which the other defendants are not answerable. It would have been so, had it not been done in pursuance of the project in which they were all engaged; but it is laid in the indictment as having been done, 'according to and in pursuance of the conspiracy, combination, confederacy and agreement among themselves had, as aforesaid,' &c. The act of one, therefore, is to be considered as the act of all. It is also objected, that it does not appear that Preston was defrauded of any money, or other property. That is of no importance, the note was paid to him *for the purpose of defrauding him*, which makes the offence complete, whether he was actually defrauded or not."

Gibson J.: "In this indictment the fact of confederating is the gist of the offence. The overt acts charged to have been done in pursuance of the conspiracy, are only matters of aggravation, and not necessary to the consummation of the crime; which would be well laid if all the overt acts were omitted. If this were an indictment for cheating, instead of conspiring to cheat, the argument in behalf of the defendant below, might possibly have weight: but I am not aware that in a case like the present, it is at all necessary to set out the false tokens or pretences with which the cheat was intended to be effected. A confederacy to cheat, generally, would be indictable before any means should be devised to carry the unlawful purpose into execution; Regina *v.* Best, 2 Ld. Raym. 1167. And where the act is *unlawful*, there is no occasion to state the means by which it is to be effected; but where it only becomes illegal from the means employed to execute it, so much must be stated as will show its illegality. In the Crown Circuit Companion, there is a precedent of an indictment against the curate and officers of a parish, for a conspiracy to cheat sufferers by fire, out of money collected by a brief for their use; in which the fraudulent intent is stated generally, without specifying any preconcerted means of carrying it into effect. And in 3 Chitty's Criminal Law 615, there is a count for a general conspiracy to defraud, without stating any overt act. But if it were necessary to set forth the nature of the false pretences, this indictment contains a sufficient description of them, even if the part objected to were struck out. To say that the defendant defrauded 'divers of the citizens of Pennsylvania of great sums of money, by means of false pretences, and false, illegal and unauthorized paper writings, in the form and similitude of bank notes, which paper writings were of no value,' would be a sufficient description of the false pretences, in an indictment for cheating. But it is objected, that these writings are further described as purporting to *have been* promissory notes for the payment of money, and to *have been* signed, &c., without any averment that they were so at the time the confederacy was formed; and, consequently, that it does not appear that those writings, unaided by false representation, could be effectual instruments in the execution of the fraudulent design, which, if effected by a naked lie, would not be indictable as a cheat. But that conclusion does not follow. A counterfeit bank note, although without a signature, and, although it should not strictly purport to be a promissory note for the payment of money, may, very readily, be the successful means of perpetrating a fraud on the unwary, who are as much under the protection of the law as the most acute. In Gover's case, Sayer Rep. 206, the defendant was indicted for cheating, by assuming the character of a merchant, and producing 'to I. S. several paper writings, which he falsely affirmed to be letters from Spain, containing commissions for jewels, &c., to the amount of £4000, by means whereof he got into his hands two watches, the property of I. S.,' without any distinct averment that the paper writings *purported* to be such; and it was held good. But taking it that the law would be otherwise, if this were an indictment for cheating, would a conspiracy be less criminal in legal estimation, because the means agreed on to carry the unlawful design into execution, were not like to prove effectual! It is no excuse for a conspiracy to carry on a malicious prosecution, that the indictment was defective, or that the court before whom it was found, had no jurisdiction; although, in either case, the defendant never was in jeopardy; Hawk. b. 1, c. 72, s. 3. The devising of means is not a constituent part of the offence, but an act done in pursuance of the original design. This remark also applies to the remaining objections, which relate to the manner of setting forth a variety of instances of fraud, *actually perpetrated* by means of the simulated paper writ-

and unauthorized paper writings in the form and similitude of bank notes, which said paper writings were of no value, and purported to have been promissory notes, bearing different dates, for the payment of divers sums on demand, by the Ohio Exporting and Importing Company, at their bank in Cincinnati, and to have been signed by Z. S. as president, and J. L. as cashier; when in verity and in truth, no such banking company existed, and that according to and in pursuance of the conspiracy, combination, confederacy and agreement among themselves had as aforesaid, the said T. C. afterwards did fraudulently, unlawfully and deceitfully offer and pay to one J. P., for the purpose of deceiving and defrauding him the said J., for and as a good, genuine and lawful bank note, one of the aforesaid false, illegal and unauthorized paper writings, in the form and similitude of a bank note, partly written and partly printed, purporting to be a promissory note for the payment of ten dollars by the Ohio Exporting and Importing Company, to N. W., or bearer, on demand, at their bank in Cincinnati, bearing date the fifteenth day of January, in the year of our Lord one thousand eight hundred and sixteen, and to have been signed by Z. S. as president, and J. L. as cashier, he the said T. C. did then and there, to wit, on, &c., well knowing that no such bank existed at Cincinnati or elsewhere, as the Ohio Exporting and Importing Company, and that the said note purporting to be a bank note issued by the said company, was of no value, &c.

Conspiracy to cheat prosecutor by inducing him to buy a bad note.

That B., late of and W., late of &c., being persons of wicked and fraudulent minds and dispositions, and wickedly devising and intending to cheat and defraud the said O. D. of his money, goods, chattels and property, on at G., in the County of W. aforesaid, unlawfully, wickedly and deceitfully did conspire, combine, confederate and agree together to cheat and defraud the said O. D. of his money, goods, chattels and property as aforesaid, under a false and

ings before described; and not to the original hatching of the plot. On the second point I concur with the rest of the court: the law has been frequently settled as stated."

Duncan J.: "It is objected, that the fact as charged is not indictable; that the sentence is erroneous. The objection is, that the indictment states that the notes purported to have been signed and to have borne date at different days, in the past tense, and though they might have purported to be so, that it did not necessarily follow that they were so, when they were uttered and passed. The conspiracy was 'to cheat and defraud, by certain papers purporting to have been signed by certain persons, and at certain times; and that Collins, in pursuance of this conspiracy, did utter and pay these papers, purporting to have been so signed and so to bear date;' this appears to me a sufficient and satisfactory setting forth of these papers. It was not necessary to set them forth verbatim, it was only necessary to state what they purported to be. The allegation is, that they purported to be what they were not. That is the substance of the offence, and it is substantially charged. It is again objected, that the act done by Collins, is not the act which the defendants are alleged to have conspired to do. Now the conspiracy was to deceive and defraud divers citizens of this commonwealth, by means of these papers, and the charge is, that Collins did, in pursuance of such conspiracy, &c., utter and pay; the overt act laid, was the act they combined to do. It was not a conspiracy to commit one act of fraud on an individual, but on all on whom they could practise this imposition. It is further objected, that no actual fraud is alleged to have been perpetrated; the act of fraud was his uttering and paying these notes; they were uttered and paid as good and genuine notes of a certain bank, the defendant well knowing there was no such bank."

deceitful colour and pretence of said B.'s securing to be paid unto the said O. D., three hundred and forty-one dollars and thirty cents, by endorsing and transferring to the said O. D., a certain promissory note made by one M. G., by which note the said M. G. promised to pay B., or order, three hundred and forty-one dollars and thirty cents on demand; and the jurors, &c., do further present, that the said B., in pursuance of and according to the said conspiracy, did, on (at in the county of aforesaid), wickedly and fraudulently pretend to the said O. D., that the said M. G. was solvent and able to pay the said note, and that the said O. D. would be in no danger of losing the sum of money contained in said note, by taking the assignment thereof, at the risk of the said O. D. collecting the contents from the said M. G., without resorting to the said B. as endorser, and that the said W., in further pursuance of and according to the conspiracy aforesaid, afterwards, to wit, on at aforesaid, falsely and deceitfully represented to the said O. D., that he the said W. was the said M. G., the maker of the said note, and that the said W. had then two hundred dollars in money for the purpose of paying in part the contents of said note, and that in case the said O. D. would purchase the said note of the said B., he the said W. would thereupon immediately pay the sum of two hundred dollars to the said O. D., in part payment of the said note, and would pay the remainder in a short time thereafter. And the jurors aforesaid, upon their oath, &c., do further present, that the said B., in further pursuance of and according to the said conspiracy, assigned and transferred, by force of the said false pretences hereinbefore mentioned; and that he the said B., in further pursuance of and according to said conspiracy, by means of said false pretences, and by force of said assignment and transfer of said note, did wickedly and fraudulently obtain from the said O. D., one horse of the value of thirty dollars, a wagon of the value of thirty dollars, &c., of the goods and chattels of the said O. D.; whereas in truth and fact, the said M. G. was then and there insolvent, and not able to pay the money contained in the said note, which they the said B. and W. then and there well knew; and whereas in truth the said W. was not the maker of the said note, nor liable to pay the same, as was falsely pretended by the said W., to the said O. D., as they the said B. and W. then and there well knew; to the great injury and damage of the said O. D., and against, &c. (*Conclude as in book* 1, *chap.* 3).(*l*)

(*l*) People *v.* Barrett and Ward, 1 Johns. R. 66. On this indictment, in consequence of the suddenly discovered absence of material testimony, the court, on application of the district attorney, withdrew a juror against the defendants' consent. On a subsequent day they were tried and convicted on the same indictment, but on error to the Supreme Court the judgment below was reversed, and they were discharged. Being afterwards re-indicted in a new bill, they answered *autrefois acquit*, to which the attorney-general replied *nul tiel record*. However irregular this plea was under the circumstances—the proper course now being in such case to demur to the plea—the validity of the present indictment was brought before the court. The prosecution rested on the alleged inadequacy of the first indictment to sustain a verdict. After a very zealous scrutiny, however, but one error was proved; but as that was enough to vitiate the indictment, it was held that it could not be pleaded in bar to further proceedings for the same offence. "The defendant's counsel," said Spencer J., "has obviated all the exceptions taken to the indictment but one. There appears to be no *venue*, either expressly or by implication, as to the fraudulent representa-

To cheat by indirect means, &c., with overt acts charging false pretences, &c.(m)

That H. G., C. L., W. W., R. W. and F. W., &c., being wicked and evil disposed persons as aforesaid, and devising and contriving, &c., on, &c., with force and arms, at, &c., unlawfully, falsely, fraudulently and deceitfully did conspire, combine, confederate and agree together unlawfully and by indirect means to obtain, acquire and get into their hands and possession, of and from one G. P. R., certain bills of exchange accepted by the said G. P. R., amounting together to a large sum of money, to wit, the sum of seven hundred pounds, and to cheat and defraud the said G. P. R. of the proceeds of the said last mentioned bills of exchange so accepted as aforesaid; that in pursuance of the said last mentioned conspiracy, combination, confederacy and agreement so as aforesaid had and made, the said H. G., C. L., W. W., R. W. and F. W., well knowing that the said G. P. R. was desirous of borrowing a certain sum of money upon certain security possessed by the said G. P. R., to wit, on, &c., at, &c., did falsely pretend, assert and affirm to the said G. P. R., that one W. P. of Paris, in the kingdom of France, and then resident at H. hotel, Piccadilly, in the said County of Middlesex, a friend of the said H. G., and a client of the said W. W., R. W. and F. W., had agreed to lend and advance to the said G. P. R. and H. G., the sum of fifty-five thousand pounds, forty-two thousand five hundred pounds, part thereof, to be received by the said G. P. R., and the sum of twelve thousand five hundred pounds, the remainder thereof, to be received by the said H. G.; and that the said sum of fifty-five thousand pounds was lying waiting for them the said G. P. R. and H. G., at Messrs. H.'s, the bankers of the said W. P.; and that if the said G. P. R. would accept bills of exchange to the amount of five thousand pounds, in addition to a certain other bill of exchange before then accepted by the said G. P. R. for the sum of one thousand pounds, and would also accept a certain other bill of exchange for two thousand pounds, they the said W. W., R. W. and F. W. should and would retain for the said G. P. R., the sum of six thousand pounds out of the said H. G.'s share of the said loan or sum of fifty-five thousand pounds, and should and would also pay and discharge certain claims upon the said G. P. R., amounting to the further sum of two thousand pounds, out of the said G. P. R.'s share of the said loan or sum of fifty-five thousand pounds; by means of which said false pretences in this count mentioned, and in further pursuance of the said last mentioned conspiracy, combination, confederacy and agreement so had and made as aforesaid, they the said H. G., C. L., W. W., R. W.

tions made by B. to O. D. that M. G., the maker of the note, was in solvent circumstances. This representation is the very gist of the indictment; and had the defendant been convicted on it, I should have held the judgment liable to be arrested; for it is a fundamental principle in criminal law that every material fact must be clearly and fully set out, so that nothing can be taken by intendment." This blank is here filled up by the averment in brackets.

(*m*) This indictment was sanctioned by the Court of King's Bench, in R. *v.* Gompertz, December 17, 1846, 11 Jurist 204, (see *ante*, p. 335, n.) The great stress was on the eighth count, which, as well as the other counts, was sustained by the court.

and F. W., afterwards, to wit, on, &c., at, &c., did obtain, acquire and get into their hands and possession, of and from the said G. P. R., certain other bills of exchange accepted by him the said G. P. R., and payable at a future day, for divers other large sums of money amounting in the whole to a large sum of money, to wit, the sum of seven thousand pounds, that is to say, four bills of exchange for the respective sums of one thousand pounds each, two bills of exchange for the respective sums of five hundred pounds each, and one other bill of exchange for the sum of two thousand pounds. Whereas in truth and in fact, the said W. P. of Paris, in the kingdom of France, and then resident at H. hotel, Piccadilly, in the said County of Middlesex, a friend of the said H. G., and a client of the said W. W., R. W. and F. W., had not agreed to lend and advance the said G. P. R. and H. G., the sum of fifty-five thousand pounds, the sum of forty-two thousand five hundred pounds, part thereof, to be received by the said G. P. R., and the sum of twelve thousand five hundred pounds, the remainder thereof, to be received by the said H. G.

And whereas in truth and in fact, no sum of fifty-five thousand pounds was lying waiting for them the said G. P. R. and H. G., at Messrs. H.'s, the bankers of the said W. P.; and whereas in truth and in fact, if the said G. P. R. would accept bills of exchange to the amount of five thousand pounds, in addition to a certain other bill of exchange before then accepted by the said G. P. R., for the sum of one thousand pounds, and would also accept a certain other bill of exchange for two thousand pounds, they the said W. W., R. W. and F. W. would not retain for the said G. P. R., the sum of six thousand pounds out of the said H. G.'s share of the said loan or sum of fifty-five thousand pounds, and would not also pay and discharge certain claims upon the said G. P. R., amounting to the sum of two thousand pounds out of the said G. P. R.'s share of the said loan or sum of fifty-five thousand pounds; and whereas in truth and in fact, there was no such person as W. P. of Paris, in the kingdom of France, and then resident at H. hotel, Piccadilly, in the said County of Middlesex, a friend of the said H. G., and a client of the said W. W., R. W. and F. W.; and whereas in truth and in fact, the said H. G., C. L., W. W., R. W. and F. W., well knew that no advance of money was intended to be made to the said G. P. R. by W. P., or any other person whatsoever; and, on the contrary thereof, the said H. G., C. L., W. W., R. W. and F. W., during all the time last aforesaid, intended only to obtain and acquire to themselves the said several last mentioned bills of exchange so accepted as aforesaid, and to convert the same to their own use, and utterly to cheat and defraud the said G. P. R. of the same, and of the proceeds thereof respectively, to wit, at, &c., to the great fraud, damage and deception of the said G. P. R., &c.

The fourth count charged that the defendants conspired to enable the said H. G. to get into his hands certain bills of exchange accepted by the said G. P. R., and cheat and defraud him of the proceeds thereof, and proceeded to state certain overt acts.

The fifth count charged that the defendants conspired to cheat and defraud the said G. P. R. of divers large sums of money, of the proper moneys of the said G. P. R.; and proceeded to state overt acts.

The sixth count charged that the defendants conspired, by divers false pretences, to cheat and defraud the said G. P. R. of divers large sums of money, of the proper moneys of the said G. P. R.

The seventh count charged that the defendants conspired, by false pretences, to get into their hands divers other bills of exchange accepted by the said G. P. R., and payable at a future day; not stating overt acts.

The eighth count stated that the said H. G., C. L., W. W., R. W. and F. W., being such evil disposed persons as aforesaid, and devising and contriving as aforesaid, afterwards, to wit, on, &c., in the year aforesaid, with force and arms, at G.'s inn aforesaid, in the County of Middlesex aforesaid, unlawfully, falsely, fraudulently and deceitfully did conspire, combine, confederate and agree together, by divers false pretences and indirect means, to cheat and defraud the said G. P. R. of his moneys, to the great damage, fraud and deceit of the said G. P. R., to the evil example, &c.

Conspiracy to cheat by false pretences. First count. Conspiracy "by divers false pretences and subtle means and contrivances" to obtain goods, &c., from prosecutors. Overt acts charging a fraudulent carrying on business by a fictitious name, receiving goods on that basis, and fraudulently concealing the same.(*n*)

That the several defendants "intending to defraud divers of the liege subjects of our lord the king of their goods and merchandise, on, &c.,

(*n*) This is the first count of the indictment in R. *v.* Hamilton, 7 C. & P. 448.

The second count charged that all the defendants, "intending to cheat and defraud divers of the liege subjects of our lord the king of their goods and merchandise," did conspire, "by divers false pretences and subtle means and contrivances, to obtain and acquire to themselves, of and from divers liege subjects of our lord the king, then carrying on business at or near Belfast aforesaid, to wit, J. B. and W. B. (*naming the eight prosecutors*), divers other goods and merchandise of great value, to wit, of the value of £10,000, and to cheat and defraud the said subjects of their said goods and merchandise, to the great damage of the said J. B. and W. B," &c.

The third count was exactly similar to the second, except that it throughout omitted the names of the parties intended to be defrauded.

The fourth count was exactly similar to the third, except that in it the names of John Bell and William Bell were inserted throughout this count, instead of the words "divers liege subjects of our said lord the king, then carrying on business at or near Belfast aforesaid."

The fifth and sixth counts were similar to the fourth, except that in these counts the names of Mr. Stewart and Messrs. Bragg were substituted for those of Messrs. Bell.

The seventh count charged that all the defendants, "intending to cheat and defraud certain persons, then carrying on business at Belfast aforesaid, of their goods and merchandise," did conspire "that the said S. J., otherwise called G. F. H., should fraudulently get into his hands, under colour and pretence of purchasing the same, divers goods and merchandises, of and belonging to certain merchants, then carrying on business at Belfast, and that (all the defendants) should cheat and defraud the said merchants so carrying on business at Belfast, of the said goods and merchandise, to the great damage of the said merchants," &c.

The eighth count charged that the defendants, intending to defraud Messrs. Bell, did conspire that S. J., otherwise called G. F. H., should "fraudulently get into his hands, under colour and pretence of purchasing the same," goods of Messrs. Bell, and that all the defendants "should cheat and defraud" Messrs. Bell of the same.

The ninth, tenth and eleventh counts were similar, substituting the names of Mr. Stewart, Messrs. Bragg and Mr. Makinson for those of Messrs. Bell.

The twelfth count charged that all the defendants, "intending to cheat and defraud divers of the liege subjects of our lord the king of their goods and merchandises," did con-

at, &c., and within the jurisdiction of the said court, unlawfully, &c., did conspire, with divers other persons unknown, by divers false pre-

spire "by divers false pretences and subtle means and devices, that the said S. J., otherwise called G. F. H., should fraudulently get into his hands divers goods and merchandise of and belonging to the said liege subjects, and that (all the defendants) should cheat and defraud the said liege subjects of their said goods and merchandises, to the great damage of the said liege subjects," &c.

The thirteenth count charged that all the defendants, "intending to cheat and defraud divers liege subjects of our lord the king of their goods and merchandises," did conspire "by false pretences and subtle means and devices to get into their hands divers goods and merchandise, of and belonging to the said liege subjects, of great value, and to cheat and defraud the said liege subjects of the same, to the great damage of the said liege subjects," &c.

In this case a summons having been obtained, calling on the prosecutors to show cause why they should not deliver a particular of the charge:

Bodkin, for the defendants contended, that, from the general nature of the indictment, the defendants could not make their defence without a particular of the charges.

C. Phillips, for the prosecution, submitted that, in a case of conspiracy, the defendants were not entitled to a particular of the charge.

Littledale J., took time to consider, and then made the following order:

"The King *v.* M. Woolf and others.

"Upon hearing Mr. Bodkin, of counsel for the defendants, and Mr. C. Phillips, of counsel for the prosecutors, and upon hearing the attorneys or agents on both sides, I do order that the prosecutors deliver to the defendant, M. Woolf, or his attorney, a particular statement and specific charge, in writing, to be made against the said M. Woolf under this indictment, in order that he may be enabled fairly to defend himself against such charge; and that in the meantime all further proceedings be staid.

"Dated this 5th day of February, 1836.

"J. Littledale."

Under this order the following particular was delivered:

"In the Central Criminal Court.—The King against Mozely Woolf and others.

"In obedience to an order obtained by you, we give you notice, that the statement or charge which is made against you is of conspiracy with Joseph Charles Lyons, Simeon Joseph, otherwise George Frederick Hamilton, Izidore Levinson, otherwise James Roller, Heyman Levin, Morris Levinson and Abraham Hartsane, or one of them, to defraud the several other persons mentioned in this indictment and others, by obtaining from them, through the said Simeon Joseph, otherwise George Frederick Hamilton, large quantities of goods, under the false pretence that the said Simeon Joseph, otherwise called George Frederick Hamilton, was a partner in the firm of Malisius Schneider and Company, of Hamburg, and under the false and fraudulent pretences and means charged in the indictment, that you the said Mozely Woolf, were a party or privy to the said conspiracy, and acted in furtherance thereof; and that you received the said goods so fraudulently obtained or part thereof, with a guilty knowledge, or with reasonable ground to suspect, that they had been fraudulently obtained, and that you did not come by honest and fair means, and in the usual course of fair and honest trade and dealing, into the possession of the said goods; and take notice, that the prosecutors will contend that they are not bound or limited by this notice to giving in evidence any matter which, if this notice had not been delivered, they would have been entitled to give in evidence on the trial of this indictment. Dated this 9th day of February, 1836.

"Yours, &c.

Ashurst & Gainsford.

"Solicitors for the prosecution.

"To Mozely Woolf, one of the above named defendants, and to Mr. Isaacs, his attorney or agent, or whom else it may concern."

A summons was afterwards taken out before Mr. Justice Littledale, for a further and better particular of the charge.

"Adolphus, for the prosecution.—I submit that there ought to be no particular in a case of conspiracy. I am aware that in cases of barratry and of embezzlement (R. *v.* Hodgson, 3 C. & P. 422; R. *v.* Bootyman, 3 C. & P. 300), particulars have been granted; and in a recent case of nuisance a particular was ordered (R. *v.* Curwood, 5 N. & M. 369); but in a case of conspiracy, I believe there is no instance of a particular of the charge having been ordered.

"Littledale J.—Before I made the order for a particular in this case, I conferred with several of the learned judges, and they agreed with me as to the making of the order. It is therefore not my opinion alone; I think you ought in your particular to state either

tences and subtle means and contrivances, to obtain and acquire to themselves of and from divers liege subjects of our lord the king, then carrying on business at or near Belfast, in that part of the united kingdom called Ireland, to wit, of J. B. and W. B., and of W. S., and of H. B. and H. B. the younger, and of G. H., and of T. H., and of C. A., divers goods and merchandises of great value, to wit, of the value of ten thousand pounds, and to cheat and defraud the said subjects thereof." And the jurors, &c., do further present, that the defendant S. J., otherwise called G. F. H., in pursuance of the said conspiracy, did afterwards at Belfast "falsely and fraudulently carry on business, under the style and firm of M. S. and Company, and did fraudulently obtain divers goods and merchandises of great value, to wit, of the value of ten thousand pounds, of and belonging to the said liege subjects of our said lord the king, then carrying on business at Belfast as aforesaid, under colour and pretence of purchasing the same for the said firm of M. S. and Company, to wit, goods and merchandise of the said J. B. and W. B., of the value of one thousand pounds," and (*stating goods of the value of five hundred pounds of each of the other prosecutors*). And the jurors, &c., do further present, that the six other defendants, in further pursuance of this conspiracy, "did afterwards, to wit, on the day and year aforesaid, at London aforesaid, and within the jurisdiction of the said court, fraudulently receive the said goods so obtained by the said S. J., otherwise called G. F. H. as aforesaid, under colour and pretence of having purchased the same, and did fraudulently conceal and secrete the same." And so the jurors

that the goods were obtained by those pretences stated in the first count, or that you should specify what the pretences were.

"Carrington, for the defendant Woolf.—Nothing can be more general than the particular already delivered. It does not limit the charge in any way either to time, place, persons or facts. I submit, that Mr. Woolf should be informed what specific acts he is charged with having done, and also the times and places at which those acts are alleged to have taken place.

"Littledale J.—I do not think that in a case of conspiracy, I ought to compel the prosecutors to state all that.

"Carrington.—The prosecutors add a notice at the end of their particulars, vague as they are, that they do not intend to be bound by them, but that they meant to go into other evidence.

"Littledale J.—The prosecutors should not add that to their particulars. If, after giving particulars the prosecutors give a distinct and separate notice, that they mean to go into other evidence, and the defendants at the trial object to that, and rely upon the particulars, the judge at the trial will decide whether he will receive any evidence beyond the particulars. I think that the ordering of particulars in cases like the present, is a highly beneficial practice, and I also think, that a particular should give the same information that a special count does. The first count in this indictment in my opinion, states enough without any particular; the effect of a particular being, when a count is framed in a general form, to give the opposite party the same information that he would give if there was a special count. I have always understood this to be the rule with respect to particulars in civil cases."

His lordship made the following order:

"The King *v.* M. Woolf, indicted with others.

"Upon hearing Mr. Carrington, of counsel for the defendant, and Mr. Adolphus, of counsel for the prosecution, and by consent, I do order, that the attorneys or agents for the prosecution, deliver to Mr. Isaacs, the defendant, M. Woolf's attorney, a further and better particular of the nature and charge alleged in the indictment in this prosecution. And that in the meantime all further proceedings be staid.

"Dated the 16th day of February, 1836.

"J. Littledale."

aforesaid, upon their oaths aforesaid, do say, that (all the defendants), in manner and by the means aforesaid, unlawfully and fraudulently did obtain from the said J. B. and W. B., W. S., H. B. and H. B. the younger, G. H., T. H. and C. M., respectively, the goods and merchandise aforesaid, and did cheat and defraud them thereof, "to the great damage of the said J. B. and W. B., &c., and against the peace," &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to obtain from prosecutor certain articles under the pretence that defendants were the servants of a third party. Overt acts charging the consummation of the conspiracy.

That J. M'G. and P. M'G, late of, &c., yeomen, being evil and ill-disposed persons and contriving and intending unlawfully, fraudulently and deceitfuly to cheat and defraud one C. G. P., of the city aforesaid, yeoman, on, &c., with force and arms, &c., at, &c., falsely, fraudulently and unlawfully did combine, conspire, confederate and agree together to obtain, acquire and get into their possession of and from the said C. G. P., three pots of kitchen fat of the value of seven shillings and sixpence and five bushels of wood ashes of the value of three shillings and ninepence, under the false colour and pretence that the said J. and P. were the servants of K. and M. of the city aforesaid, tallow chandlers and soap boilers, and employed and authorized by them the said K. and M. to collect kitchen fat and wood ashes for them the said K. and M. And the said J. and P. in pursuance of and according to the conspiracy, combination and agreement aforesaid, so as aforesaid between them had, afterwards, to wit, on the same day and year aforesaid, at the city aforesaid, and within the jurisdiction of this court, falsely, fraudulently, unlawfully and deceitfully did pretend and affirm that they, then and there were the servants of K. and M., tallow chandlers and soap boilers, and that they were employed and authorized by them to collect kitchen fat and wood ashes. And the said J. and P. in pursuance of and according to the conspiracy, combination and agreement aforesaid, afterwards, to wit, on the same day and year aforesaid, at the city aforesaid and within the jurisdiction of this court, by the false pretences aforesaid, did obtain, acquire and get into their possession unlawfully and fraudulently, three pots of kitchen fat of the value of seven shillings and sixpence and five bushels of wood ashes of the value of three shillings and ninepence, of the goods and chattels of the said C. G. P., from the said C. G. P., whereas in truth and in fact, they the said J. and P. were not then the servants of the said K. and M., nor was either of them the servant of the said K. and M., and whereas they the said J. and P. were not then authorized and employed, nor was either of them authorized and employed by the said K. and M. to collect kitchen fat and wood ashes, to the great damage of the said C. G. P., to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiring to get prosecutor's goods by false pretences, &c.(o)

That A. W. and C. J., both now resident in Ipswich in the County of Essex aforesaid, labourers, being evil disposed persons and devising and contriving to cheat and defraud one M. P. of his property, on, &c., now last past, at, &c., with force and arms did unlawfully conspire, combine, confederate and agree together to obtain, acquire and get into their hands and possession of and from the said M. P. a large quantity of women's shoes; and that they the said W. and J. in pursuance of the unlawful conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had, did then and there falsely, fraudulently, unlawfully and deceitfully pretend to and affirm to the said P. that his the said M. W.'s name was W. L., that he the said W. then lived in the town of Gloucester, in the county aforesaid, that he carried on the business of shoemaking in the said town of Gloucester, that he wanted a large number of shoes to ship to the Havana in the West Indies; that he then had a large number of shoes making for his use to be shipped to the said Havana by him, but that they could not be finished and delivered to him so soon as he should have occasion for them, and that he the said M. P. giving credit to and believing the aforesaid false, deceitful and fraudulent pretences and affirmations of the said W. and J., and not knowing the contrary, was induced to and then and there did deliver to the said W. and J. two hundred pairs of women's shoes of the value of one hundred and twenty-four dollars, upon trust and credit; and that the said M. W. in pursuance of and according to the unlawful conspiracy, combination, confederacy and agreement aforesaid, did then and there falsely, deceitfully and fraudulently make counterfeit and fabricate two promissory notes of hand for the sum of sixty-two dollars each, bearing date the day aforesaid, one of which notes was made payable to the said M. P. or his order in thirty days from the said date, the other of which was made payable as aforesaid in sixty days from the said date; and that the said A. W., then and there, in pursuance of and according to the conspiracy, combination, confederacy and agreement aforesaid, did

(o) This count was sustained in Com. *v.* Warren, 6 Mass. 74, and on this account I have introduced it into the text, though I doubt whether it can be held an authority any where except in the state where it was ruled, and even there its weight is very much affected by Com. *v.* Hunt, 4 Mete. 111. In the case of Warren, Parsons J., in disposing of the indictment, said: "The gist of the offence is the conspiracy to cheat Putnam of his shoes, and the defendants might lawfully have been convicted, if the jury were satisfied on legal evidence that they were guilty of the conspiracy charged, although no act done in pursuance of it had been proved; Com. *v.* Judd *et al.*, 2 Mass. R. 329.

"But Warren's intent to defraud Putnam is not denied, and the question is, whether the jury could lawfully infer that Johnson was an associate and confederate in the same fraudulent design. He went with Warren, he was with him in the shop when he received the shoes, and when he gave the fictitious securities. If Johnson gave no evidence to explain his connexion with Warren, whence the jury might infer that it was innocent, they might infer that he was privy to Warren's want of credit, and that he had obtained the shoes fraudulently. If the evidence had rested here, the jury might have pressed it too far; but when it was proved that he received a hundred pair of the shoes, and sold them under a fictitious name, the jury might well infer that as he had his share in the plunder, he was an associate in the villainy by which it was obtained. We cannot, therefore, say that the verdict as to Johnson is against evidence, but the presumption against him is so strong, that the jury were well warranted to infer his guilt in the conspiracy charged."

falsely, deceitfully and fraudulently and with a design to deceive, cheat and defraud the said P., counterfeit, sign and place the said name of W. L. to each of the said notes of hand as and for the true and real name of him the said A. W., and deliver the said notes to said P. as security for the payment of the said shoes, as and for the notes of him the said A. W.; whereas in truth and in fact, the name of said A. W. was not W. L., and whereas in truth and in fact, the said A. did not then live or dwell in the said town of Gloucester, nor did he then or at any other time carry on the business of shoemaking in said town of Gloucester, nor did the said A. W. intend to ship the said shoes to the said port of Havana, nor had he then any quantity of shoes making or expected to be made for him to be shipped to the said Havana, or for any other purpose whatever; but the said W. was then and there a person of no business, property, credit or character whatever, and was an idle, dissolute and fraudulent person. And so the jurors aforesaid, upon their oath aforesaid do say, that the said A. W. and C. J., according to and in pursuance of the unlawful conspiracy, combination, confederacy and agreement aforesaid, him the said M. P. of the aforesaid two hundred pairs of shoes in manner aforesaid, did unlawfully cheat, deceive and defraud, to the great damage of him the said M. P., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against the officers of a bank, for a conspiracy to obtain by fraudulent means, discounts on state stock to a large amount.(*p*)

That by an act of congress of the United States, passed on the tenth day of April, in the year of our Lord &c., at the City of Washington, entitled "an act to incorporate the subscribers to the Bank of the United States," a bank was established and chartered as a corporation and body politic, by the name and style of the "President, Directors and Company of the Bank of the United States," with authority, power and capacity among other things to have, purchase, receive, possess, enjoy and retain to them and their successors, lands, rents, tenements, hereditaments, goods, chattles and effects, of whatsoever kind, nature and quality, to an amount not exceeding in the whole fifty-five millions of dollars; to deal and trade in bills of exchange, gold and silver bullion; and to take at the rate of six per cent. per annum for, upon its loans or discounts, and to issue bills or notes signed by the president and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her or their order, or to bearer.

And that under, and by virtue of the power and authority given to the said directors by said act of congress, an office of discount and deposit of the said corporation was, at the time hereinafter mentioned, regularly and duly established in pursuance of the power contain-

(*p*) This and the following form were sustained by the Court of Appeals of Maryland, in the celebrated case of State *v.* Buchanan; 5 Har. & J. 317. They bear the name of Luther Martin, the attorney-general, &c., and for accuracy and appropriateness of expression, are almost unrivalled. The opinion of the court has been already noticed (*ante*, p. 337), but a careful examination of it is recommended to the student.

ed in said act at the City of Baltimore, in the State of Maryland, aforesaid. (And that G. W. late of the City of Baltimore, merchant, was at the time hereinafter mentioned and before and afterwards, one of the directors of the said Bank of the United States at Philadelphia, to wit, at the City of Baltimore aforesaid). And that J. A. B., late of the City of Baltimore, merchant, was at the time hereinafter mentioned, and before and since, president of the said office of discount and deposit of the said Bank of the United States, in the City of Baltimore. And that J. W. M'C., late of the City of Baltimore, gentleman, was at the time hereinafter mentioned, and before and afterwards, cashier of the said office of discount and deposit of the said Bank of the United States in the City of Baltimore, to wit, at the City of Baltimore aforesaid. (And that the said G. W., so being one of the directors of the said Bank of the United States), and that the said J. A. B., so being president of the said office of discount and deposit of the said bank in the City of Baltimore, and the said J. W. M'C., so being cashier of the said office of discount and deposit of the said bank in the City of Baltimore, being evil disposed and dishonest persons, and wickedly devising, contriving and intending, falsely, unlawfully, fraudulently, craftily and unjustly, and by indirect means to cheat and impoverish the said President, Directors and Company of the Bank of the United States (and to defraud them of their moneys, funds and promissory notes for the payment of money, commonly called bank notes, and of their honest and fair gains to be derived under and pursuant to the said act of congress, from the use of their said moneys, funds and promissory notes for the payment of money, commonly called bank notes), on the eighth day of May, in the year of our Lord, &c., at the City of Baltimore aforesaid, with force and arms, &c. did wickedly, falsely, fraudulently and unlawfully conspire, combine, confederate and agree together, by wrongful and indirect means to cheat, defraud and impoverish the said President, Directors and Company of the Bank of the United States, * and by subtle, fraudulent and indirect means and divers artful, unlawful and dishonest devices and practices, to obtain and embezzle a large amount of money and of promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of current money of the United States, the same being then and there the property and part of the proper funds of the said President, Directors and Company of the Bank of the United States, from and out of the said office of discount and deposit of the said bank in the city of Baltimore, without the knowledge, privity or consent of the said President, Directors and Company of the Bank of the United States, and also without the privity, consent or knowledge of the directors of the said office of discount and deposit of the said bank in the City of Baltimore, for the purpose of having and enjoying the use thereof for a long space of time, to wit, for the space of two months, without paying any interest, discount or equivalent for the use thereof, and without securing the payment thereof to the said corporation. And the more effectually and securely to perpetrate and conceal the same, that the said J. W. M'C. should from time to time falsely and fraudulently † state, allege and represent to the said directors of the said

office of discount and deposit in the City of Baltimore, that such moneys and promissory notes so agreed to be obtained and embezzled as aforesaid, were loaned on good, sufficient and ample security (in capital stock of the said bank, pledged and deposited therefor; and also, should from time to time make and fabricate false statements and vouchers respecting the same; and other property and funds of the said corporation, to be laid before and exhibited to the said directors of the said office of discount and deposit of the said bank in the City of Baltimore). And that the said (G. W.) J. A. B. and J. W. M'C., being such officers of the said corporation as aforesaid, ** did then and there in pursuance of and according to the said unlawful, false and wicked conspiracy and confederacy, combination and agreement aforesaid, by indirect, subtle and wrongful, fraudulent and unlawful means, and by divers artful and dishonest devices and practices, and without the knowledge, privity or consent of the said President, Directors and Company of the Bank of the United States, and without the privity, knowledge or consent of the directors of said office of discount and deposit of the said bank in the City of Baltimore, obtain and embezzle a large amount of money and of promissory notes for the payment of money, commonly called bank notes, the same being the property and part of the proper funds of the said corporation, from and out of their said office of discount and deposit in the City of Baltimore, to wit, the amount and value of one million five hundred thousand dollars, current money of the United States, for the purpose of having and enjoying the use thereof, and did have and enjoy the use thereof for a long space of time, to wit, for the space of two months, without paying any interest, discount or equivalent therefor, and without securing the payment of the said moneys and the said promissory notes for the payment of money commonly called bank notes; and did then and there falsely, craftily, deceitfully, fraudulently, wrongfully and unlawfully keep and convert the same to their own use and benefit, without the knowledge, privity or consent of the said corporation, and without the knowledge, privity or consent of the directors of the said office of discount and deposit in the City of Baltimore; and did then and there the more effectually to perpetrate and conceal the said conspiracy, confederacy, fraud and embezzlement, cause and procure false and fraudulent representations, allegations, statements and vouchers to be made and fabricated, and the same to be exhibited to and laid before the directors of the said office of discount and deposit in the City of Baltimore, by the said J. W. M'C. as cashier of the said office of discount and deposit, respecting the said moneys and the said promissory notes for the payment of money so obtained and embezzled as aforesaid, in which said representations, allegations, statements and vouchers, it was then and there falsely and fraudulently represented, alleged and exhibited, that the said moneys and promissory notes for the payment of money, were loaned on good, sufficient and ample security, in capital stock of the said bank, pledged and deposited therefor. When in truth and in fact no capital stock of the said bank, and no other security was pledged or deposited therefor, as the said G. W., J. A. B. and J. W. M'C. then and there well knew; and that the said false, wicked, unlawful

and fraudulent conspiracy, confederacy and agreement above mentioned, and the said false, wicked, unlawful and fraudulent acts done in pursuance thereof, above set forth, were then and there made, done and perpetrated by the said G. W., J. A. B. and J. W. M'C. in abuse and violation of their duty and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively as such officers of the said corporation aforesaid. And that the said G. W., J. A. B. and J. W. M'C. did then and thereby, falsely, wickedly, fraudulently, wrongfully and unlawfully impoverish, cheat and defraud the said President, Directors and Company of the Bank of the United States, to the great damage of the said president, directors and company, to the evil example of all others in like manner offending, and against &c. (*Conclude as in book* 1, *chap.* 3).

Against same for conspiring to obtain by fraudulent means the temporary use of a large quantity of notes belonging to said bank without paying interest for them.

That the said G. W., so being one of the directors of said Bank of the United States at Philadelphia, to wit, at Baltimore aforesaid; and the said J. A. B., so being president of the said office of discount and deposit of the said bank in the City of Baltimore; and the said J. W. M'C., so being cashier of the said office of discount and deposit of the said bank in the City of Baltimore, being evil disposed and dishonest persons, and wickedly devising and contriving and intending, falsely, unlawfully, fraudulently, craftily and unjustly, and by indirect means to cheat and impoverish the said President, Directors and Company of the Bank of the United States, and to defraud them of their moneys, funds and promissory notes for the payment of money, commonly called bank notes, and of their honest and fair gains to be derived under and pursuant to the said act of congress, from the use of their said moneys, funds and promissory notes for the payment of money, commonly called bank notes, afterwards, to wit, on the eighth day of May, in the year of our Lord, &c., at the City of Baltimore aforesaid, with force and arms, &c., did wickedly, falsely, fraudulently and unlawfully conspire, combine, confederate and agree together by wrongful and indirect means to cheat, defraud and impoverish the said President, Directors and Company of the Bank of the United States, and by subtle, fraudulent and indirect means and divers artful, unlawful and dishonest devices and practices, to obtain and embezzle a large amount of money and promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of one million five hundred thousand dollars, current money of the United States, the same being then and there the property and part of the proper funds of the said President, Directors and Company of the Bank of the United States, from and out of the said office of discount and deposit of the said bank in the City of Baltimore, without the knowledge, privity or consent of the said President, Directors and Company of the Bank of the United States, and also without the privity, consent or knowledge of the directors of the said office of discount and deposit of said bank in the City of Baltimore, for the purpose of having and

enjoying the use thereof for a long space of time, to wit, for the space of two months, without paying any interest, discount or equivalent for the use thereof, and without securing the payment thereof to the said corporation; and that the said false, wicked, unlawful and fraudulent conspiracy, confederacy and agreement above mentioned, were then and there made, done and perpetrated by the said G. W., J. A. B. and J. W. M'C., in abuse and violation of their duty and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively as such officers of the said corporation as aforesaid, to the great damage of the said president directors and company, to the evil example of all others in like manner offending, and against &c. (*Conclude as in book* 1, *chap.* 3).

Against same for conspiring to appropriate several bills of exchange, &c.

Same as count on p. 357, *omitting passages in brackets down to* * *and proceed*: and that in pursuance of and according to the said unlawful, false and wicked conspiracy, confederacy, combination and agreement aforesaid, the said J. W. M'C. did then and there fraudulently, secretly and contrary to the duties of his office, give and deliver over to the said J. A. B., and the said J. A. B. did then and there fraudulently, secretly and contrary to the duties of his office, receive and take, for the purpose of having and enjoying the benefit and use of the same for a long space of time, to wit, for the space of four months, without the privity, knowledge or consent of the said President, Directors and Company of the Bank of the United States, and without the privity, knowledge or consent of the directors of the said office of discount and deposit of the said bank at Baltimore, as aforesaid, and without securing the payment of the value or amount of the same, certain bills of exchange, the number whereof is unknown to the jurors aforesaid, drawn upon a certain person or certain persons in London, to the jurors aforesaid unknown, to the amount in the whole of six thousand and eighty pounds sterling, lawful money of Great Britain, and equal in value to twenty-seven thousand twenty-two dollars and twenty-two cents, lawful money of the United States; which said bills of exchange, he the said J. W. M'C. had previously thereto received and taken, by virtue of his office of cashier as aforesaid, in payment of a debt which was then and there due to the said President, Directors and Company of the Bank of the United States, by the Farmers' and Mechanics' Bank of Georgetown in the District of Columbia, and which said bills of exchange were then and there in the custody and possession of him the said J. W. M'C., he being such cashier as aforesaid, as the property and part of the proper funds of the said President, Directors and Company of the Bank of the United States; and the more effectually to perpetrate and conceal the same, and in further pursuance of the said conspiracy, confederacy, combination and agreement, the said J. W. M'C. did then and there, with the knowledge, privity and consent of the said J. A. B., cause and procure false and fraudulent allegations, representations and statements to be made and fabricated, and exhibit the same to, and lay the same before the directors of the said office of discount and deposit of

the said Bank of the United States in the City of Baltimore, in which said allegations, representations and statements, the said Farmers' and Mechanics' Bank of Georgetown was designedly and falsely represented as owing the aforesaid debt, for the payment of which the aforesaid bills had been previously received and accepted by him, the said J. W. M'C., as aforesaid; and the same J. W. M'C. being such cashier as aforesaid, fraudulently and wickedly and with the privity, knowledge and consent of the said J. A. B., then and there caused and procured that no entry or notice of the receipt of the said bills of exchange, or of the delivery of them to the said J. A. B., should be taken or made in the books of account of the said office of discount and deposit in the City of Baltimore, and that no credit for the said bills of exchange should be given to the said Farmers' and Mechanics' Bank of Georgetown in the said books of accounts; and that the said false, wicked, unlawful and fraudulent conspiracy, confederacy and agreement above mentioned, and the said false, wicked, unlawful and fraudulent acts, done in pursuance thereof, above set forth, were then and there made, done and perpetrated by the said J. A. B. and J. W. M'C., in abuse and violation of their duty and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively, as such officers of the said office of discount and deposit of the said bank, in the City of Baltimore as aforesaid; and that the said J. A. B. and J. W. M'C. did then and there, thereby falsely, wickedly, fraudulently, wrongfully and unlawfully impoverish, cheat and defraud the said President, Directors and Company of the Bank of the United States, to the great damage of the said President, Directors and Company of the said Bank of the United States, to the evil example of all others in like manner offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against same for obtaining money from the bank by means of false entries and a fictitious draft.

Same as count on p. 356, *down to* **, *leaving out passages in brackets, and inserting at* † *the averment* "cause false entries to be made in the books of the said office of discount and deposit, whereby it should be falsely and fraudulently stated and represented, and should falsely and fraudulently," *and then proceed*:

He the said J. A. B., with privity, knowledge and consent of the said J. W. M'C. and without the privity, knowledge and consent of the said President, Directors and Company of the Bank of the United States, and without the knowledge, privity or consent of the directors of the said office of discount and deposit of the said bank in the City of Baltimore, did then and there, in pursuance of and according to the said unlawful, false and wicked conspiracy, confederacy, combination and agreement aforesaid, fraudulently obtain, draw out, take and embezzle, for the purpose of applying the same to his own proper use, and without securing the repayment of the same promissory notes for the payment of money, commonly called bank notes, and moneys to a large amount in the whole, to wit, to the amount of twenty-five thousand dollars, lawful money

of the United States, the property and part of the proper funds of the said President, Directors and Company of the Bank of the United States, entrusted to and managed by the directors of their said office of discount and deposit in the City of Baltimore aforesaid; and that they, the said J. A. B. and J. W. M'C., the more effectually to perpetrate and conceal the same, and in further pursuance of the said conspiracy, confederacy, combination and agreement, afterwards, to wit, on the day and year aforesaid, and at the place aforesaid, did procure and cause to be made false entries on the books of the said office of discount and deposit, falsely representing, and did then and there falsely and fraudulently represent and allege to the directors of the said office of discount and deposit of the said Bank of the United States, that the said promissory notes for the payment of money, commonly called bank notes, and moneys were loaned on good, sufficient and ample security, to wit, on a draft for the payment of a large sum of money, that is to say, a like sum of twenty-five thousand dollars, drawn by a certain commercial firm then carrying on trade and commerce in the City of Baltimore, under the name and style of S. S. and B., upon one D. C. H. of the State of Louisiana, pledged and delivered therefor, which said draft had been remitted to the office of discount and deposit of the said Bank of the United States in the City of New Orleans (which said office last mentioned was then and there legally established at New Orleans, to wit, at Baltimore aforesaid), and that the said office of discount and deposit last mentioned, was truly and justly accountable therefor, whereas in fact and in truth, the said entries so made and procured were false; neither was such draft for the payment of money, nor was any other security pledged or delivered therefor, as they the said J. A. B. and J. W. M'C. then and there well knew; and that the said false, wicked, unlawful and fraudulent conspiracy, confederacy and agreement above mentioned, and the said false, wicked, unlawful and fraudulent acts done in pursuance thereof, above set forth, were then and there made, done and perpetrated by the said J. A. B. and J. W. M'C. in abuse and violation of their duty and the trust reposed in them, and the oaths taken and sworn by them respectively, as such officers of the said office of discount and deposit of the said bank as aforesaid; and that the said J. A. B. and J. W. M'C. did then and there, thereby falsely, wickedly, fraudulently, wrongfully and unlawfully impoverish, cheat and defraud the said President, Directors and Company of the Bank of the United States, to the great damage of the said president, directors and company, to the evil example of all others in like manner offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy and cheat, under pretence of being a merchant, with overt act.(*q*)

That P. R., J. B. and A. F., all late of, &c., yeomen, being persons of evil name and fame and dishonest conversation, and not caring to get their livelihood by honest labour, but by fraud and deceit, main-

(*q*) Drawn in 1790 by Mr. Bradford, then attorney-general of Pennsylvania.

taining their idle course of life, on, &c., at, &c., with force and arms, unlawfully and wickedly among themselves did combine, conspire and agree together one M. E., widow, there resident, of her goods and chattels, to wit, of a large quantity of oaken staves and heading, of the value of fifty pounds, lawful money of Pennsylvania, and more falsely and fraudulently by false pretences, deceit, practice and covin, to cheat, deceive and defraud, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

In pursuance of such their wicked conspiracy, combination and agreement aforesaid, the said P. R., afterwards, to wit, on, &c., deceitfully bargained with the said M. E., to deliver to him, the said P., four thousand nine hundred and fifty hogsheads' staves and two thousand two hundred hogsheads' heading, to the value of fifty-two pounds eighteen shillings and fourpence, and upon such bargaining the said P. R. falsely took upon himself and pretended to be a merchant, resident in the City of Philadelphia, and then and there personated a merchant of Philadelphia as if he had been a true merchant, and that he the said P. would duly pay to the said M. the aforesaid sum when he should be desired so to do, and that the said A. F. then and there took upon himself and pretended to be a labourer, employed and paid by him the said P., to receive and move the said staves and headings, and then and there did falsely affirm to the said M. E., that the said P. was a merchant as aforesaid, and that the aforesaid M. E. giving credit to the said fictitious assumptions, personatings and deceits, did then and there deliver to the said P. R. and A. F., the said staves and headings, of the value aforesaid; whereas, in fact and in truth, the said P. R. was not a true merchant as aforesaid, nor was he used to get his living by buying and selling, nor was the said A. F. a labourer employed and paid by the said P. in manner aforesaid, nor did the said P., A. or J., or either of them, intend or design to pay or satisfy the said M. E. for the said staves, but the same to their own use afterwards, to wit, on the same day and year, fraudulently did dispose and convert, and the said M. of the same did then and there cheat and defraud, to the great damage of her the said M., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That the said J., afterwards, on, &c., in further pursuance of such their wicked intention, in conspiracy and agreement as aforesaid, at, &c., falsely did pretend and affirm to the said M. E. that the said P. R. was a merchant as aforesaid, and that the said P. R. was then sick and had sent him the said J. to purchase a further quantity of staves of her the said M., with an intent to defraud and cheat the said M. of a further large quantity of staves in manner aforesaid, to the evil example of all others in the like case offending, to the great damage of her the said M., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to sell lottery tickets.(*r*)

That defendants, &c., did conspire to sell and expose to sale, and

(*r*) Com. *v.* Gillespie, 7 S. & R. 469; see this form examined *ante*, note to p. 333, 337.

cause and procure to be sold and exposed to sale, a lottery ticket, and tickets in a lottery not authorized by the laws of this commonwealth, against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy for enticing a person to play at unlawful games, &c.(*s*)

That J. D., G. B. and J. D., all late of, &c., yeomen, on, &c., unlawfully, wickedly and deceitfully did combine, conspire and agree together to cheat and defraud one S. B., and his goods and moneys, by art, practice and fraud, into their custody and possession to obtain and get; and in pursuance of such their unlawful and wicked conspiracy and agreement aforesaid, they the said J. D., G. B. and J. D., afterwards, to wit, the same day and year, and at, &c., did challenge and provoke him the said S. B., at a certain unlawful game at cards to play and game for money, and then and there by fraud, deceit, art, practice and covin at the said unlawful game, and by laying wagers thereon, did unlawfully and fraudulently obtain and get into their possession, the sum of six pounds seven shillings and sixpence, of the moneys of the said S. B., and the same moneys then and there did take and carry away, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to make a great riot and to demolish walls, buildings and fences, with overt acts.(*t*)

That A. B., late of, &c., (*naming the other defendants*), together with divers other evil disposed persons, to the jurors aforesaid as yet unknown, heretofore, to wit, on, &c., with force and arms, at, &c., aforesaid, did unlawfully conspire, combine, confederate and agree together unlawfully, riotously and routously to break down, pull down, prostrate, demolish and destroy a certain wall, and certain other erections, buildings, posts, pales, rails and fences of one C. D., there then erected, standing and being near a certain dwelling house and premises of the said C. D., there situate. And the jurors, &c., that in pursuance of the said conspiracy, combination, confederacy and agreement so as aforesaid had, they the said A. B., &c., afterwards, to wit, on, &c., aforesaid, at, &c., aforesaid, with force and arms, did unlawfully, riotously and routously assemble and meet together, near to the said dwelling house and premises of the said C. D., and near to the dwelling houses and premises of divers other liege subjects of the said state, there and being so assembled and met together, then and there unlawfully, riotously and routously did make a great noise, riot, disturbance and affray, and staid and continued there making such noise, riot, disturbance and affray, for a long time, to wit, for the space of five hours, and thereby for and during all that time, there greatly disturbed, disgusted, terrified and alarmed the said C. D. and his wife and family, in the peaceable possession and enjoyment of his said dwelling house and premises, and also greatly dis-

(*s*) Drawn by Mr. Jared Ingersoll, attorney-general of Pennsylvania, in 1789.
(*t*) Dickinson's Q. S. 6th ed. 353.

turbed, disquieted, terrified and alarmed the said other liege subjects of the said state, and residing in the said dwelling houses and premises, and then and there unlawfully, riotously and routously did break down, pull down, prostrate, demolish and destroy great part of the said wall, to wit, twenty perches of the said wall, then and there standing and being, and the materials thereof, to wit, five hundred bricks, of a large value, to wit, &c., unlawfully, riotously, routously and wantonly did cast and scatter into and about the common and public highway of the said state there, to the great damage and terror of the good citizens of said state, and against the peace, &c. (*Conclude as in book* 1, *chap.* 3).

Second count, without overt acts.

That the said A. B., &c., together with divers other evil disposed persons, to the jurors as aforesaid as yet unknown, heretofore, to wit, on, &c., aforesaid, with force and arms, at, &c., aforesaid, did unlawfully conspire, combine, confederate and agree together unlawfully to break down, demolish, prostrate and destroy certain other erections, buildings, posts, pales, rails and fences there then standing, and being the property of and belonging to the said citizens of said state, there then inhabiting and residing, against the peace, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to prevent by force and arms, the use of the English language in a German congregation, and to oppose "with their bodies and lives," and by all means lawful and unlawful, the introduction of any other language but the German. Overt acts, riot and assault.(*u*)

That F. E. et al., on, &c., were members of the German Evangelical Lutheran congregation, in and near Philadelphia. And so being severally and respectively members of the said congregation, they the said F. E. et al., unlawfully and wickedly combining, conspiring and confederating together to acquire for themselves unjust and illegal authority and power in the said congregation, and to distress, oppress and aggrieve the peaceful citizens of this commonwealth, also members of the said congregation, and to prevent them from the free, lawful and proper enjoyment of the rights and privileges thereof, afterwards, to wit, on the day and year aforesaid, at the City of Philadelphia aforesaid, and within the jurisdiction of this court, unlawfully assembled and met together, and being so assembled and met together, did then and there unjustly and unlawfully and oppressively conspire, combine, confederate and agree together to prevent by force

(*u*) Com. *v.* Eberle, Pamph. 218; 3 S. & R. 9. This indictment was prepared by very eminent counsel, and was tried before Yeates J., at Nisi Prius, in 1816. The question whether it set forth an indictable offence, was very warmly argued during trial, but under instructions from the court, the jury found the defendants guilty on both counts. No motion in arrest of judgment was made, though a motion for a new trial was strenuously urged before the court in banc, by the very acute and experienced counsel for the defendants, Mr. Levy and Mr. Rawle. It would seem from this, that the correctness of the indictment was conceded; and in fact, in the opinions of both Tilghman C. J. and Yeates J., the agreement by the defendants to oppose the introduction of the English language "with their bodies and lives," and by all means lawful and unlawful, is treated as constituting an indictable offence, and the overt acts are considered as mere aggravation.

and arms, the use of the English language in the worship of Almighty God among the said congregation, and for that purpose did then and there determine and firmly bind themselves before God, and solemnly to each other, to defend with their bodies and lives, the German divine worship, and to oppose by every means lawful and unlawful, the introduction of any other language into the churches; and the said F. E. et al., and each of them, in pursuance of the said unlawful and oppressive conspiracy, combination, confederacy and agreement so formed and made as aforesaid, afterwards, to wit, on, &c., at the City of Philadelphia aforesaid, and within the jurisdiction of this court, at an election then and there held by the members of said congregation for certain officers of the same, to wit, for elders and wardens, did unlawfully and oppressively, and with force and violence, riotously and routously make and raise, and cause to be made and raised, a great noise, tumult, riot and disturbance, and then and there in further pursuance of the said unlawful and oppressive conspiracy, combination, confederacy and agreement so formed and made as aforesaid, did assault, beat and wound certain members of the said congregation, to wit, for the better carrying on the said unlawful and oppressive conspiracy, combination, confederacy and agreement into effect and execution, to the great damage, oppression and grievance of the members of the German Evangelical Lutheran congregation in and near Philadelphia aforesaid, to the evil and pernicious example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count, omitting overt acts, and charging the mere conspiracy.

Conspiracy to produce abortion on a woman not quick.(*v*)

That the said W. B. T., &c., being persons of evil minds and dispositions, on, &c., at, &c., and within the jurisdiction of the said court, unlawfully and wickedly did conspire, combine, confederate and agree together, in and upon the body of one S. R. S. an assault to make, with a wicked intent, to wit, to cause and procure the said S. to miscarry and to bring forth a certain child, with which she was then big and pregnant, dead, to the great damage of the said S., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count, with overt act.

That the said W. B. T., &c., being such persons as aforesaid, on the day and year aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, combine, confederate and agree together to cause and procure the said S. R. S. to miscarry and to bring forth a certain child, with which she was then big and pregnant, dead, to the great damage of the said S. And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said defendants, in pursuance of and according to the said conspiracy, combination, confederacy and agreement between them the said defendants as aforesaid had on the day

(*v*) These counts were sustained on special demurrer, by the Supreme Court of Pennsylvania, in Com. *v.* Demain, 6 Pa. L. J. See *ante*, p. 338.

and year aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in and upon the body of the said S., then and there being pregnant and big with a certain other child, did make an assault, and her, the said S., then and there did bruise, wound and ill treat, so that her life was thereby greatly despaired of, and a certain instrument made of silver or other metal, in the shape and form of a hook, up and into the womb and body of the said S., then and there wickedly, violently and inhumanly did force and thrust, with a wicked intent to cause and procure the said S., as aforesaid, to miscarry and abort as aforesaid, and to kill and murder the said child, by reason whereof, and by means of which said last mentioned premises, the said child was killed and its life destroyed and taken away in its mother's womb; and the said S., afterwards, to wit, on, &c., in the year aforesaid, miscarried and was aborted of the said child, being a female child, to the great injury of the said S., to the evil example, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy by persons confined in prison, to effect their own escape and that of others.(*w*)

That A. B., C. D. and E. F., all of said B., labourers, on, &c., at, &c., were persons lawfully confined in the commonwealth's prison, situated in B., in the county aforesaid, and then and there lawfully detained in the custody of the keeper of said prison, by divers legal processes then and there in force against them the said A. B., C. D. and E. F., (*state the cause of the detention of each of the defendants*), and that said A. B., C. D. and E. F., unlawfully contriving and intending to effect the escape of themselves and divers other persons, to the said jurors unknown, who were then and there prisoners lawfully confined in the said prison, and in the custody of the keeper thereof, from out of said prison, did then and there conspire, combine, confederate and agree together, unlawfully to effect the escape of themselves the said A. B., C. D. and E. F., and the said other prisoners, then so lawfully confined in said prison, from and out of the same; against, &c. (*Conclude as in book* 1, *chap.* 3).

The same form may be used when the design of the conspirators is to effect their own escape only, and not that of others, by omitting the allegation of divers other persons then and there lawfully confined, &c.

By prisoners to escape; with overt act, attempting to blow up the wall of a prison with gunpowder.(*x*)

That A. B., C. D. and E. F., late of, &c., labourers, at the time next hereafter mentioned, were prisoners lawfully confined in the commonwealth's prison, situated in B. aforesaid, in the county aforesaid, and then and there lawfully detained in the custody of the keeper of said prisoners, by virtue of divers legal processes then in legal force against them; and that the said A. B., C. D. and E. F., contriving and intending to break down, blow up, demolish, prostrate and des-

(*w*) 3 Chit. C. L. 1150.
(*x*) 3 Chit. C. L. 1151; Davis' Prec. 106.

troy a certain part of the wall of said prison belonging to and enclosing the same, and thereby to effect the escape of themselves and of divers other prisoners, then lawfully confined in said prison, and in the lawful custody of the keeper thereof, from and out of the said prison, on the day of now last past, at in the county aforesaid, did unlawfully and wickedly conspire, combine, confederate and agree among themselves for the purpose aforesaid; and that in pursuance of and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had among themselves, they the said A. B., C. D. and E. F. did then and there make and cause and procure to be made a certain large hole and breach in the said wall of the said prison, of the length of six feet, and of the width of six feet; and then and there unlawfully and wickedly put, placed and laid a large quantity of gunpowder, to wit, ten pounds of gunpowder, into the said hole and breach, so as aforesaid made in the wall aforesaid, with intent to set fire to the said gunpowder, and thereby to break down, blow up, demolish, prostrate and destroy part of the said wall, and by the means last mentioned to effect the escape of themselves and the said other prisoners so confined in the said prison, and in the lawful custody of the keeper thereof, from and out of the same, against, &c. (*Conclude as in book* 1, *chap.* 3).

By prisoners to effect their escape; with overt act, breaking down part of the wall of the prison.(*y*)

That A. B., C. D. and E. F., all of labourers, at the time next hereafter mentioned, were prisoners, lawfully confined in the commonwealth's prison situated at B., in the county aforesaid, and then and there lawfully detained in the custody of the keeper of said prison by divers legal processes then in force against them; and that they the said A. B., C. D. and E. F., unlawfully contriving and intending to break down, demolish, prostrate and destroy part of the wall belonging to and enclosing the said prison, and thereby unlawfully to effect the escape of themselves, the said A. B., C. D. and E. F., and divers other prisoners then lawfully confined in said prison, and in the custody of the keeper thereof, from and out of the same, on at in the county aforesaid, did unlawfully conspire, combine, confederate and agree among themselves, and meet together for the purposes aforesaid; and being so assembled and met together, did then and there, in pursuance of the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had among themselves, unlawfully and wickedly begin to break down, demolish, prostrate and destroy part of the said wall, with intent thereby unlawfully to effect the escape of themselves and the said other prisoners so there confined in the said prison, and in the custody of the keeper thereof; against, &c. (*Conclude as in book* 1, *chap.* 3).

(*y*) 3 Chit. C. L. 1151; Davis' Prec. 106.

Conspiracy to impose on the public, by the manufacture of spurious indigo, with intent to sell the same as genuine indigo of the best quality.(z)

That A. B., C. D. and E. F., all of B., in the County of S., labourers, devising and fraudulently intending to acquire and get into their hands and possession the moneys, goods and property of the citizens of this commonwealth, by fraudulent and dishonest means, on, &c., at, &c., did falsely, fraudulently and unlawfully conspire, combine, confederate and agree among themselves, to mix, compound and manufacture certain articles and materials hereafter mentioned, into the form and colour and to the resemblance of good and genuine indigo of the best quality, and of foreign growth and manufacture, with the fraudulent intent and design, that the base materials to be mixed, compounded and manufactured as aforesaid, should be exposed to sale, and that the same should in fact be sold to the citizens of this commonwealth and others as and for good and genuine indigo of the best quality and of foreign growth and manufacture. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., C. D. and E. F., in pursuance of and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had among themselves, on the day and year last aforesaid, at B. aforesaid, in the county aforesaid, did fraudulently mix and compound, with a certain quantity of genuine indigo of foreign growth and manufacture, certain other articles and materials, to wit, starch, blue vitriol, nutgalls, alum and a decoction of logwood, in such quantities and proportion, as thereby to increase the quantity of the aforesaid genuine indigo, when mixed and compounded as aforesaid, to three times the quantity and number of pounds' weight thereof, and having so mixed and compounded the same, did then and there so manufacture and work up the same and the base materials and composition aforesaid, as to give the same the false appearance and resemblance of good and genuine indigo of the best quality and of foreign growth and manufacture, and with the fraudulent intent and purpose, that the purchaser or purchasers thereof should be cheated and defrauded, against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to publish fraudulent bank notes with intent to cheat the public.(a)

That J. W. R., late of, &c., yeoman, and N. C., late of, &c., yeoman, devising and fraudulently intending to acquire and get into their hands and possession, the moneys, goods and property of the citizens

(z) This form is the same as that used in Com. v. Judd, 2 Mass. 329, with the exception of the alterations there recommended by the court. "The latter part of the indictment in this case," says Mr. Davis, (Prec. 105), "is left out of this precedent, which is conformable to the decision of the court. The chief justice and defendant's counsel speak of the *different counts* in the indictment. There was but one count in the indictment, and when the second and third counts are referred to, it can apply only to the different allegations in the body of the indictment, introduced as usual, by the words, 'and the jurors aforesaid, upon their oaths aforesaid, do further present.'"

(a) This form was sustained in Com. v. Clary, 4 Barr 210.

of this commonwealth by fraudulent and dishonest means, on, &c., at Pittsburg, in the county aforesaid, did falsely, fraudulently and unlawfully conspire, combine, confederate and agree among themselves to make, utter and publish certain false, forged and counterfeited bank notes of the Mineral Bank of Maryland, in the form and to the resemblance of good, genuine and true bank notes of the Mineral Bank of Maryland, with the fraudulent intent and design that the said false, forged and counterfeited bank notes of the said Mineral Bank of Maryland, should be uttered, published, paid and passed to the citizens of this commonwealth and others, as and for good, genuine and true bank notes of the Mineral Bank of Maryland, and with intent to cheat and defraud *the President, Directors and Company of the Mineral Bank of Maryland, and*(*b*) divers the good citizens of this commonwealth, *contrary to the form of the act of the general assembly in such case made and provided,*(*b*) to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to defraud the queen by fraudulently removing goods subject to duties.(*c*)

That the defendants wickedly, &c., intending to cheat and defraud the queen, heretofore, to wit, on, &c., at, &c., "did unlawfully and fraudulently conspire, combine, confederate and agree together and with divers other persons," &c., "to cause and procure certain goods, wares and merchandises, which had been and were heretofore imported and brought into the port of London from parts beyond the seas, and in respect whereof certain duties and customs were then and there due and payable to our said lady the queen, to be taken and carried away from the said port, and to be delivered to the respective owners thereof without payment to our said lady the queen of a great part of the duties of customs so then and there due and payable thereon as aforesaid, with intent thereby then and there to defraud our said lady the queen in her said revenue of the customs; in contempt," &c.

(*b*) The italicised passages were held by the court to be surplusage.

(*c*) R. *v.* Blake, 6 A. & E. N. S. 126. The second count charged the defendants with conspiring "by false and fraudulent representations and statements of and concerning the numbers, measures, weights and values respectively, of certain foreign goods, wares and merchandises, which had been and were theretofore imported and brought into the said port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to our said lady the queen, according to the numbers, measures, weights and values respectively, of the said foreign goods, wares and merchandises respectively, to deprive and defraud our said lady the queen of a great part of the said duties of customs so due as aforesaid, in contempt," &c.

The third count charged the defendants with having conspired "by fraudulently and unlawfully omitting and neglecting to make and give a true, full and correct declaration and description of the particulars of the numbers, measures, weights and values respectively, of certain foreign goods, wares and merchandises respectively, which had been and were theretofore imported * and brought into the said port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to our said lady the queen, according to the numbers, measures, weights and values respectively, of the said foreign goods," &c., "respectively to deprive and defraud our said lady the queen of a great part of the said duties of customs so due as aforesaid, in contempt," &c.

The fourth count described the conspiracy to be "to cheat and defraud our said lady the

Conspiracy to cast away a vessel with intent to defraud the underwriters at common law. First count, conspiracy to cast away, &c.(*d*)

That A. B., late of, &c., yeoman, C. D., late of, &c., yeoman, E. F., late of, &c., yeoman, and G. H., late of, &c., yeoman, with other evil disposed persons to the inquest aforesaid unknown, on, &c., at, &c., with force and arms, &c., unlawfully, wickedly, designedly, falsely and fraudulently did conspire, combine, confederate and agree together to cast away, burn or destroy on the high seas and to cause and procure to be cast away, burnt and destroyed on the high seas, a certain sloop or vessel called the Norfolk, whereof one J. R. was then and there master, with an intent then and there to defraud the Delaware Insurance Company of Philadelphia, (*naming the other companies*), to the evil example, &c., and against., &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Conspiracy to defraud the underwriters, and as overt acts in pursuance thereof, loading a vessel with a sham cargo, exhibiting her to the underwriters and fraudulently representing to them that the vessel contained specie, &c.

That the said A. B., &c., with other evil disposed persons to the inquest aforesaid unknown, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, and within the jurisdiction of

queen of divers large sums of money then being due and payable to our said lady the queen in respect of the duties of customs of this realm, in contempt," &c.

Lord Denman C. J.: "I do not feel the smallest doubt that this indictment is good. The charge is for conspiracy to procure imported goods in respect of which duties are payable, to be delivered to the owners without payment. That is the substance of the first count; the fourth count is in effect the same, and may perhaps be liable to the same objection. I cannot think it necessary to specify the goods. It was a matter of evidence what the goods were to which the conspiracy related. The parties might have conspired without knowing what they were; they might have laid their heads together to cheat the queen of whatever customable goods they could pass. The case is not like that cited, of soliciting a custom house officer to neglect his duty. There it was necessary to show that the party solicited was such an officer, that the duty was incumbent on him."

Patteson J.: "The first count shows the offence which is charged as clearly as can be done in a case of this kind. As to a future plea of *autrefois convict* or *autrefois acquit*, the identity of the offence must be the matter of evidence, in ninety-nine cases out of a hundred in the cases of charges of conspiracy.

"We know that a general count for a conspiracy to bring the house of commons into contempt would be good, though the means were not set forth; and, in such a case, the identity of the offence if the party were indicted again, must be made matter of evidence."

Wightman J., Coleredge J. being absent: "I am of the same opinion. In Rex *v.* Gill, 2 B. & Al. 204, the defendants were charged with conspiring by divers false pretences and subtle means and devices to obtain from A. and B. divers large sums of money and to cheat and defraud them thereof, and it was held that the gist of the offence being the conspiracy, it was sufficient only to state the act and its object, and not necessary to set out the specific means. Mr. Cockburn's objection would apply to almost every case of conspiracy to defraud a party of goods. It is true that there might arise some difficulty on a plea of *autrefois acquit* or *autrefois convict*, from the want of particularity in the indictment. That, in most cases, must be supplied by parol evidence; it is very seldom that enough appears on the face of an indictment to enable a defendant to dispense with such proof."

"Rule for arresting judgment refused."

(*d*) Com. *v.* Hollingsworth, Supreme Court, Pennsylvania, November Term, 1821, No. 30. This indictment was framed by eminent counsel, and contained, beside the counts in the text, several others charging conspiracies to defraud distinct insurance companies. The defendants were convicted at a nisi prius held by Tilghman C. J., and a motion in arrest of judgment was overruled by the court in banc.

this court, with force and arms, &c., unlawfully, wickedly, designedly, falsely and fraudulently did conspire, combine, confederate and agree together to defraud the Delaware Insurance Company of Philadelphia, (*naming all the other companies*). And the jurors aforesaid, upon their oaths and affirmations aforesaid do further present, that the said A. B., &c., with other evil disposed persons to the inquest aforesaid unknown, in pursuance of such conspiracy, combination, confederacy and agreement as aforesaid, did then and there load and put on board and cause and procure to be then and there loaded and put on board a certain sloop or vessel called the Norfolk, whereof one J. R. was then and there master, certain boxes, to wit, sixty-one boxes containing pig-iron, hay and rubbish and certain kegs, to wit, four kegs containing lead and hay; and the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said A. B., &c., with other evil disposed persons to the inquest aforesaid unknown, in further pursuance of such conspiracy, combination, confederacy and agreement as aforesaid, did then and there falsely and fraudulently exhibit and produce and cause and procure to be then and there falsely and fraudulently exhibited and produced to the Delaware Insurance Company of Philadelphia, (*naming all the other companies*), false and fraudulent invoices and bills of lading, and did then and there falsely and fraudulently pretend and represent and cause and procure it to be then and there falsely and fraudulently pretended and represented to the Delaware Insurance Company of Philadelphia aforesaid, (*naming all the other companies*), that the said boxes then and there contained true and genuine goods, wares and merchandise, that the said kegs then and there contained true and genuine specie, and that the said sloop or vessel called the Norfolk was then and there bound and intended to be sent and to depart on a voyage from Philadelphia to New Orleans, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Conspiracy to defraud the underwriters by falsely representing to them that a vessel loaded with a sham cargo was loaded with specie, and was the property of defendants.

That the said A. B., &c., with other evil disposed persons to the said inquest unknown, wickedly devising and intending fraudulently to get to themselves of and from the said Delaware Insurance Company of Philadelphia, (*naming all the other companies*), large sums of money, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, with force and arms, &c., did conspire, combine, confederate and agree together falsely and fraudulently then and there to represent and cause and procure to be then and there falsely and fraudulently represented to the Delaware Insurance Company of Philadelphia, (*naming all the other companies*), that they the said A. B., &c., were then and there severally the owners and proprietors of certain goods, wares, merchandise and specie of great value and amount, that they the said A. B., &c., had then and there severally shipped, loaded and put on board a certain sloop or vessel called the Norfolk, whereof one J. R. was then and there master, the said goods, wares and merchandise and specie, that the said sloop or vessel called the Norfolk was then

and there bound and intended to be sent and to depart on a voyage from Philadelphia to New Orleans, and that they the said A. B. then and there severally desired to have and obtain insurance and policies of insurance underwritten upon the said goods, wares, merchandises and specie, for the purpose of guarding against loss or damage from or by reason of storms or other casualties on the voyage aforesaid from Philadelphia to New Orleans; whereas in truth and in fact, the said A. B. et al., had then and there loaded and put on board and caused and procured to be then and there loaded and put on board the said sloop Norfolk, certain boxes, to wit, sixty-one boxes containing pig-iron, hay and rubbish, and certain kegs, to wit, four kegs containing lead and hay, with an intent after having caused and procured policies of insurance on the said pretended goods, wares, merchandise and specie, to be then and there underwritten, to burn and destroy the said sloop or vessel called the Norfolk on the high seas, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Conspiracy to procure the insurance in a particular company, of certain boxes of hay as boxes of dry goods, and then afterwards to cause the vessel to be burned; and in pursuance of the conspiracy, as an overt act, inducing an agent of the underwriters to negotiate for them an insurance.

That the said A. B. et al., with other evil disposed persons to the inquest aforesaid unknown, wickedly devising and intending to get to themselves from the Delaware Insurance Company of Philadelphia, a large sum of money, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid and within the jurisdiction of this court, with force and arms, &c., did conspire, combine, confederate and agree together to cause and procure a policy of insurance to be then and there underwritten by the said Delaware Insurance Company of Philadelphia, in the sum of five thousand dollars, on certain boxes, to wit, on twenty-four boxes containing pig-iron and hay, under colour and pretence that the said boxes then and there did contain dry goods and other true and genuine goods, wares and merchandises, and after the said policy of insurance should be then and there so as aforesaid underwritten, to cause and procure the said boxes to be burnt and destroyed upon the high seas, with intent fraudulently and deceitfully to demand, recover and receive from the said Delaware Insurance Company of Philadelphia, the sum underwritten by them on the policy aforesaid. And in pursuance and prosecution of the said conspiracy, combination, confederacy and agreement, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid and within the jurisdiction of this court, the said E. F. falsely, deceitfully, designedly and fraudulently did pretend and affirm to a certain N. B., and did cause and procure the said N. B. then and there untruly to pretend and affirm to the said Delaware Insurance Company of Philadelphia, that he the said E. F. had then and there shipped and loaded in and on board a certain sloop or vessel called the Norfolk, whereof one J. R. was then and there master, certain boxes of goods, wares and merchandise, to wit, six boxes containing shoes and boots, eleven boxes containing cloths and other dry goods, and seven boxes containing drugs and medicines, altogether

of great value, to wit, of the value of ten thousand eight hundred and eight dollars and one cent, and did then and there cause and procure the said N. B. then and there to request the said Delaware Insurance Company of Philadelphia, then and there to underwrite a policy of insurance in the sum of five thousand dollars upon the said pretended goods, wares and merchandise in and on board the said sloop Norfolk, from Philadelphia to New Orleans, and did then and there cause and procure the said N. B. then and there to produce and exhibit to the said Delaware Insurance Company of Philadelphia, a certain false and pretended invoice of the said pretended goods, wares and merchandise so as aforesaid pretended to have been shipped and loaded in and upon the said sloop Norfolk, and did then and there cause and procure the said Delaware Insurance Company of Philadelphia, then and there to underwrite a policy of insurance in the sum of five thousand dollars, at the rate of two per centum from Philadelphia to New Orleans, upon the said pretended goods, wares and merchandise, as and for true and genuine goods, wares and merchandise, to wit, shoes and boots, cloths and other dry goods, and drugs and medicines, according to the invoice as aforesaid, and as being of the value of ten thousand eight hundred and eight dollars and one cent; whereas in truth and in fact the boxes which the said E. F. so as aforesaid, and in pursuance of the conspiracy aforesaid, caused and procured to be insured as containing true and genuine goods, wares and merchandise, then and there contained only pig-iron, hay and rubbish, which they the said A. B., &c., then and there well knew, to the great deceit and damage of the said Delaware Insurance Company of Philadelphia, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against A., B., C. and D., for a conspiracy to rise upon a vessel and carry her to a port occupied by an enemy, with an overt act; and against E. for comforting and abetting them, &c.(e)

That J. B., otherwise called M. M., R. D., A. D., A. S. and C. E., all late of, &c., yeomen, on, &c., at, &c., unlawfully, secretly and wickedly did consult, combine, conspire and agree together that they, each of them, should go, enter and hire themselves on board a certain sloop or vessel, whereof was the master and commander of the said sloop or vessel, then lying in the river Delaware near the shores of this commonwealth and belonging to some subject or subjects of this state (to the jurors aforesaid unknown), under pretence of serving as seamen on board the said vessel and of faithfully navigating the same, according to the directions of the said and that they, afterwards, to wit, as soon as the said vessel should come and arrive on the open seas and main ocean, should then and there feloniously and piratically make a revolt in the said sloop or vessel and then and there should rise upon, conquer and subdue the said or whoever should be master thereof, and the faithful mariners on board the said vessel, and

(e) Drawn by Mr. Bradford in 1789.

then and there should take, navigate and run away with said sloop or vessel, her tackle, apparel, furniture and cargo to the City and Port of New York, then and yet being in the possession and under the power of the king of Great Britain, the open enemy of this state. And the inquest aforesaid, &c., do further present, that the said J. B., otherwise called M. M., &c., in order to effectuate such their wicked and unlawful conspiracy aforesaid, on the day and year aforesaid at the county aforesaid, did go, enter and hire themselves on board the said sloop or vessel, under the pretences aforesaid and with the intentions and designs aforesaid, contrary to the form of the act of assembly in such case made and provided, to the evil example of all others in the like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

That S. F., late of, &c., in the county aforesaid, widow, not being ignorant of the premises but well knowing the same, on the day and year aforesaid at the county aforesaid, the said J. B., otherwise called, &c., unlawfully and wickedly did receive, harbour and abet, maintain and comfort, and then and there for the maintaining and comforting of the said J. B., otherwise called, &c., meat and drink to him then and there did give and deliver and cause to be given and delivered, and then and there the said J. B., otherwise called, &c., did secrete, harbour and conceal, with intent the due course of justice in this behalf to obstruct and prevent, she the said S. F. then and there well knowing the said J., &c., so as aforesaid to have combined, conspired and agreed with the malefactors aforesaid, &c.

Conspiracy to disturb a party in the possession of his lands, and to deprive him of them.(*f*)

That J. S. C., J. R. M., R. S. C., and divers other persons to the jurors aforesaid as yet unknown, being persons of evil minds and dispositions, on, &c., with force and arms at, &c., unlawfully and wickedly did conspire, combine, confederate and agree together unlawfully and unjustly to disturb, molest and disquiet G. J. in the peaceable and quiet possession, occupation and enjoyment of certain manors, messuages, lands and hereditaments and premises situate and being in the said County of J., of which he the said G. J. then was and for a long time had been peaceably and quietly possessed; and also to deprive him of certain issues and profits arising, issuing and accruing therefrom, and of the rents, issues and profits of certain other lands, messuages and premises situate and being in the said county, whereof certain persons then were in peaceable and quiet possession as tenants of the said G. J. by unlawful means and devices. And the jurors, &c., that the said J. S. C. in pursuance of the said unlawful and wicked conspiracy, combination, confederacy and agreement, and for carrying the same into effect, did afterwards, to wit, on, &c., with force and arms at, &c., break and enter a certain messuage, called Stafford castle, situate in the county aforesaid, whereof the said G. J. had long been and then was in the peaceable and quiet possession. And the

(*f*) Dickinson's Q. S. 6th ed. 355. Found at Stafford Summer Assizes, 1823. Removed into K. B.; see R. *v.* J. S. S. Cooke, 2 B. & C. 618; 5 *ib.* 538; 4 D. & R. 114; 7 *ib.* 673.

jurors, &c., that J. S. C. on, &c., at, &c., did falsely, fraudulently and wilfully affirm to W. H. C. and divers other persons, that he the said J. S. C. had been appointed agent to the said R. S. C. his brother, by the house of peers; whereas in truth, he had not been appointed agent to the said R. S. C. by the house of peers, as he the said J. S. C. then and there well knew. And the jurors, &c., that in further pursuance, &c., said J. R. M. on, &c., at, &c., did unlawfully pretend and assume to hold a court leet and court baron of the manor of F. in the said county, as the steward thereof to R. S. C., whom he had then and there represented to be lord of the said manor, the said G. J. then being in the peaceable occupation of the said manor as J. R. M. then and there well knew, to the great damage of Sir G. J., &c., and contra pacem.

Second count. Exactly similar, without overt acts.

Third count. To cut down timber trees.

That defendants and ten other persons, on, &c., with force and arms, at, &c., did conspire, &c , to cause and procure a large number of timber trees growing and being in certain lands situate in the said County of S., and then and long before in the peaceable possession of certain tenants of the said G. J., and the same then being the property of the said G. J., unlawfully and against the will of the said G. J. to be cut down, felled and prostrated, and to get the same into their possession, and convert and dispose of the timber thereof to their own use. And the jurors, &c., that J. S. C. on, &c., at, &c., did obtain and procure divers labourers to cut down, fell and prostrate divers of the said trees, and the said labourers did accordingly then and there, by his directions, with force and arms, unlawfully and violently break and enter divers, to wit, twenty closes wherein the said trees were growing and being as aforesaid, and unlawfully cut down, fell and prostrate divers, to wit, one hundred of the said trees, and did take and carry away the same, to the great damage, &c.

Fourth count. Exactly the same, without overt acts.

Fifth count. To cheat tenants of rent, by a false claim as landlord.

Did conspire, &c., unlawfully and wickedly to cheat, defraud and impoverish M. R., W. R., J. D. and divers other persons, who then and there lawfully held and enjoyed divers messuages, lands and tenements situate and being in the county aforesaid, as tenants thereof to the said G. J., and unlawfully and fraudulently to obtain from them divers large sums of money, by causing to be believed by the said tenants, that the said R. S. C. had a claim of title to the said messuage, lands and tenements, which was admitted, received and allowed by the said G. J., the landlord of the said tenements, to be good and valid; whereas in truth and in fact, they the said (defendants then and there well knew that the said R. S. C. had not a claim of title to the said messuages, lands and tenements, or any of them, admitted, received or allowed by the said G. J. to be good and valid). And the jurors, &c., that the said J. S. C., on, &c., at, &c., did falsely, fraudulently and wilfully misrepresent to the said J. D., then being a tenant of said G. J. of certain of the said messuages, lands and tenements, and then owing certain rent in respect of the same; and to J. R., the son of the said W. R., who then held certain moneys of his father

who was then tenant of certain of the said messuages, &c., of the said G. J., and then and there owed rent for the same; that he the said J. S. C. then had in his possession a letter of the said G. J., recognizing the justice of the claim of the said R. S. C. to the said messuages, &c. whereas in truth and in fact, the said J. S. C. had not in his possession a letter, &c., (*repeating as above*), as he the said J. S. C. then well knew, and thereby he the said J. S. C. did falsely and fraudulently then and there receive and obtain from the said J. D., a large sum of money, to wit, the sum of pounds of his moneys; and from the said J. R., a large sum of his moneys, to wit, the sum of pounds of the moneys of his said father W. R. And the jurors, &c., that the said J. S. C. on, &c., at, &c., did offer to M. P., then being tenant of the said G. J. of certain messuages, &c., to obtain for her a lease of the premises of which she was then so tenant, from the said R. S. C.; and thereupon he the said J. S. C., then and there in pursuance of the said last mentioned conspiracy, combination, confederacy and agreement, falsely and fraudulently asserted to the said M. P., that the said G. J. had given up all title to the estate whereof the said premises conveyed by the said M. P. were parcel; and also, that he the said J. S. C. had a letter from the said G. J., to prove that he had so given up title to the said estate; whereas in truth and in fact, the said G. J. had not given up all title to the said estate, as he the said J. S. C. well knew; and whereas in truth and in fact, the said J. S. C. had not a letter from the said G. J., to prove that he had given up such title, to the evil example, &c.

Sixth count. Exactly similar to fifth, but without overt acts.

Seventh count. To molest tenants by distresses, &c.

Did conspire, &c., by unlawful and vexatious distresses and threats of the power of the said R. S. C., under the title of Lord S., to molest, disturb and disquiet divers persons, who then and there lawfully held and enjoyed divers messuages, lands, &c., situate in the said county, as tenants thereof to the said G. J. (Overt act by J. S. C., that he "did unlawfully and fraudulently issue and sign as agent to the said R. S. C. by the title of Lord S., a certain warrant of distress for rent on the premises occupied by one P. S., a parcel of the messuages, &c., last aforesaid, as tenant thereof to the said G. J., under and by colour whereof the goods of the said P. S. on the said premises, being of great value, to wit, &c., were afterwards, to wit, on, &c., at, &c., taken and seised as for and in the name of a distress for rent pretended to be due to the said R. S. C. under the title of Lord S. for the said premises);" to the evil example, &c.

Eighth count. Exactly similar, without overt acts.

Conspiracy to obtain goods upon credit, and then to abscond and defraud the vendor thereof.(*g*)

That A. B., C. D. and E. F., all of, &c., in the county aforesaid,

(*g*) Com. *v.* Ward, 1 Mass. R. 473. In the text the overt acts may be omitted, which were treated by the court in their judgment as surplusage. See *ante*, p. 338, as to indictments for conspiracy to commit the statutory offence of secreting goods, &c.

traders, wickedly and unjustly devising and intending one G. H. to defraud and cheat of his goods, property and merchandises, on, &c., at, &c., did falsely and fraudulently conspire, combine, confederate and agree among themselves, to obtain and get into their hands and possession, of and from the said G. H., his goods, property and merchandises upon trust and credit, and then to abscond out of the said commonwealth, and defraud him thereof; and that the said A. B., C. D. and E. F., in pursuance of and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had, did then and there falsely and fraudulently obtain and get into their hands and possession, of and from the said G. H., goods, wares and merchandises of the value of five hundred dollars, upon trust and credit; and in further pursuance of the conspiracy, combination and confederacy aforesaid, so as aforesaid had among themselves, they the said A. B., C. D. and E. F., before the time of payment for the said goods, property and merchandises had arrived, did abscond and go out of the said commonwealth, and did then and there in manner aforesaid, cheat and defraud the said G. H. of his goods, property and merchandise aforesaid. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to defraud an illiterate person, by falsely reading to him a deed of bargain and sale, as and for a bond of indemnity.(*h*)

That A. B., C. D. and E. F., all of, &c., in the county aforesaid, yeomen, unlawfully devising and intending one G. H. to injure, deceive and defraud, and him the said G. H. fraudulently to deprive of his property and estate, on, &c., at, &c., did unlawfully conspire, combine, confederate and agree among themselves, falsely and fraudulently to obtain from the said G. H. a deed of bargain and sale of a certain lot of land in said town of B., called lot No. 20 in said town of B., and that, in pursuance of and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had, they the said A. B., C. D. and E. F. did falsely and fraudulently prepare, make out and fabricate a deed of bargain and sale of the said lot of land, to be signed and executed by him the said G. H., and did then and there falsely and fraudulently present the same to him the said G. H., and did then and there falsely and fraudulently, and in pursuance of the conspiracy, combination, confederacy and agreement aforesaid, read the same to him the said G. H. as a bond and obligation for the sum of seventy dollars, to be given by him the said G. H. to one I. J. as a consideration that he the said G. H. should indemnify the said I. J. against the payment of certain notes of hand which he the said G. H. had before the day aforesaid, made and given to one K. L.; he the said G. H. being then and there an illiterate person, and by reason thereof wholly unable to read the deed, so as aforesaid falsely and fraudulently made out and presented to him, &c.

(*h*) "This precedent (says Mr. Davis, Prec. p. 103), contains the substance of an indictment tried in the Supreme Court of Massachusetts for the County of Kennebec. The original indictment stated the manner in which this fraud was carried into effect; but it is not retained in this precedent, it being unnecessary." A similar attempt at an early period was held indictable; R. *v.* Skirrett, 1 Sid. 312.

Conspiracy to procure the elopement of a minor daughter from her father. First count, charging the conspiracy with an overt act averring that in furtherance of the conspiracy the defendants aided the said minor to elope.(*i*)

That at the time of the commission of the several grievances hereinafter mentioned, and for a long time before, at said county, one J. M. N., a daughter of D. N. and M. his wife, of said county, was a

(*i*) Com. *v.* Mifflin, 5 W. & S. 461. This indictment was sustained on error by the Supreme Court.

The following reasons for a new trial and in arrest of judgment were assigned, which were overruled by the court below, and were assigned for error:

1st. That the matters charged in the bill of indictment are not indictable.

2d. That the matters charged were not sufficiently stated in the bill of indictment, inasmuch as it contains no specification of the means or overt acts by which the purpose was to be effected.

3d. The purpose to be effected, as laid in the bill, was neither criminal or unlawful.

4th. That the object of the conspiracy, as charged, was not criminal.

5th. That the conspiracy is alleged to have been by the defendants *and others to the jury unknown*, and the overt acts to have been by the defendants alone, in pursuance of a different conspiracy, to wit, of a conspiracy by the said defendants alone, *without others* to the jury unknown.

Gibson C. J., after examining the character of the offence, said: "In Rex *v.* Pywell (1 Stark. Rep. 402), a confederacy to cheat in the sale of a horse, was held to be innocent, and in the State *v.* Dickey (4 Halst. 293), it was held that a civil injury, which is not indictable when committed by an individual, does not contract the quality of guilt by being the act of a confederacy. But the contrary was held in the State *v.* Buchanan (5 Har. & J. 317), and in the King *v.* Stratton (1 Campb. 549); a confederacy to deprive the secretary of a trading company of his office, was held not to be indictable only because the company was illegal. These discrepancies show the want of test for doubtful cases; but these are cases of such transcendental wrong and outrage, as leave no doubt of their character; and a confederacy to steal a daughter is not the least of them. It is a denial or contempt of the father's right to counsel and advise; and it is only less atrocious than the conspiracy in the King *v.* Grey (3 St. Tr. 519), and that in the King *v.* Delavel (3 Burr. 1437), to ruin a virgin by enticing her to desert her father's protection, and live in a state of concubinage. A marriage at twelve, which is valid for the sake of the issue, would be scarce less brutal or offensive to the feelings of the family; and why, but to protect the feelings of relatives, was a combination to take up dead bodies, for scientific purposes, which is not essentially immoral, held to be indictable in Rex *v.* Lynn? (2 T. R. 723). But if it would be indictable to procure the elopement of a girl who had just attained the age of consent, at what other age within the period of infancy would such an act be innocent; and how would the law discriminate? It is true that Mr. Justice Bulley was of opinion, in Rex *v.* Fowler (2 East's P. C. c. 11, s. 11), that as the act of marriage is lawful in itself, a combination to procure it can become criminal only by the use of undue means; but the parties, in that case, were *sui juris*, and he left the question, what is undue means, an open one. If the subject of the present indictment is no more than a private wrong, it must pass entirely without rebuke; for it would be easier to find a precedent for a criminal corrective of it, than a civil one. But even a private injury, such as hissing an actor, or impoverishing a man, becomes a public wrong when done in concert; and this was certainly so.

"Even had the precedents not reached the case before us, there would be no reason why the law of conspiracy should stop short of it now, considering the smallness of the point from which it started, and the degree of its subsequent expansion. In Ld. Coke's day it was limited to 'a consultation and agreement between two or more, to appeal or indict a person falsely and maliciously;' 3 Inst., 143; since when, it has spread itself over the whole surface of mischievous combination. I am not one of those who fear that the catalogue of crimes will be unduly enlarged by its progress, seeing, as I do, that it is never invoked except as a corrective of disorder which would else be without one, and as a curb to the immoderate power to do mischief which is gained by a combination of the means. It is true, that there is no recent precedent of an indictment like the present; but had not the 3 Hen. VII. c. 2, and the 39 Eliz. c. 9, provided a more energetic remedy for the offence, common law precedents of indictments for it would have abounded. But were we without even the semblance of a precedent, we could not hesitate to pronounce the act of which the defendants have been convicted, a common law offence."

minor, under the age of twenty-one years, and was dwelling and residing in the family of her said father, and under his paternal care, guardianship, protection, instruction, control, authority and employment. And the said jurors, on their said oaths and affirmations, do further present, that J. M., late of said county, yeoman, R. C. H., late of said county, physician, and D. H. C., late of said county, yeoman, being persons of evil minds and dispositions, together with divers other evil disposed persons, to the jurors aforesaid unknown, on, &c., at, &c., with force and arms, &c., unlawfully, wickedly, falsely, maliciously and injuriously did conspire, combine, confederate and agree together to cause, effect, produce and procure the elopement and escape of the said J. M. N. from the house, family, guardianship, protection, control, care, authority and employment of her said father, the said D. N., without the consent of her said father and against his will; and in pursuance and furtherance, and according to the said conspiracy, combination, confederacy and agreement between them, the said J. M., R. C. H. and D. H. C. as aforesaid had, did on the night between the tenth and eleventh days of June, in the year aforesaid, at said county, entice, persuade, cause, procure and assist the said J. M. N. to elope, escape and depart from her said father's, the said D. N.'s house, family, care, guardianship, protection, authority, control and employment, secretly, covertly and without his leave, consent or approbation and against his will, the said J. then and there still being a minor, under the age of twenty-one years; to the great damage of the said D. N., and of his said minor daughter, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Conspiracy to procure the elopement of the said minor with intent to marry her to one C. K., and overt act charging the elopement, &c.

That the said J. M., R. C. M. and D. H. C., together with divers persons to the jurors aforesaid unknown, being persons of evil minds and dispositions, afterwards, to wit, on, &c., at, &c., with force and arms, &c., unlawfully, wickedly, deceitfully, maliciously and injuriously did conspire, combine, confederate and agree together to cause, induce, persuade and procure the said J. M. N., the said J. then and there being a minor under the age of twenty-one years, and dwelling and residing in the house and family of her father, D. N., and under his paternal care, guardianship, protection, control and authority, to escape, elope and depart from her said father's house, family, care, guardianship, protection and control, without her said father's consent and against his will, with the view, purpose and intent that she, the said J. M. N. might be joined in marriage with one C. K., without the consent and approbation and against the wish and will of the said D. N., and in violation of his lawful and parental rights and authority. And the jurors aforesaid, on their oaths and affirmations aforesaid, do further present, that the said J. M., R. C. H. and D. H. C., with the said other persons unknown, in pursuance and furtherance of and according to the said conspiracy, combination, confederacy and agreement, between them the said J., R. and D. as aforesaid had, did on the night between the tenth and eleventh days of June, in the year aforesaid, and about the hour of one o'clock, at Shippensbury, in said

county, and within the jurisdiction of this court, wickedly, falsely, maliciously, unlawfully and injuriously entice, persuade, cause, procure, aid and assist the said J. M. N. to elope, escape and depart from her said father's house, family, care, guardianship, protection, control and authority, in the company and along with the said C. K., and secretly and without the knowledge, approbation and consent and against the will of the said D. N., with the view, purpose and intent that she the said J. M. N. should be joined in marriage with the said C. K., without the consent and against the will of her said father; and with the same intent and purpose, and in furtherance and according to the said conspiracy, combination, confederacy and agreement, the said J. M., R. C. H. and D. H. C. and other persons unknown, then and there did aid, assist, abet and co-operate with the said J. M. N. and C. K., secretly and covertly to carry away and remove a large quantity of clothing, goods and chattels of the said D., and to place the said J. M. N. and the said goods, chattels and clothing within and upon a certain railroad car then and there passing, so that the said J. might be swiftly and secretly conveyed and carried away and transported beyond the pursuit and protection of her said father, with the intent, view and purpose aforesaid, to the great damage of the said D. N., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to inveigle a daughter from the custody of her parents, for the purpose of marrying her, (*in substance*).(*j*)

That C. S. was an infant of thirteen years of age (her father P. S. being dead, and S. her mother married to C. G.), and under the guardianship of M. S. and A. S. both as to person and estate, and that the same C. was entitled to a large property under her father's will, to wit, one thousand pounds, and resided with the said C. and S, with the consent of her said guardians, and that the said M. H. et al., well knowing the premises, on, &c., did conspire together to deprive the said C. and S. of the service of the said C. and to seduce her from their house, and to inveigle her into a marriage with the said M. H., and under divers false pretences did seduce and inveigle the said C. for the purposes aforesaid, against the will of the said C. and S. and of the said M. and A., and in pursuance of the said conspiracy did ply the said C. with wine and other strong liquors, and she the said C. being intoxicated, did procure the ceremony of marriage to be recited between the said M. H. and C. S., to the great damage and disgrace of the said C., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For a conspiracy to incite J. N. to lay wagers, &c.; overt act, actually cheating.(*k*)

That R. S., late of, &c., yeoman, together with a certain other per-

(*j*) Resp. *v.* Hevice, 2 Yeates 114. This is the mere skeleton of the indictment employed in this case. I have been unable to discover the record.

(*k*) Drawn by Mr. Bradford.

son, to the inquest aforesaid unknown, being persons of evil name and fame and not caring to get their livelihood by honest labour, but by fraud and covin maintaining their idle and disorderly course of life (on the year and day, the place and jurisdiction), unlawfully and wickedly did combine and conspire and agree together, to cheat and defraud the liege citizens of this commonwealth, and particularly a certain J. N. of their money, goods and chattels, by art, fraud, practice and deceit, and then and there unlawfully and wickedly did combine, conspire and agree together, that he the said R. S. should provoke and incite the said liege subjects of this commonwealth, but particularly the said J. N. aforesaid, to bet and lay wagers with the said unknown person, with an intent in the said betting and wagering, to deceive and impose on and cheat the said liege subjects of this commonwealth, and particularly the said J. N., and them the said liege citizens of this commonwealth and particularly J. N. aforesaid, of money, goods and chattels, by false tricks and deceit in and about the betting and wagering aforesaid, deceive and defraud, to the great damage of the said liege subjects of this commonwealth and particularly to the said J. N., to the evil example, &c., and against, &c.

And that the said R. S., together with the said other person to the inquest aforesaid unknown, in pursuance of such their conspiracy aforesaid, afterwards, to wit, on the day and year aforesaid, at the city aforesaid and within the jurisdiction aforesaid, did wickedly and fraudulently provoke and incite the said J. N. to lay wagers with the unknown person aforesaid, and that the said R. S. together with the person to the inquest aforesaid unknown as aforesaid, by betting and laying wagers with the said J. N., then and there did get into their possession, unlawfully and wickedly, the sum of fifteen shillings, lawful money of Pennsylvania, of the goods and chattels of the said J. N., and him the said J. N. of the said sum of fifteen shillings aforesaid, lawful money as aforesaid, by false acts and tricks then and there did deceive and defraud and cheat.

And so the inquest aforesaid on their oaths and affirmation aforesaid, do say, that the said R. S., together with the said other person to the inquest aforesaid unknown, according to the conspiracy, combination and agreement aforesaid, the aforesaid J. N. of the sum of fifteen shillings, lawful money aforesaid, in manner and form aforesaid fraudulently and wickedly did deceive, cheat and defraud, contrary, &c., to the great damage, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy at common law, among workmen, to raise their wages and lessen the time of labour.(*l*)

That A. B., &c., (*setting out their names and additions*), on, &c., at, &c., being workmen and journeymen in the art, mystery and man-

(*l*) Starkie's C. P. 471.

What degree of particularity is required in indictments of this class, is examined by Shaw C. J. in Com. v. Hunt, 4 Mete. 125.

"The first count," he said, "set forth that the defendants, with divers others unknown,

ual occupation of a wheelwright, and not being content to work and labour in that art and mystery by the usual number of hours in each

on the day and at the place named, being workmen and journeymen in the art and occupation of bootmakers, unlawfully, perniciously and deceitfully designing and intending to continue, keep up, form and unite themselves into an unlawful club, society and combination, and make unlawful by-laws, rules and orders among themselves, and thereby govern themselves and other workmen in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did unjustly and corruptly conspire, combine, confederate and agree together, that none of them should thereafter, and that none of them would work for any master or person whatsoever in the said art, mystery and occupation, who should employ any workman or journeyman or other person in the said art, who was not a member of said club, society or combination, after notice given to him to discharge such workman from the employ of such master; to the great damage and oppression, &c.

"Now it is to be considered that the preamble and introductory matter in the indictment—such as unlawfully and deceitfully designing and intending unjustly to extort great sums, &c.—is mere recital, and not traversable, and therefore cannot aid an imperfect averment of the facts constituting the description of the offence. The same may be said of the concluding matter which follows the averment, as to the great damage and oppression, not only of their said masters employing them in the said art and occupation, but also of divers other workmen in the same art, mystery and occupation, to the evil example, &c. If the facts averred constitute the crime, they are properly stated as the legal inferences to be drawn from them. If they do not constitute the charge of such an offence, they cannot be aided by these alleged consequences.

"Stripped then of these introductory recital and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this, that the defendants and others formed themselves into a society, and agreed not to work for any person who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman.

"The manifest intent of the association, is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honourable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness and distress; or to raise their intellectual, moral and social condition; or to make improvement in their art; or for other purposes; or the association might be designed for purposes of oppression and injustice. But in order to charge all those who become members of an association, with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association, was criminal. An association may be formed, the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colourable pretences. It looks at truth and reality, through whatever disguise it may assume. But to make such an association, ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement which makes it so, is to be averred and proved as the gist of the offence. But when an association is formed for purposes actually innocent, and afterwards its powers are abused by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members of the association. In this case no such secret agreement, varying the objects of the association from those avowed, is set forth in this count of the indictment.

"Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they propose to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work if they so prefer. In this state of things, we cannot perceive that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests. One way to test this is, to consider the

day, and at the usual rates and prices for which they and other workmen and journeymen were wont and accustomed to work, but

effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it: The consequences might be the same. A workman who should still persist in the use of ardent spirit, would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skilful but intemperate workman. Still it seems to us, that as the object would be lawful, and the means not unlawful, such an agreement could not be called a criminal conspiracy.

"From this count in the indictment, we do not understand that the agreement was, that the defendants would refuse to work for an employer to whom they were bound by contract for a certain time, in violation of that contract; nor that they would insist that an employer should discharge a workman engaged by contract for a certain time, in violation of such contract. It is perfectly consistent with every thing stated in this count, that the effect of the agreement was, that when they were free to act, they would not engage with an employer, or continue in his employment, if such employer when free to act, should engage with a workman, or continue a workman in his employment, not a member of the association. If a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together, it would present a very different question. Suppose a farmer employing a large number of men engaged for the year at a fair monthly wages, and suppose that just at the moment that his crops were ready to harvest, they should all combine to quit his service, unless he would advance their wages, at a time when other labourers could not be obtained: it would surely be a conspiracy to do an unlawful act, though of such a character, that if done by an individual, it would lay the foundation of a civil action only, and not of a criminal prosecution. It would be a case very different from that stated in this count.

"The second count, omitting the recital of unlawful intent and evil dispositions, and omitting the direct averment of an unlawful club or society, alleges that the defendants, with others unknown, did assemble, conspire, confederate and agree together, not to work for any master or person who should employ any workman not being a member of a certain club, society or combination, called the Boston Journeymen Bootmaker's Society, or who should break any of their by-laws, unless such workmen should pay to said club, such sum as should be agreed upon as a penalty for the breach of such unlawful rules, &c., and that by means of said conspiracy they did compel one J. B. W., a master cordwainer, to turn out of his employ one T. H., a journeyman bootmaker, &c., in evil example, &c. So far as the averment of a conspiracy is concerned, all the remarks made in reference to the first count are equally applicable to this. It is simply on averment of an agreement amongst themselves not to work for a person, who should employ any person not a member of a certain association. It sets forth no illegal or criminal purpose to be accomplished, nor any illegal or criminal means to be adopted for the accomplishment of any purpose. It was an agreement, as to the manner in which they would exercise an acknowledged right to contract with others for their labour. It does not aver a conspiracy or even an intention to raise their wages; and it appears by the bill of exceptions, that the case was put upon the footing of a conspiracy to raise their wages. Such an agreement, as set forth in this count, would be perfectly justifiable under the recent English statute, by which this subject is regulated; St. 6 Geo. IV. c. 129; see Roscoe's Crim. Ev. (2d Am. ed.), 368, 369.

"As to the latter part of this count, which avers that by means of said conspiracy, the defendants did compel one W. to turn out of his employ one J. H., we remark, in the first place, that as the acts done in pursuance of a conspiracy, as we have before seen, are stated by way of aggravation, and not as a substantive charge, if no criminal or unlawful conspiracy is stated, it cannot be aided and made good by mere matter of aggravation. If the principal charge falls, the aggravation falls with it; State v. Rickey, 4 Halst. 293.

"But further; if this is to be considered as a substantive charge, it would depend altogether upon the force of the word 'compel,' which may be used in the sense of coercion, or duress, by force or fraud. It would therefore depend upon the context and the connexion with other words, to determine the sense in which it was used in the indictment. If, for instance, the indictment had averred a conspiracy, by the defendants, to compel W. to turn H. out of his employment, and to accomplish that object by the use of force or fraud, it would have been a very different case; especially if it might be fairly construed, as perhaps in that case it might have been, that W. was under obligation, by contract, for

falsely and fraudulently conspiring and combining, unjustly and oppressively to increase and augment the wages of themselves and

an unexpired term of time, to employ and pay H. As before remarked, it would have been a conspiracy to do an unlawful, though not a criminal act, to induce W. to violate his engagement, to the actual injury of H. To mark the difference between the case of a journeyman or a servant and master, mutually bound by contract, and the same parties when free to engage anew, I should have before cited the case of Boston Glass Co. *v.* Binney, 4 Pick. 425. In that case, it was held actionable to entice another person's hired servant to quit his employment, during the time for which he was engaged; but not actionable to treat with such hired servant, whilst actually hired and employed by another, to leave his service, and engage in the employment of the person making the proposal, when the term for which he is engaged shall expire. It acknowledges the established principle, that every free man, whether skilled labourer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract. But whatever might be the force of the word 'compel,' unexplained by its connexion, it is disarmed and rendered harmless by the precise statemant of the means, by which such compulsion was to be effected. It was the agreement not to work for him, by which they compelled W. to decline employing H. longer. On both of these grounds, we are of opinion that the statement made in this second count, that the unlawful agreement was carried into execution, makes no essential difference between this and the first count.

"The third count, reciting a wicked and unlawful intent to impoverish one J. H., and hinder him from following his trade as a bootmaker, charges the defendants, with others unknown, with an unlawful conspiracy, by wrongful and indirect means, to impoverish said H., and to deprive and hinder him from his said art and trade and getting his support thereby, and that, in pursuance of said unlawful combination, they did unlawfully and indirectly hinder and prevent, &c., and greatly impoverish him.

"If the fact of depriving J. H. of the profits of his business, by whatever means it might be done, would be unlawful and criminal, a combination to compass that object would be an unlawful conspiracy, and it would be unnecessary to state the means. Such seems to have been the view of the court in the King *v.* Eccles, 3 Dougl. 337, though the case is so briefly reported, that the reasons, on which it rests, are not very obvious. The case seems to have gone on the ground, that the means were matter of evidence, and not of averment; and that after verdict, it was to be presumed, that the means contemplated and used were such as to render the combination unlawful and constitute a conspiracy.

"Suppose a baker in a small village had the exclusive custom of his neighbourhood, and was making large profits by the sale of his bread. Supposing a number of those neighbours, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not, that they would introduce another baker; and on his refusal, such other baker should, under their encouragement, set up a rival establishment, and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved, that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbours. The same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition, that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances, where each strive to gain custom to himself, by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

"We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honourable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows as a necessary consequence, that if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment; as a further legal consequence, that as the criminality will depend on the means, those means must be stated in the indictment. If the same rule were to prevail in criminal, which holds in civil proceedings—that a case defectively stated may be aided by a verdict—then a court might presume, after verdict, that the indictment was supported by proof of criminal or unlawful means to effect the object.

other workmen and journeymen in the said art, and unjustly to exact and extort great sums of money for their labour and hire in the said art, mystery and manual occupation, from their masters, who employ them therein, with force and arms, on the same day and year aforesaid, at the parish aforesaid in the county aforesaid, together with divers other workmen and journeymen in the same art, mystery and manual occupation (whose names to the jurors aforesaid are as yet unknown), unlawfully did assemble and meet together, and so being assembled and met, did then and there unjustly and corruptly con-

But it is an established rule in criminal cases, that the indictment must state a complete indictable offence, and cannot be aided by the proof offered at the trial.

"The fourth count avers a conspiracy to impoverish J. H., without stating any means; and the fifth alleges a conspiracy to impoverish employers, by preventing and hindering them from employing persons, not members of the Bootmaker's Society; and these require no remarks, which have not been already made in reference to the other counts.

"One case was cited, which was supposed to be much in point, and which is certainly deserving of great respect; People *v.* Fisher, 14 Wend. 9. But it is obvious, that this decision was founded on the construction of the revised statutes of New York, by which this matter of conspiracy is now regulated. It was a conspiracy by journeymen to raise their wages, and it was decided to be a violation of the statutes, making it criminal to commit any act injurious to trade or commerce. It has, therefore, an indirect application only to to the present case.

"A caution on this subject, suggested by the commissioners for revising the statutes of New York, is entitled to great consideration. They are alluding to the question, whether the law of conspiracy should be so extended, as to embrace every case where two or more unite in some fraudulent measure to injure an individual, by means not in themselves criminal. 'The great difficulty,' say they, 'in enlarging the definition of this offence, consists in the inevitable result of depriving the courts of equity of the most effectual means of detecting fraud, by compelling a discovery on oath. It is a sound principle of our institutions, that no man shall be compelled to accuse himself of any crime; which ought not to be violated in any case. Yet such must be the result, or the ordinary jurisdiction of courts of equity must be destroyed, by declaring any private fraud, when committed by two, or any concert to commit it, criminal;' 9 Cow. 625. In New Jersey, in a case which was much considered, it was held that an indictment will not lie for a conspiracy to commit a civil injury; State *v.* Rickey, 4 Halst. 293. And such seemed to be the opinion of Ld. Ellenborough, in the King *v.* Turner, 13 East 231; in which he considered that the case of the King *v.* Eccles, 3 Dougl. 337, though in form an indictment for a conspiracy to prevent an individual from carrying on his trade, yet in substance was an indictment for a conspiracy in restraint of trade, affecting the public

"It appears by the bill of exceptions, that it was contended on the part of the defendants, that the indictment did not set forth any agreement to do a criminal act, or to do any lawful act by criminal means, and that the agreement therein set forth did not constitute a conspiracy indictable by the law of this state, and that the court was requested so to instruct the jury. This the court declined doing, but instructed the jury that the indictment did describe a confederacy among the defendants to do an unlawful act, and to do the same by unlawful means—that the society, organized and associated for the purposes described in the indictment, was an unlawful conspiracy against the laws of this state, and that if the jury believed, from the evidence, that the defendants or any of them had engaged in such confederacy, they were bound to find such of them guilty.

"In this opinion of the learned judge, this court, for the reasons stated, cannot concur. Whatever illegal purpose can be found in the constitution of the Bootmaker's Society, it not being clearly set forth in the indictment, cannot be relied upon to support this conviction. So if any facts were disclosed at the trial, which, if properly averred, would have given a different character to the indictment, they do not appear in the bill of exceptions, nor could they, after verdict, aid the indictment. But looking solely at the indictment, disregarding the qualifying epithets, recitals and immaterial allegations, and confining ourselves to facts so averred as to be capable of being traversed and put in issue, we cannot perceive that it charges a criminal conspiracy punishable by law. The exceptions must, therefore, be sustained, and the judgment arrested."

Some difficulty will arise in adapting the indictment in the text either to the above decision, or to the present course of popular sentiment on the subject. See, however, notes on p. 387 and 388.

spire, combine, confederate and agree among themselves, that none of the said conspirators, after the same day of , would make or do their work at any lower or lesser rate than five shillings for the hewing of every hundred of spokes for wheels, and eight shillings for making of every pair of hinder wheels, for or on account of any master or employer whatsoever in the said art, mystery and occupation, and also that none of them the said conspirators would work day work or labour any longer than from the hour of six in the morning till the hour of seven in the evening in each day from thenceforth, to the great damage and oppression not only of their masters employing them in the said art, mystery and occupation, but also of divers others of his majesty's liege subjects, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy by workmen, &c., in the employ of A. and B., to prevent their masters from retaining any person as an apprentice.(*m*)

That the defendants, with divers other evil disposed persons to the jurors unknown, on, &c., at, &c., being journeymen and workmen in

(*m*) R. *v.* Ferguson, 2 Stark. N. P. C. 489.

In the second count it was charged that the defendants, together with other evil disposed persons, afterwards, to wit, on, &c., at, &c., being such journeymen and workmen as aforesaid, in the employment of the said S. D. and R. T., maliciously intending to hurt, injure and impoverish their said employers and to prevent them from retaining any other journeymen and workmen, and retaining and instructing apprentices in the said occupation, did conspire, combine, confederate and agree to quit, leave and turn out from their said employment at one and the same time together, to the great damage, &c.

In a third count it was alleged that the defendants, together with the said other evil disposed persons, afterwards, to wit, on, &c, at, &c., being such journeymen and workmen as aforesaid, in the employment of the said S. D. and R. F., maliciously intending to control, injure, terrify and impoverish their said employers, and force and compel them to dismiss from their said employment, divers persons then and there retained by them as journeymen workmen and apprentices therein, unlawfully did conspire, combine, confederate and agree to quit, leave and turn out from their said employment, until the said last mentioned journeymen, workmen and apprentices should be dimissed by their said masters and employers, to the great damage, &c.

It appeared that upon the prosecutors taking into their employment a young person of the name of G. as an apprentice, the defendants, together with a number of journeymen, declared to the prosecutors that they would not stand it, and after consultation left their work, and that E.'s agreement was given up to him, and he went away. The rest of the workmen were conciliated for the time, by the prosecutors agreeing to relinquish G. the apprentice. Sometime afterwards F. and the other workmen again turned out, upon the prosecutors taking into their service another apprentice of the name of M. At the time of these turn-outs, the prosecutors had in their employment sixteen journeymen and eight apprentices, and it appeared upon the cross-examination of one of the prosecutors that the objection which had been made by the defendants and their associates, did not apply to the eight apprentices which the prosecutors then had in their employment, but that they objected to the prosecutors taking a greater number of apprentices than half the number of journeymen.

It was objected on behalf of the defendants, upon this evidence, that it varied from the indictment, which alleged generally a conspiracy to prevent the masters from taking into their employment any apprentices, &c.; whereas it should have been alleged according to the fact, to be a conspiracy to hinder their masters from taking into their employment any more apprentices, or a number exceeding half the number of journeymen; but,

Wood B. was of opinion, that the indictment was sufficiently supported by the evidence, since the effect was to prevent the masters from taking into their employment any person as an apprentice, to be taught and instructed, as alleged in the indictment.

The defendants were both found guilty.

When the defendants were brought before the Court of K. B. for judgment in the ensu-

the trade, mystery and manual occupation of engravers, in the employment of S. D. and R. F., did conspire, combine, confederate and agree together to prevent, hinder and deter their said masters and employers from retaining and taking into their employment any person as an apprentice, to be taught and instructed in the said trade and occupation, to the great damage, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy by parties engaged on the public works to increase the rate of passage money and freight.(*n*)

That A., late of, &c., canal transporter, B., late of, &c., canal transporter, C., late of, &c., canal transporter, D., late of, &c., canal transport-

ing term, the objection was renewed, but the court were of opinion, that the indictment was sufficiently proved: and it was intimated, that the evidence applied to the third count as well as the first, since in order to support the third count, it was sufficient to prove that the defendants turned out from their employment with intent to compel their masters to dismiss any one apprentice.

The defendants received sentence of fine and imprisonment.

(*n*) This form, for which I am indebted to Mr. Magraw, the prosecuting attorney in the City of Pittsburg, was prepared by eminent counsel in that city, and was held sufficient to support a conviction. The question of the indictability of the offence was examined with great clearness by Judge Grier, now of the Supreme Court of the United States, on a preliminary hearing.

"The defendants pray to be discharged," he said, "on the ground that they have been imprisoned contrary to law, or in other words, that the charge on which they are committed is not indictable, and not an offence known to the law. It is admitted that the commitment states that it is for a 'conspiracy and unlawfully combining,' &c.; but it is contended that the oath on which the commitment is founded, does not set forth any such offence. If this be so the defendants should be discharged. For by the constitution of the state, no warrant can issue to seize any person, without probable cause supported by oath or affirmation. We are therefore bound, in justice to the prisoners, to examine whether the oath on which the commitments are founded, show 'probable cause,' or in any other words, whether it states any offence known to the law, for which the defendants are criminally liable.

"The affidavit states that the defendants being engaged in the business of carriers and transporters of merchandise on the Pennsylvania canal, on the 17th day of December, 1841, and intending to unite themselves into a board and combination, to regulate the price of transportation of merchandise on said canal, did assemble and meet together, and did then and there agree upon and adopt, and severally swear to observe, a certain preamble and constitution (of which a copy is annexed), for their regulation as carriers and transporters, &c.

"The paper referred to as containing this unlawful combination or conspiracy, is entitled, 'The Preamble and Constitution adopted by the Board of Canal Transporters, at Pittsburg, 1841.'

"It is signed by the prisoners and others, and sworn to in the following words:

"'We the subscribers, do severally swear or affirm, that we will to the best of our abilities and understanding carry out the views of the foregoing instrument, to which our names are attached, in sincerity and good faith.'

"This constitution as it is called, embraces no less than twelve sections or articles, each of considerable length; in a brief outline of some of its provisions, it will be necessary to state in order to understand its meaning and effect:

"1. The board is to consist of ten proprietors and agents, who are conducting the business of the several lines (of transportation), at Pittsburg, whose names are annexed, &c.

"2. To have a president and secretary.

"3. The board shall fix the time for the delivery of goods at their destination, and the rates of freight, on all goods going eastward, &c.—and no member of the board shall be allowed to forward freight at a less rate or shorter time than that agreed on previously, and fixed by the board.

"4. Each line to furnish weekly or monthly accounts of the amount of freight shipped, prices charged, &c., *under oath*, and in the event of any line being out of freight, a fund

er, E., late of, &c., canal transporter, F., late of, &c., canal transporter, G., late of, &c., canal transporter, H., late of, &c., canal transporter, and

to be formed, by the payment of seven per cent. on all freights, to be divided into nine shares, and each line to draw one-ninth without regard to the amount put in by said line.

"5. Lines violating the constitution to forfeit their share of the fund.

"6. Clerks of the funds to have no business connexions with mercantile houses for the purpose of securing *freight, influence* or patronage.

"7. No line to have a freight agent, &c., nor shall any person be allowed to receipt, agree or contract, to forward goods, on any other terms than those set forth (in that article).

"8. No member to pay a bonus for freight, &c., or propose to sell produce free of commission, or carry packages or passengers with a view to lessen the cost of freight, nor take currency in payment of freight, without exacting the regular discount in addition to the full account of freight; and any arrangement or contract for freight that will in any way reduce the amount below the regular established rate, shall be considered a direct violation of the constitution.

"9. Sets forth the mode of proceeding when any one is *suspected* of violating the constitution.

"10. No freight to be brought west at lower prices than those established.

"11. Members may withdraw on two weeks' notice.

"12. Each line to produce at every meeting an affidavit in the following form: 'I, A. B., do solemnly swear that since the last regular meeting of the board, I have not in any manner, shape or form, directly or indirectly, violated the intent, meaning or spirit of the constitution, as agreed upon by the agents of the lines stationed at Pittsburg, and that the annexed list is a correct return of freight,' &c.

"This constitution (as it is called), or articles of confederation (as they might be called), appear to have been drawn with considerable care, and whatever its object or intention may be, is guarded with unusual sanctions to increase its stringency.

"The objects of the confederation are plainly stated, and its consequences and effects upon the community are obvious to the most careless observers.

"It is nothing less than a combination between the chief capitalists and carriers on this line of our public works to raise or depress the rate of freight, as it may suit their own interests, either to increase their profits or crush a competitor.

"Does such a combination come within the description of those which are punishable by indictment as conspiracies at common law? On this subject it would be useless to notice the various and confused dicta of what is necessary to constitute the offence, as there is no subject in the whole range of criminal jurisprudence so uncertain and unsettled in its definitions and principles. But so far as they have any application to the present case, they are lucidly and correctly stated by Chief Justice Gibson, in the case of Com. *v.* Carlisle (Journal of Jurisprudence 225). 'I take it then (says the chief justice), a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederate, and giving effect to the purposes of the latter, whether of extortion or mischief.' According to this view of the law, a combination of employers to depress the wages of journeymen, below what they would be if there were no recurrence to artificial means, is criminal. So also, Chief Justice Savage (in People *v.* Fisher, 14 Wend. 9), observes: 'It is important to the best interest of society that the price of labour be left to regulate itself, or rather to be limited by the demand for it. Combinations and confederacies to *enhance* or *reduce* the prices of labour, or of any articles of trade or commerce, are injurious. They may be oppressive by compelling the public to give more for an article of necessity or convenience than it is worth; or, on the other hand, of compelling the labour of the mechanic for less than its value. Without any officious or improper interference on the subject, the price of labour or the wages of mechanics will be regulated by the demand for the manufactured article and the value of that which is paid for it; but the right does not exist either to enhance the price of the article or the wages of the mechanic by any forced and artificial means. The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labour for any particular reward.'

"The one may refuse to sell, and the other to work, except on his own terms, but he has no right to say, that another shall not exercise the same liberty.

"'There is,' says C. J. Gibson, 'between the different parts of the body politic, a reciprocity of action, which like the antagonizing muscles in the natural body, not only prescribes to each its appropriate state and condition, but regulates the motion of the whole.

I., late of, &c., canal transporter, being engaged in the carriage for hire of goods, wares and merchandise on the Pennsylvania canal, and the several railways connected therewith, forming a line of communication between the Cities of Philadelphia and Pittsburg, in said commonwealth, and not being content with the usual rates and prices for which they and others were accustomed to work and labour in the said business and occupation, but contriving and intending unjustly and oppressively to increase and augment the said rates and prices, to counteract the effect of free competition on the speed and price of transportation, and thereby to exact and procure great sums of money from the citizens of this commonwealth, and from all others having goods, wares or merchandise to be transported on said canal and railways, did on, &c., with force and arms at, &c., combine, conspire, confederate and unlawfully agree together and did enter into a written compact signed and sworn by them, and entitled "preamble and constitution adopted by the board of canal transporters at Pittsburg," whereby it was, amongst other things, provided, that said board should consist of the proprietors and agents who are conducting the business of the several lines at Pittsburg, whose names are thereunto annexed. And by the said preamble and constitution it was provided, that "the board shall fix the time for the delivery of goods at their destination, and the rates of freight on all goods going eastward, such rates affording a fair remuneration to the transporter, without imposing any oppressive rate on the public, and no member of this board, proprietor, agent, clerk or any other person shall, by agreement or otherwise, either directly or indirectly, forward or offer to forward, freight of any description, at a less rate or shorter time than that agreed on previously, and fixed by the board;" and in another part of the same preamble and constitution, it was declared that "any arrangement or contract for freight, that will in any way reduce the amount below the regular established rate, shall be considered a direct violation of the constitution;" and the said preamble and constitution provided that "no proprietor, agent, clerk or any person for them, shall make contracts for goods coming westward, at any rate or rates less than those established at the place of shipment, and recognized and agreed on by the partners of the several transportation companies herein concerned;" which said combination so as aforesaid entered into is of grievous prejudice to the common and public good and welfare, of evil example, &c., and against &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said A., B., C., D., E., F., G., H. and I., being engaged in the carriage for hire of goods, wares and merchandise on the Pennsylvania canal, and the several railways connected therewith, forming a line of communication between the Cities of Philadelphia and Pitts-

The efforts of an individual to disturb this equilibrium can never be perceptible, but the increase of power by the combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals but mischievous to the public at large, and it is the employment of an engine so dangerous and powerful, that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual.' "

burg in said commonwealth, and not being content with the usual rates and prices for which they and others were accustomed to work and labour in the said business and occupation, but contriving and intending unjustly and oppressively to increase and augment the said rates and prices, to counteract the effect of free competition on the speed and price of transportation, and thereby to exact and procure great sums of money from the citizens of this commonwealth, and from all others having goods, wares or merchandise to be transported on said canal, did, on the day and year aforesaid, combine, conspire, confederate and unlawfully agree together, and did enter into a written compact, signed and sworn to by them, and entitled "preamble and constitution adopted by the board of canal transporters at Pittsburg," whereby it was amongst other things provided, that said board should consist of the proprietors and agents who are conducting the business of the several lines at Pittsburg, whose names are thereunto annexed, and by the said preamble and constitution it was provided, that "the board shall fix the time for the delivery of goods at their destination, and the rates of freight on all goods going eastward, such rates affording a fair remuneration to the transporters, without imposing any oppressive rate on the public; and no member of this board, proprietor, agent, clerk or any other person shall, by agreement or otherwise, either directly or indirectly, forward or offer to forward freight of any description at a less rate, or shorter time, than that agreed on previously, and fixed by the board;" and in another part of the same preamble and constitution it was declared, that "any arrangement or contract for freight that will in any way reduce the amount below the regular established rate, shall be considered a direct violation of the constitution;" and the preamble and constitution provided that "no proprietor, agent, clerk, or any person for them, shall make contracts for goods coming westward at any rate or rates less than those established at the place of shipment, and recognized and agreed on by the partners of the several transportation companies herein concerned;" and the said A., B., C., D., E., F., G., H. and I., in pursuance of the said unlawful conspiracy, combination and agreement, did refuse, and for a long time continued to refuse to work and labour in the business and occupation aforesaid, except at the rates and prices fixed and established by the aforesaid board; which said conspiracy, so as aforesaid carried into execution, is of grievous prejudice to the common and public good and welfare, of evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

That the said A., B., C., D., E., F., G., H. and I., being engaged in the carriage for hire of goods, wares and merchandise on the Pennsylvania canal, and the several railways connected therewith, forming a line of communication between the Cities of Philadelphia and Pittsburg in said commonwealth, and not being content with the usual rates and prices for which they and others were accustomed to work and labour in the said business and occupation, but contriving and intending unjustly and oppressively to increase and augment said

rates and prices, to counteract the effect of free competition on the speed and price of transportation, and thereby to exact and procure great sums of money from the citizens of this commonwealth, and from all others having goods, wares or merchandise to be transported on the said canal and railways, did, on the day and year aforesaid combine, conspire, confederate and unlawfully agree together, to raise and keep up the prices and rates of transportation as aforesaid; to the grievous prejudice of the common and public good and welfare, of evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

That the said A., B., C., D., E., F., G., H. and I., being canal transporters as aforesaid, and designing and intending to form and unite themselves into an unlawful club and combination, and to make and ordain unlawful and arbitrary rules and orders amongst themselves, and thereby to govern themselves in their said business as canal transporters, and unlawfully and unjustly to exact and extort great sums of money by means thereof, on the day and year aforesaid, with force and arms at the county aforesaid, did unlawfully assemble and meet together, and being so met together did then and there unjustly and corruptly combine, conspire, confederate and agree, that none of them the said conspirators would thereafter transport or carry any goods, wares, merchandise or other freight on the Pennsylvania canal, and the several railways connected therewith, forming a line of communication between the Cities of Philadelphia and Pittsburg, at a less rate, or in a shorter time than should have been previously fixed, agreed upon and allowed by the said conspirators; to the great prejudice of the common and public good and welfare, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3.)

Conspiracy to charge a man with a crime.(o)

That J. S., late of, &c., labourer, and A. his wife, and J. W., late of, &c., carpenter, and E. W., late of, &c., labourer, being evil disposed persons, and wickedly devising and intending not only to deprive one J. N. of his good name, fame, credit and reputation, but also to subject him as far as in them lay to the pains and penalties by the laws of his kingdom made and provided against and inflicted upon persons guilty of (rape), on, &c., with force and arms, at, &c., did amongst themselves, conspire, combine, confederate and agree together, falsely to charge and accuse the said J. N., that he the said J. N. had then lately before (feloniously ravished and carnally known the said A., violently and against her will and consent). That the said J. S. and A. his wife, and J. W. and E. W., afterwards, to wit, on, &c., at, &c., in pursuance of and according to the said conspiracy,

(o) This is taken from Archbold's C. P. 5th Am. ed. 672. See for conspiracy to charge a man with forgery, 4 Went. 86; sodomy, C. Cir. Com. 126, *post* 395; larceny, C. Cir. Com. 135; 3 Burr. 1320; receiving stolen goods, C. Cir. Com. 125, *post* 394; poisoning horses, 4 Went. 98.

combination, confederacy and agreement among themselves had as aforesaid, (*here set out the overt acts as in precedents above*; *see ante*, *p.* 343, *et seq.*; *introducing the second and each of the subsequent acts thus*): That in further pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst them, the said J. S. and A. his wife, and J. W. and E. W. had as aforesaid, they the said, &c., on, &c., at, &c., (*continuing the indictment from the above asterisk, as thus*): falsely and unlawfully in the presence and hearing of divers persons, did charge and accuse the said J. N. with and of the rape aforesaid. That in further pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst them the said J. S. and A. his wife, and J. W. and E. W. had as aforesaid, she the said A. afterwards, to wit, the day and year aforesaid, at the parish aforesaid in the county aforesaid, did upon her oath falsely charge and accuse the said J. N. before A. C., Esq., when and yet being one of the justices of, &c., in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county, that he the said J. N. had then lately before feloniously ravished and carnally known her the said A., violently and against her will and consent. That in further pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst them, the said J. S. and A. his wife, and J. W. and E. W. had as aforesaid, she the said A., by the name of A. the wife of J. S., afterwards, to wit, at the General Quarter Sessions of the Peace of our said lady the queen, holden at the New Sessions House, on Clerkenwell Green, in and for the County of Middlesex aforesaid, on, &c., before A. B. and C. D., Esqrs., and others their associates, justices of our said lady the queen, assigned to keep the peace of our said lady the queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county, did falsely exhibit a certain bill, commonly called a bill of indictment, against the said J. N., by the name and addition of J. N., late of the parish of C., in the County of M., yeoman, to P. C., Esq., (*here insert the names of the grand jurors to whom the indictment for rape was exhibited*), good and lawful men of the said county, then and there sworn and charged to inquire for, &c., for the body of the said county; which said bill was by the said jurors then and there returned into the said court, before the justices of, &c., last aforesaid, and others their fellows aforesaid, thus endorsed: "not found;" which said bill is in these words, that is to say, (*here set out the indictment verbatim, and you may then add*, "with intent to obtain and acquire to them the said J. S. and A. his wife, and the said J. W. and E. W. of and from the said J. N., divers sums of money for compounding the said pretended felony and rape so falsely charged upon the said J. N. as aforesaid;" *if this be the fact, and that there will be no difficulty in proving it*); to the great damage, &c., to the evil example, &c., and against &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to charge a man with receiving stolen goods, knowing them to be stolen, and obtaining money for compounding the same.(*p*)

The jurors, &c., upon their oath present, that A. B. and C. D., both of, &c., labourers, wickedly and maliciously devising and intending one E. F. unjustly to deprive of his good name and character, and also fraudulently to obtain and acquire to themselves, of and from the said E. F., divers sums of money, on, &c., at, &c., in the county aforesaid, did wickedly, fraudulently and maliciously conspire, combine, confederate and agree among themselves, falsely to charge and accuse, and in pursuance of said conspiracy, combination, confederacy and agreement, did then and there falsely charge and accuse the said E. F., that he had then lately before received certain stolen goods, which had then lately before been feloniously stolen, taken and carried away, knowing them to be stolen; and that they the said A. B. and C. D., by divers threats and menaces of them the said A. B. and C. D. made and uttered in pursuance of the said conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had between them the said A. B. and C. D., that the said E. F. should be prosecuted and punished as a receiver of stolen goods, knowing them to be stolen, afterwards, to wit, on the said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, did demand, receive and take the sum of fifty dollars of him the said E. F., for and as a composition of and agreement not to prosecute the said pretended offence, and to discharge him the said E. F. from all further prosecution for the same.

Conspiracy to charge a man with receiving stolen goods and thereby obtaining money for compounding the same, and causing him to lay out a sum of money for the entertainment of the conspirators at one of their houses.(*q*)

That A. B., late of, &c., gentleman, and C. D., late of, &c., labourer, being ill-disposed persons and wickedly devising and intending one M. N. not only of his credit and good reputation unjustly to deprive, but also to obtain and acquire to themselves, of and from the said M. N. divers large sums of money, on, &c., with force and arms, at, &c., * did amongst themselves conspire, combine, confederate and agree falsely to charge and accuse the said M. N. with having lately before then received stolen goods. The said A. B. and C. D., afterwards, to wit, on, &c., according to the said conspiracy, combination, confede-

(*p*) Davis' Prec. 100.

In Com. *v.* Tibbetts, 2 Mass. 536, an indictment of a character very similar to this was sustained. There were, it is true, several additional overt acts, but as they were imperfectly set out, they were discharged by the court as surplusage.

When the object of the combination is to indict the prosecutor, it is not necessary to show with what particular offence it was intended to charge him, but it will suffice to say that they conspired to indict him of a crime punishable by the laws of the country, and then it may be alleged that they, according to the conspiracy, did falsely indict him; R. *v.* Spragge, 2 Burr. 993: nor is it necessary to aver that the man is innocent of the offence; R. *v.* Kinnersly, 1 Str. 103; for he shall be presumed to be innocent until the contrary appear; see R. *v.* Best, 1 Salk. 174; R. *v.* Spragge, 2 Burr. 993.

(*q*) Stark. C. P. 468.

racy and agreement between themselves before had as aforesaid, falsely, wickedly and for the sake of lucre and gain, did in the presence and hearing of divers persons charge and accuse him the said M. N., that he the said M. N. had bought hats that were stolen, knowing them to have been stolen, and that they the said A. B. and C. D. did then and there falsely pretend and affirm to the said M. N. that a bill of indictment had been found at the general session of the peace, holden at the Quarter Sessions in and for the said county, on, &c., then last, against the said M. N. for receiving stolen goods, knowing the same to have been stolen; whereas, in truth and in fact there was not at the time of such charge and accusation, nor at any time before or since, any bill or bills of indictment whatsoever in any manner found against the said M. N., for the said supposed offence so falsely charged upon him, or for any such like crime; and whereas, in truth and in fact the said M. N. was never guilty of the said supposed offence or any other offence of that kind.

And the jurors aforesaid, upon their oath aforesaid, do further present, that by the said false accusations and by divers threats, menaces and allegations of them the said A. B. and C. D. then and there uttered and made, that he the said M. N. should be transported into parts beyond the seas for the said pretended offence, they the said A. B. and C. D. did then and there demand, receive and take of the said M. N. one piece of gold coin, of the proper coin of this realm, called a guinea, for and as a compensation and agreement of the said pretended offence, and to discharge the said M. N. from all further prosecution for the same; and they the said A. B. and C. D. did also then and there, by the false and wicked pretences aforesaid, unlawfully cause and procure the said M. N. to expend and lay out, and the said M. N. did expend and lay out twenty-three shillings, of lawful money of Great Britain, at the dwelling house of the said A. B., in wine and other liquors, in the company and for the entertainment of them the said A. B. and C. D., to the great damage, infamy and disgrace of the said M. N., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to charge a man with an unnatural crime, and thereby to obtain money.(*r*)

(*Commencement as in the last precedent to the* *). Did amongst themselves conspire, combine, confederate and agree falsely to charge and accuse the said M. N., that he the said M. N. then lately before had committed the crime of sodomy, commonly called buggery, with him the said A. B. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. and C. D., afterwards, to wit, on, &c., at, &c., according to the conspiracy, combination, confederacy and agreement between them as aforesaid had, falsely, unlawfully and wickedly did charge and accuse the said M. N., that he the said M. N. then lately before had committed the crime of sodomy, commonly called buggery, with him the said A. B.; whereas, in truth

(*r*) Stark. C. P. 469.

and in fact the said M. N. was never guilty of the said crime, or of any crime of the like nature; and that they the said A. B. and C. D., in pursuance of and according to the conspiracy, combination, confederacy and agreement between them as aforesaid had, afterwards, to wit, on, &c., at, &c., unlawfully, wickedly and unjustly did obtain, acquire and get into their hands and possession the sum of five pounds of lawful money of Great Britain, of the moneys of the said M. N., of and from the said M. N., under the aforesaid false colour and pretence, and also under colour and pretence of concealing the said supposed crime, and for not prosecuting the said M. N. for the same, to the great damage of the said M. N., and against the peace, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said A. B. and C. D., on, &c., with force and arms, at, &c., wickedly, unlawfully and for lucre and gain sake, did threaten the said M. N., that unless he the said M. N. would give them the said A. B. and C. D. five pounds, they the said A. B. and C. D. would swear sodomy (meaning the detestable crime of sodomy, called buggery), against him the said M. N.; whereas, in truth and in fact the said M. N. was never guilty of the crime of sodomy, or of any such crime. And that the said A. B. and C. D., afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, by means of the threatening aforesaid, unlawfully, wickedly and injuriously did obtain, acquire and get to themselves, of and from the said M. N., five pounds of lawful money of Great Britain, of the moneys of the said M. N. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to extort money generally by criminal prosecution. First count, charging a conspiracy to extort, by commencing and continuing a prosecution.(*s*)

That the defendants, intending unlawfully, fraudulently and deceitfully to extort, obtain and procure of and from the prosecutor a large sum of money for their own use, on, &c., at, &c., did corruptly and unlawfully conspire together to extort, obtain and procure of and from the prosecutor, a large sum of money for their use, and in order to extort, obtain and procure the same, did corruptly and unlawfully

(*s*) R. *v.* Hollingberry, 6 D. & R. 345. Motion for a new trial and in arrest of judgment, was refused after a conviction.

Abbott C. J.: "The indictment, in my opinion, most clearly charges a legal offence, and an attempt to commit it by illegal means. I consider the very term 'extort,' necessarily to imply the adoption of illegal means; the third count, therefore, is undoubtedly good, because that states only that the defendants unlawfully conspired to extort money from the prosecutor by offering to suppress an indictment pending against him, if he would give them a sum of money as a consideration for so doing. The first two counts certainly charge that the defendants conspired falsely to exhibit indictments against the prosecutor. If that must be construed to mean that they conspired to exhibit false indictments against him, there is a variance, because the jury have expressly found that the indictments were not false. But, as it seems to me, that allegation may fairly be construed to mean, and I believe that it really did mean that the defendants falsely exhibited the indictments; that is, exhibited them not for the purposes of justice, but for false and wicked purposes of their own; which, whether true or not, is an immaterial allegation, because the question was, whether they exhibited them illegally with an illegal intent, and for an illegal purpose, which the jury, after full consideration, have found that they did."

conspire to indict the prosecutor for having kept a common gaming house, &c. That defendants, in furtherance of their conspiracy, afterwards, to wit, on, &c., at, &c., at the Quarter Sessions, &c., did falsely exhibit and cause to be exhibited, a certain bill of indictment against the prosecutor, and afterwards, in pursuance, &c., did corruptly, wilfully and wickedly procure and cause the said bill of indictment to be returned a true bill, and that defendants, in further pursuance, &c., afterwards, to wit, on, &c., at, &c., in the Court of K. B., did falsely exhibit and cause to be exhibited, a certain bill of indictment against the prosecutor, and did afterwards, in pursuance, &c., corruptly, wilfully and wickedly procure and cause the said bill of indictment to be returned a true bill. That the defendants, in pursuance, &c., afterwards, to wit, on, &c., at, &c., did unlawfully and wilfully endeavour to obtain and procure of and from the prosecutor, a large sum of money as and for a consideration or recompense to them for compromising and suppressing the said indictments, and giving up the further prosecution thereof.

Second count. Charging a prosecution already commenced, and a conspiracy to extort money by proposing to suppress it.

The defendants preferred an indictment at the Quarter Sessions against the prosecutor for keeping a common gaming house, which being removed into the Court of K. B. and depending there, defendants did unlawfully and wickedly conspire to extort, &c., of and from the prosecutor a large sum of money, and in pursuance, &c., did unlawfully propose to the prosecutor to suppress the indictment, and to withhold certain evidence which they had and could bring forward to prove that the prosecutor had unlawfully kept a common gaming house, if he would give and pay to them a large sum of money for their use.

Third count. Charging a conspiracy to extort by promising to compromise a then pending prosecution.

That defendants wickedly intending to extort, &c., of and from the prosecutor, divers large sums of money, did unlawfully and wickedly conspire to extort, obtain and procure of and from the prosecutor divers large sums of money, and in pursuance of their conspiracy, did propose to compromise and suppress a certain indictment before preferred against the prosecutor by defendant B., and then pending in the Court of K. B., and a certain other indictment before preferred against the prosecutor by defendant S., then also pending in the Court of K. B., and to prevent further proceedings being taken against the prosecutor thereon, if the prosecutor would give and pay to defendants a large sum of money as a consideration and recompense to them for compromising and suppressing the last mentioned indictments, and preventing any further proceedings being taken against the prosecutor thereon.(*ss*)

(*ss*) This form is given merely in skeleton, and can only be of use as such.

Conspiracy to impoverish the prosecutor, and hinder him from exercising his lawful trade as a tailor; with an overt act, setting forth the consummation of the conspiracy.(*t*)

That F. E. and six others, devising and intending unjustly, unlawfully and by indirect means to impoverish one H. B., and to reduce to beggary and want the said H. B., and to hinder and deprive the said H. B. from using and exercising his trade and business as a tailor, which he then and there used and exercised, on, &c., at, &c., wrongfully, fraudulently, maliciously and unlawfully did confederate, conspire, combine and agree amongst themselves by indirect means to impoverish the said H. B., and to deprive and hinder him from following and exercising his aforesaid trade or business of a tailor; and the said F. E., &c., in pursuance of and according to the unlawful conspiracy, combination and agreement aforesaid, on, &c., at, &c., indirectly, wrongfully, unlawfully, maliciously and unjustly did prevent and hinder the said H. B. from following his aforesaid trade or business in Liverpool aforesaid, and thereby did then and there greatly impoverish the said H. B., to the great damage, &c.

Conspiracy to defame a public officer. First count, conspiracy to defame by charging corrupt conduct.(*u*)

That A. B., &c., together with certain other evil disposed persons whose names to the said inquest are as yet unknown, on, &c., at, &c., wickedly and maliciously devising and intending to bring contempt, discredit and dishonour on the administration of public justice, &c., and to deprive C. D., Esq., then and there holding the office and ex-

(*t*) On this count there was a verdict of guilty in Rex *v.* Eccles, 3 Dougl. 337. (Reported also in 1 Leach 276; and 13 East 230, n). The indictment contained another count not materially different, and according to the report in Douglass, was thus disposed of.—Chambre moved an arrest of judgment on two grounds. 1. The charge is too general; Hawk. b. 2, c. 26, s. 59; The King *v.* How, B. R., E.; 12 Geo. I.; 1 Str. 699; The King *v.* Munot, B. R., H.; 13 Geo. I.; 2 Str. 1127; 14 Vin. 386. (Willes J., referred to The King *v.* Kinnersly, B. R., T.; 5 Geo. I.; 1 Str. 193). It must be a conspiracy to do something. (Buller J.: Here the act intended is stated). It is only the consequence and not the means that is stated. (Lord Mansfield: Be the means what they may, if it be in consequence of a conspiracy, it is criminal). The issue is not well joined, for it does not appear that any of the defendants but Eccles have pleaded.

Lord Mansfield: "The conspiracy is to prevent Booth from working, the consequence is poverty. But the conspiracy and consequence are stated; but it is objected that there is no allegation of the means. Such allegation is unnecessary. The latter cases, and especially the King *v.* Kinnersly, are very strong. As to the objection on the issue, the record goes on and says, 'they and each of them.'"

Buller J.: "The indictment states more than is sufficient in alleging that the defendants conspired 'by indirect means.' The means are matter of evidence. If the indictment had stated that they conspired to prevent Booth from carrying on his trade, it would have been sufficient: 'by indirect means' is surplusage.

"As to the issue, it does not appear by this record that any of the defendants let judgment go by default. Therefore the court cannot go into the matter, and the issue is joined, though in a very slovenly manner. If any of the defendants have in fact let judgment go by default, and are injured by this manner of entering the issue, they have their remedy against the clerk in the crown office."

Motion denied.

(*u*) Com. *v.* Strafford, Sup. Ct. Pa., Dec. T., 1845, No. 39.

ercising the duties, (*setting forth the office*), of his good name, fame and reputation, as well as unjustly to subject him the said C. D. to pains and penalties, did among themselves conspire, combine, confederate and agree together to vilify and defame the said C. D., and falsely and maliciously to charge and accuse him the said C. D. with having been guilty of great corruption and other misdemeanors in his said office, and with having at divers times in his said office and in the exercise of the said duties, corruptly, unlawfully and wickedly received divers large bribes and sums of money and other valuable things, and with having in consideration of such bribes, moneys and other valuable things, unlawfully, corruptly and wickedly retarded, checked, prevented, falsified and frustrated the due course of public justice of the said commonwealth in the said city and county, to the great damage, disgrace and infamy of the said C. D., to the great discredit and dishonour of the administration of public justice as aforesaid, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same as first, setting out the matter charged.

That the said A. B., on the day and year aforesaid, at the county aforesaid and within the jurisdiction aforesaid, together with divers other evil disposed persons whose names are to this inquest as yet unknown, wickedly and maliciously with them devising and intending to bring contempt, discredit and dishonour on the administration of public justice in the said city and county, as well as to deprive the said C. D., Esq., holding the office and exercising the duties hereinbefore specified, of his good name, fame and reputation, as well as unjustly to subject him the said C. D. to high pains and penalties, did among themselves conspire, combine, confederate and agree together falsely to charge and accuse the said C. D., Esq., then in the office and in exercise of the duties hereinbefore specified, with having, in a case then shortly before pending, to wit, &c., (*here state the matter charged*); to the great damage, infamy and disgrace of the said C. D., to the great discredit and dishonour of the administration of public justice as aforesaid, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. By charging the prosecutor with having been guilty of corruption in a particular case.

That the said A. B., on the day and year aforesaid, at the county aforesaid and within the jurisdiction aforesaid, together with divers other evil disposed persons whose names are to this inquest as yet unknown, wickedly and maliciously with them devising and intending to bring contempt, discredit and dishonour on the administration of public justice in the said city and county, as well as to deprive C. D. holding the office and exercising the duties hereinbefore specified, of his good name, fame and reputation, as well as unjustly to subject the said C. D. to high pains and penalties, did among themselves conspire, combine, confederate and agree together falsely to charge and accuse the said C. D., when in the office and in the exercise of the duties hereinbefore specified, with having, in a case then shortly before pending, to wit, a case in which one K. was defendant, corruptly, wickedly and unlawfully received a large sum of money as a bribe, to wit, the sum of seventy-five dollars; to the great damage, infamy

and disgrace of the said C. D., to the great discredit and dishonour of the administration of public justice as aforesaid, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to indict a person for a capital offence, who was acquitted on the trial.(*v*)

That J. S., late of, &c., and M. S., late of, &c., being persons of an evil mind and wicked disposition, and devising and intending to deprive one W. G. of his good name, fame, credit and reputation, and also to subject the said W. G., without any just cause, to the loss of his life and forfeiture of his goods and chattels, lands and tenements, on, &c., at, &c., aforesaid, wickedly and maliciously did conspire, combine and agree amongst themselves to indict and cause to be indicted the said W. G., for a crime or offence liable by the laws of this kingdom to be punished capitally,(*w*) and to prosecute the said W. G. upon such indictment. And the jurors, &c., do further present, that the said J. S. and M. S., according to the conspiracy, combination and agreement aforesaid, between them as aforesaid before had, afterwards, to wit, on, &c., at the session of Oyer and Terminer of our said lord the king, then holden at New Sarum aforesaid, in and for said County of Wilts, before the honourable Sir R. A., knight, one of the barons of his majesty's Court of Exchequer, and E. W., Esq., one of his said majesty's sergeants at law, and others their fellows, justices of our said lord the king, assigned by, &c., (*here recite the commission as in the last precedent*), to inquire of all crimes by the oath of N. P., Esq., (*the names of the grand jurors*), good and lawful men of the county aforesaid, then and there sworn and charged to inquire for our said lord the king for the body of the said county, falsely, wickedly and maliciously, and without any reasonable or probable cause, did indict and cause to be indicted, the aforesaid W. G. by the name of W. G., late of, &c., bookseller and stationer, for that, &c., (*here recite the indictment*). And the jurors of this inquisition on their oaths aforesaid, further present, that the said J. S. and M. S., according to the conspiracy, combination and agreement between them as aforesaid before had, afterwards, to wit, on the said, &c., and on divers other days and times afterwards, at New Sarum aforesaid in the county aforesaid, the said W. G., upon the indictment aforesaid, wickedly and maliciously did prosecute, until the said W. G. afterwards, to wit, at the delivery of the gaol of our said lord the king, of his said County of W., holden at New Sarum aforesaid, on, &c., before the honourable H. L., Esq., one of the barons of his said majesty's Court of Exchequer, W. H., Esq., sergeant at law, and others their fellows, justices of our said lord the king, duly assigned to deliver his said gaol of the said County of W., of the prisoners therein being, by a certain jury of the county, by due form of law was acquitted of the premises aforesaid in the said indictment above speci-

(*v*) This count was sustained in 3 Burr. 993, see Chit. C. L. 1174, and approved by the Supreme Court of Alabama in State *v.* Cawood, 2 Stew. 360. See *ante*, p. 392.

(*w*) This is sufficient; 2 Burr. 993.

fied, by reason of which said false and malicious prosecutions of the said W. G. by them the said J. S. and M. S., in form aforesaid, he the said W. G. was compelled to expend divers sums of money, and to undergo divers hardships of body, in his defence to the prosecution aforesaid, to the great damage, disgrace and infamy of the said W. G., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiracy to induce a material witness to suppress his testimony.(*x*)

The jurors, &c., upon their oath present, that A. B., C. D. and E. F., all of, &c., labourers, being evil disposed persons and well knowing that a certain bill of indictment for felony was intended and about to be preferred against one G. H., and that one I. J. was a material witness in support of such bill of indictment, on, &c., at, &c., in the county aforesaid, did unlawfully and wickedly conspire, combine, confederate and agree together to induce the said I. J. to suppress the evidence he knew, and which was within his knowledge touching the said felony, and to withdraw and conceal himself, in order to prevent his being examined as a witness in support of said bill of indictment, so as aforesaid intended to be preferred, against, &c. (*Conclude as in book* 1, *chap.* 3).

Same as last, in another shape.

The jurors, &c., upon their oath present, that at the time of the conspiracy, combination, confederacy and agreement hereafter mentioned, one A. B. was a prisoner in the commonwealth's gaol, situated in B., in the county aforesaid, lawfully committed and charged with a certain felony before that time by him committed, and a certain indictment was about to be preferred against him the said A. B. for the said felony, and that one C. D. was a material witness in support of such bill of indictment; and that E. F. and G. H., both of, &c., labourers, well knowing the premises, and contriving and intending to prevent the due course of law and justice, and to prevent the said C. D. from attending as a witness in support of said bill of indictment about to be preferred as aforesaid, on, &c., at, &c., and while the said A. B. was a prisoner in the said prison as last aforesaid for the said felony, wilfully and corruptly did conspire, combine, confederate and agree among themselves to induce the said C. D. to suppress the evidence he knew concerning said felony, and to prevent the said C. D. from attending to give evidence as a witness in support of said bill of indictment against the said A. B., so about to be preferred against him as aforesaid. (*Conclude as in book* 1, *chap.* 3).

(*x*) See 3 Chit. C. L. 1156; 1 Salk. 174; 2 Ld. Raym. 1167; Davis' Prec. 109.

CHAPTER III.

NUISANCE.

General frame of indictment.

That A. B., late of, &c., on, &c., and on divers days and times between that day and the taking of this inquisition,(*a*) at, &c., near to the dwelling houses of divers citizens of, &c., and also to divers public streets of said, &c., did, &c., (*stating the particular offence*), on, &c., and on the other days and times aforesaid, there, &c., by reason whereof, (*state the particular annoyance as in succeeding forms*), to the great damage and common nuisance(*b*) not only of all the in-

(*a*) This averment, if unsupported by evidence, is surplusage. It is introduced, however, in all cases where the nuisance continues, and the object of it is to enable the court to give judgment of abatement; 13 East 164; 8 T. R. 142; 2 Stra. 686; 3 Chit. C. L. 608.

(*b*) The conclusion must always be "to the common nuisance." Thus an indictment for a nuisance, which ends "to the common nuisance of divers of the commonwealth's citizens," is insufficient. It should be laid to the common nuisance "of all the citizens of the commonwealth, residing in the neighbourhood," or "of all citizens, &c., residing, &c., and passing thereby;" Com. *v.* Faris, 5 Rand. 691. In Pennsylvania it is admissible to conclude to the common nuisance of the citizens of the Commonwealth of Pennsylvania; Graffins *v.* Com., 3 Penn. R. 502. On the same principle, an indictment for a nuisance in frequenting houses of ill fame, must charge that "the defendant, knowing the house to be a house of ill fame, did openly and notoriously haunt and frequent the same;" Brooks *v.* State, 2 Yerg. 482. 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 these facts be of such a nature as may justify that conclusion as one of law as well as of fact; Com. *v.* Webb, 6 Rand. 726; State *v.* Baldwin, 1 Dev. & Bat. 195. Thus, where it was charged that the defendants assembled at a public place, and profanely and with a loud voice cursed, swore and quarreled, in the hearing of divers persons then and there assembled, whereby a certain singing-school was broken up and disturbed, *ad commune nocumentum*, it was held that the indictment could not be sustained as one for a common nuisance; State *v.* Baldwin, 1 Dev. & Bat. 195. It is not enough in an indictment for a public nuisance in damming up and stagnating the waters of a creek, whereby the air is corrupted and infected, and sends forth noisome and unwholesome smells, to lay it to the common nuisance of "all the citizens of the commonwealth, not only residing and inhabiting there, but also going, returning, passing and repassing by the same," nor "to the common nuisance of all the citizens of the commonwealth;" but to maintain a public prosecution for a nuisance, it is necessary to allege and prove that the obstructions placed in the creek, produce a stagnation of the waters, and corrupt the air in or near a public highway, or in some other place in which the public have a special interest; Com. *v.* Webb, 6 Rand. 726.

Before considering the precedents of indictments for nuisance (*in obstructing, encroaching on or annoying the public in using public highways, bridges, harbours, water-courses or navigable rivers*), the general character of the offence will be examined. All permanent obstructions to the passage of the citizens of the state over public highways or bridges are nuisances for which an indictment will lie, and it will even be no defence that the highway was opened by an erroneous judgment of the county court; State *v.* Spainhour, 2 Dev. & Bat. 547. Thus, to place logs of timber upon them; to erect a gate across a road without immemorial usage to do so, even if it is kept open; and to suffer a way to be incommoded by trees hanging over it, are indictable offences; Hawk. b. 1, c. 75, s. 9; see Viner's Abridgment, *tit Nuisance* (C). And though it has been holden that no indictment will lie for distributing lawful handbills on the footway in the street, to the inconvenience of

habitants of the said , but of all other good citizens of the said commonwealth, thence, (*or if the nuisance be on a highway, say* on said highway), returning, passing, repassing, riding and labouring, &c. (*Conclude as in book* 1, *chap.* 3).

the passengers; R. *v.* Sermon, 1 Burr. R. 516; yet it seems now to be well established that every unauthorized obstruction of a highway is a misdemeanor; R. *v.* Cross, 3 Campb. 227. Thus, a wagoner habitually keeping his wagon standing for hours to unload, R. *v.* Russel, 8 East R. 427; a constable collecting a crowd by a sale, Com. *v.* Milliman, 13 S. & R. 403; a coachmaster plying for passengers, and allowing his coach to remain in the street more than a reasonable length of time to take up and set down passengers, R *v.* Cross, 2 Campb. 224; an auctioneer placing goods on the pavement intended by him for sale, Passmore's case, 1 S. & R. 217; or the owner of a house allowing it to remain under repair, and obstructing the public passage for a longer time than is necessary, R. *v.* Jones, 3 Campb. 330; will be respectively indictable for nuisances. So where the defendants, who were proprietors of a distillery in the City of Brooklyn, were in the habit of delivering grains remaining after distillation, called slops, by passing them through pipes to the public street opposite their distillery, where they were received into casks standing in carts and wagons; and the teams and carriages of the purchasers were accustomed to collect there in great number to receive and take away the article; and in consequence of their remaining there to take their turns, and of the strife among the drivers for priority, and of their disorderly conduct, the street was obstructed and rendered inconvenient to those passing thereon; it was held that the defendants were guilty of nuisance; People *v.* Cunningham, 1 Denio 524. Nuisances resulting from the several acts of distinct parties, *e. g.* occupiers of land raising fenders along a line of navigation, may be made the subject of a joint indictment against all of them; R. *v.* Trafford and others, 1 B. & Ad. 874; but the ill consequences of erecting piles in a harbour, if slight, uncertain and rare, are not indictable; R. *v.* Tindall and others, 6 A. & E. 143; 1 N. & P. 719.

To divert a part of a public stream, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burthen as it could before, is a common nuisance; 1 Hawk. c. 75, s. 11. But if a ship or other vessel sink by accident in a river, although it obstructs the navigation, yet the owner is not indictable as for a nuisance for not removing it; R. *v.* Morris, 1 B. & Ad. 441; R. *v.* Watts, 2 Esp. 675; R. *v.* Tindall, 6 A. & E. 143; R. *v.* Russell and others, 9 D. & R. 561; R. *v.* Ward, 4 A. & E. 384; 6 B. & C. 566. After conviction, the court may award a fine, or (if the subject matter of the nuisance indicted is of a permanent nature, admitting of abatement), prostration of so much of the thing as makes it a nuisance, or both fine and prostration; but both are not absolutely necessary, for the judgment should be adapted to the nature of the case; R. *v.* Pappineau, Stra. 686; R. *v.* Yorkshire, 7 T. R. 467; R. *v.* Stead, 8 *ib.* 142; 3 Bla. C. 221; and if the obstruction which was indicted is removed, so that the public have free passage again, the judgment will be for a nominal fine; R. *v.* Incledon, 13 East 164; R. *v.* White and Ward, 1 Burr. 338.

(*What are public ways and bridges*). A cartway (*via* or *aditus*), contains a footway (*iter*), and a pack and prime or horse and footway (*actus*), and is called *regia alta via*, because common to all the queen's subjects; Co. Lit. 56, a; Bac. Abr. tit. *Highways* (A.); but a "pack and prime" way does not contain a carriage way, *ib.* First, it may be proper to observe that no prosecution in any form can be sustained for the omission to repair any way or bridge. A bridge may be a common *highway;* Regina *v.* Sainthill, Ld. Raym. 1174; but *county* bridges are not within the new highway act, 5 and 6 Wm. IV. c. 50; unless so specially mentioned, (*ib.* s. 5); but such as are *public;* for the omission to repair a private way, or even its positive obstruction, not being *a common nuisance*, is only the ground of a civil action. It often, therefore, becomes a question, whether the way or bridge in respect of which a prosecution is instituted, is *public* or *private*. On this question it is indisputable that all ways, whether for carriages, horses or foot passengers, leading to a market town, or beyond it, or from town to town, are properly called "highways;" Co. Lit. 56, a. It is now held that a road dedicated to and used by the public for twenty-five years becomes a highway, which the parish must repair, though they have neither adopted nor acquiesced in the dedication or the user; R. *v.* Leake (Inhab.), 5 B. & Ad. 469; 2 N. & M. 503, S. C.; see R. *v.* Paddington (Vestry), 9 B. & C. 456; R. *v.* Lyon, 5 D. & R. 497; and four or five years' user as a public road is sufficient to warrant a jury in presuming that it was so used with the full assent and by the dedication of the owners of the soil; Jarvis *v.* Dean, 3 Bing. 448; Woodger *v.* Haddon, 5 Taunt. 138. In the latter case, eight years were held sufficient, and no particular time necessary to constitute evidence of dedication. But a way to a private house,

For erecting a gate across a public highway.(*c*)

That at the time of committing the nuisance hereinafter mentioned, there was and yet is a certain ancient common highway in the parish of M., in the County of N., leading from, &c., into, through and over a certain public(*d*) highway, called the great north road, and from thence to, &c., in the parish of B., in the said county, for all the good people

or perhaps even to a village, which terminates there, or leads to the common fields of a town, and it is said, even to a parish church, is only a way for a particular class of persons, and therefore not public; Hawk. b. I, c. 76, s. I. And Ld. Tenterden, in a well known case, said that "he had great difficulty in conceiving that there can be a public way which is not a thoroughfare, as the public at large cannot well be in the use of it;" Wood *v.* Veal, 5 B. & Al. 454; and see 5 Taunt. 138, Woodger *v.* Haddon; both cases of *cul de sac;* R. *v.* Limehouse, 2 Shower 455; Drinkwater *v.* Porter, 7 C. & P. 181. There must be an *intention* by the owner of the soil to dedicate. Of that intention the use by the public is *evidence*, but no more. A single act of interruption by the owner is of much more weight on a question of intention than many acts of enjoyment; *dict.* Parke B. in Poole *v.* Huskinson, 11 M. & W. 830.

All bridges built in highways, by whomsoever erected and dedicated to the public, are public bridges; but to constitute a bridge a public bridge, at least where it has not been repaired, or a county bridge, it must be over such water as answers the description of a *flumen vel cursus aquæ*, that is, water flowing in a channel between banks more or less defined, although such a channel may be occasionally dry: 2 Inst. 701; R. *v.* Oxfordshire (Inhab.), 1 B. & Ad. 289; (as stated by Patteson J., in R. *v.* Whitney (Inhab.), 3 A. & E. 72); also restated *per cur.* 1 B. & Ad. 289. And a raised causeway forming an approach to a bridge, but at more than three hundred feet from it, and pierced with arches and culverts to suffer water to pass under, when the meadows over which it was carried were flooded, is not such a bridge as the county is bound to repair; R. *v.* Oxfordshire (Inhab.).

But the Queen's Bench has since denied that R. *v.* Oxfordshire proves any rule of law to exist for prohibiting, under all or any circumstances, every part of a structure from being treated as *a bridge*, because water does not *at all times* flow under that part; for to confine the roads, *flumen vel cursus aquæ*, to a constant stream or course of water, flowing at all times to the exclusion of *flood-waters*, whether rarely or often occurring, does not consist with R. *v.* Trafford, 1 B. & Ad. 874, 887, affirmed *quoad hoc* in error, 2 Tyr. 201; 8 Bing. 204; 2 C. & J. 265; where it was held unlawful to obstruct the accustomed course of flood-waters flowing only occasionally. At any rate, where the arches were twenty-nine in number, contiguous to, and as it were, in immediate continuation of an acknowledged county bridge, which extended from one end of them over the river Trent by five arches, and from the other over a brook by eight arches, and had been always immemorially, R. *v.* Derbyshire (Inhab.), 2 Q. B. 745, repaired by the county as part of that bridge; it was held that no rule of law prevented the whole structure from being taken to be one county bridge. The river Trent constantly flowed under all five arches, and the brook under one of the eight, while under most of the other twenty-nine were pools of stagnant water at all times, and under all of them the water of Trent flowed in flood time; *ib.* The court intimated that a structure of arches made to carry a highway in such a manner as to permit flood-waters to flow in their accustomed course, should be treated as a *bridge*, though at ordinary times there may be no waters passing under the arches.

Where a bridge consists of more than one arch, the whole must be indicted as one bridge; nor can each arch be there treated as a separate bridge; R. *v.* Oxfordshire (Inhab.), 1 B. & Ad. 289, as stated *per curiam*, 2 Q. B. 755.

A want of parapets will not prevent a structure from being a bridge, or make it a culvert only; nor will the mere fact of an arch spanning a stream necessarily make it a bridge; see per Ld. Denman, in R. *v.* Whitney (Inhab.), 3 A. & E. 71; and Bridge's case, Godbolt's R. 346, pl. 441; stated 1 B. & Ad. 301, note. If a bridge be used by the public only in time of flood, and be shut at other times, it will only be public for such purpose, and at such a period; R. *v.* Northamptonshire (Inhab.), 2 M. & S. 262; R. *v.* Buckingham (Marquis), 4 Camph. 189; but though the purpose for which the dedication takes place, may be limited, there can be no *dedication* to a limited part of the public; *dict.* Parke B., 11 M. & W. 830; Poole *v.* Huskinson; Dickinson's Q. S. 396.

(*c*) Dickinson's Q. S. 6th ed. 417.

(*d*) So in Regina *v.* Stratford (Inhab.), 3 Ld. Raym. 40; in error; Dickinson's Q. S. 6th ed. 417.

of said state to go, return and pass on foot and on horseback, at their free will and pleasure, and that on, &c., A. B., late of, &c., with force and arms, at a certain place there in the parish of aforesaid, contiguous to and on the east side of the great north road aforesaid, unlawfully and injuriously did erect and cause to be erected a certain wooden gate, of the length of fifteen feet and of the height of four feet, upon and across the said highway, leading from the place called, &c., to the great north road aforesaid; and that the said A. B., the said wooden gate so as aforesaid erected and made from the said, &c., until the day of the taking this inquisition, with force and arms, at, &c., aforesaid, unlawfully and injuriously did continue locked and fastened with an iron chain, and yet doth continue, by which the common highway last aforesaid, during all the time aforesaid, was so obstructed and stopped up that the good people of said state in, by and through the same highway could not, nor yet can go, return and pass on foot and on horseback so freely as they ought and were wont to do; to the great damage and common nuisance(*e*) of all the good citizens of the said state going, returning, passing and repassing in, along and through the said last mentioned highway, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For erecting and continuing a house, part of which was on the highway.(*f*)

(*Describe the highway as before*). That A. B., late of, &c., with force and arms, at, &c., unlawfully did erect and build, and cause and procure to be erected and built, a certain brick messuage and tenement, containing in length twelve feet and six inches, and in depth at the east end thereof five feet and six inches, and in depth at the west end thereof two feet nine inches, and that the same was erected and built, and caused and procured to be erected and built, by him the said A. B., in and upon the said ancient and common highway at the parish aforesaid, in the county aforesaid, to wit, opposite to a certain dwelling house of one C. H. there situate, and the said part of the said messuage and tenements so erected and built, and caused and procured to be erected and built, by him the said A. B. as aforesaid, in and upon the said ancient and common highway, at the parish afore-

(*e*) Every indictment and presentment, whether for nuisances arising from neglect of duty or for encroachments on the public rights, must, in its conclusion, contain the words "to the common nuisance of all the liege subjects of our lady the now queen," residing, passing or using, &c., (according to the facts); 2 Stra. 688; Dickinson's Q. S. 6th ed. 417. See *ante*, p. 402.

(*f*) R. *v.* Wright, 3 B. & Ad. 681. See form of indictment for erecting and continuing a market stall in a public highway; R. *v.* Starkey, 7 A. & E. 95. Indictment lies against even the tenant at will of a house, which, standing on the highway, is ruinous and like to fall down, for, as the danger is what concerns the public, they have a remedy against the occupier in respect of his occupation; Reg. *v.* Watts, 1 Salk. 357, S. C. Ld. Raym. 856; Rym. Ent. 25; see other cases, Burns' Justice, tit. Highways, s. vi. 4 (cited 9 B. & C. 730); see R. *v.* Hollis, 2 Stark. C. N. P. 536, *post*. An increased general facility in communicating with a seaport, and particularly in the conveying coals there, will not justify narrowing the highway by laying down a railway alongside of it; R. *v.* Morris, 1 B. & Ad. 441. As to the neighbourhood of railways, annoying old roads by smoke, see R. *v.* Pease, 4 B. & Ad. 30; R. *v.* Gregory, 5 *ib.* 555; 2 N. & M. 478; 2 Tyr. R. 201, S. C. in error. See note on p. 403, as to the learning generally on this point.

said in the county aforesaid, he the said A. B. from the said day of in the year aforesaid, until the day of the taking of this inquisition, with force and arms, at the parish aforesaid in the county aforesaid, unlawfully and injuriously did continue and yet doth continue; by reason and means whereof the said ancient and common public highway was, during the time aforesaid, at the parish aforesaid in the county aforesaid, encroached upon, narrowed and straitened, so that the good people of the said state, by and through the said highway could not, nor yet can go, return, &c. (*As before*).

For obstructing a common highway by placing in it drays.(g)

In the county aforesaid, in a certain street, there called Leman street, being a common highway, used for all the good people of the said state, with their horses, coaches, carts and carriages to go, return, pass, repass, ride and labour at their free will and pleasure, unlawfully and injuriously did (put and place three empty drays, and did then and on the said other days and times there, unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in and upon the common highway aforesaid, for the space of several hours, to wit, for the space of five hours on each of the said days); whereby the common highway aforesaid, then and on the said other days and times, for and during all the time aforesaid, on each of the said days respectively, was obstructed and straitened, so that the good people of the said state could not then and on the said other days and times, go, return, pass, repass, ride and labour with their horses, coaches, carts and other carriages, in, through and along the common highway aforesaid, as they ought and were wont and accustomed to do; to the great damage and common nuisance of all the people of the said state going, returning, passing, repassing, riding and labouring in, through and along the common highway aforesaid, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same with filth, &c.

That A. B. of Boston aforesaid, yeoman, on, &c., at, &c., a certain common and public nuisance in and upon the land and tenement of him the said A. B. situated, at, &c., near to certain public passage-ways, to wit, certain passage-ways called and known by the name of did cause, create, suffer and maintain, by then and there causing and suffering great quantities of offensive and

(g) Archbold's C. P. 5th Am. ed. 756.

See precedents of obstructing a highway by continuing a hedge across it; C. Cir. Com. 307; by erecting a gate across it; 6 Went. 401, 405; Reg. *v.* Bosfield, 1 C. & M. 151; by building or continuing a building upon it; 4 Went. 181, 191; 1 A. & E. 822; by placing carts upon it for the sale of vegetables; C. Cir. Com. 305; by laying soil upon it; C. Cir. Com. 303; by laying rubbish upon it; C. Cir. Com. 315; by digging holes in it; C. Cir. Com. 303, 314; by digging a horse-pond and erecting a cistern in it; C. Cir. Com. 304; by stopping a water course and thereby overflowing the highway; C. Cir. Com. 376; by exhibiting effigies at a window and thereby attracting a crowd; R. *v.* Carlisle, C. C. & P. 637.

stinking filth, water and substances, solid and liquid, to collect, stagnate, ferment and be mixed together in and upon his land and tenement aforesaid, and from his said land and tenement to flow, descend and be removed to and upon certain open and exposed places and yards, upon, in and near the same land and tenement and to and upon certain public passages near thereunto, to wit, certain passage-ways called and known by the name of and from said offensive and stinking substances, water and filth did cause, suffer and permit divers noxious, offensive, deleterious, unwholesome and unhealthy vapours, exhalations and smells to arise and then and there to contaminate, poison and destroy the air and atmosphere above, around and near the same tenements and lands, and in and upon and over said passage-ways, to wit, the passage-ways called over which the good citizens of said commonwealth in great numbers pass and repass every day, to wit, to the number of three hundred passengers daily, and near which many citizens inhabit, live and work, to the great damage and injury of said passengers and all other persons there being, residing and passing, to the great hazard of their health, comfort and lives, and to the common nuisance of all of said passengers, persons and citizens, and of all the citizens of said commonwealth there being, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For letting off fire-works in the public street.(*h*)

That A. B., late of, &c., on, &c., at, &c., in a certain common and public street and highway there for all the good people of the said state, on foot and with their horses, carts and carriages to go, return, ride, pass and repass and labour, at their free will and pleasure, wrongfully, unlawfully and injuriously did fire certain fire-works called rockets, serpents and Roman candles, whereby the said public street and common highway was then and there greatly obstructed, and divers good citizens of the said state then and there standing, being, passing and repassing in and along the said last mentioned public street and common highway, were then and there greatly terrified and put in great peril and danger of bodily harm, and could not then go, return, pass and repass, on foot and with their horses, coaches, carts and carriages, in and along the said last mentioned public street and common highway, as they ought to have done, and had been used and accustomed to do, and otherwise might and would have done; to the great terror, alarm, danger and common nuisance of all the good people of the said state in and near the said public street and highway inhabiting and residing, and of all others the good people of the said state there standing, being and passing, in con-

(*h*) Dickinson's Q. S. 6th ed. 421. 9 and 10 Wm. III. c. 7, provides by s. 2 and 3, specific penalties for this offence, to be levied by distress after summary conviction by a justice; yet by the first section, the offence is declared to become a *common nuisance;* therefore it may be indicted as such, either at common law or under the statute; R. v. Harris, 4 T. R. 202; 1 Saund. 135, n. (4). The making, selling, throwing or permitting to be thrown from any house, making or selling any moulds for making, or aiding in making any fire-works, are all declared to be offences by the different sections of the statute.

tempt of the said state and their laws, to the evil example, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For keeping a pond of stagnant water in a city.

That J. P., I. Z. & H. H., all late of, &c., gentlemen, on, &c., and at divers days and times between that day and the day of the taking of this inquisition, with force and arms, &c., at the city aforesaid and within the jurisdiction of this court, then and there unlawfully and knowingly did keep and permit to be and remain, in and upon a certain lot or piece of ground to them the said J., I. and H. belonging, and in their possession then and there being, situate near and adjoining the public streets in the said city, to wit, Mulberry street and Eighth street, a certain pond of putrid, filthy, noxious and stagnant water one hundred yards in circumference, by and from which divers hurtful, pernicious and unwholesome smells on the day and during the time aforesaid did and doth arise, and the air there was and yet is thereby greatly corrupted and infected, to the great damage and common nuisance, not only of all the subjects of this commonwealth their resident and dwelling, but also of all the subjects of this commonwealth passing and repassing, &c.

For placing a quantity of foul liquor called "returns," in the highway.(*i*)

That A. B., the day of in the year, &c., at the county aforesaid and within the jurisdiction of this court, did discharge out of the still-house of him the said A. B., lying and being in the county aforesaid, into the road &c., a quantity of foul and nauseous liquor called "returns," to the great damage and common nuisance of all the good citizens of this commonwealth, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For laying dung near a public street, whereby the air was infected and inhabitants annoyed.(*j*)

That A. B., late of, &c., on, &c., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms at, &c., aforesaid, to wit, in a certain common and public highway there, called B.'s wharf, unlawfully and injuriously did put, place and leave, and caused and procured to be put, placed and left, divers large quantities of dung and filth, whereby divers noxious and unwholesome smells from the said dung and filth did then and there arise, and thereby the air there became and was greatly corrupted and infected; to the great damage and common nuisance not only of all the good people of the said state, inhabiting and residing near the place where the said dung and filth was so put, placed and left as aforesaid, but also of all other good people of the said state in, by and through the said highway, and near the place

(*i*) Drawn by William Bradford, Esq.
(*j*) Dickinson's Q. S. 6th ed. 427.

aforesaid, going, returning, passing and repassing, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For letting wagons stand in a public street, so as to incommode passengers.(*k*)

That A. B., late of, &c., before and at the times hereafter mentioned, was and still is a proprietor of divers wagons for conveyance for hire of goods and merchandise to and from E., and being such proprietor, he the said A. B., on, &c., and on divers other days and times between that day and the day of in the year aforesaid, in the parish of in the county aforesaid, without just cause or excuse, but wrongfully and unjustly did cause and permit divers, to wit, twenty wagons to stand and remain for a long time, to wit, ten hours on each day, before his warehouse, situate in a public street and highway called in the parish aforesaid, in the county aforesaid, and divers cumbrous and other parcels which had been conveyed or were intended to be conveyed in such wagons, to lie during such time, scattered about such public street; to the common nuisance, great hinderance, impediment and annoyance of all the good people of the said state, passing and repassing such streets, &c.

Second count.

(That the defendant permitted divers wagons to stand in the public street and highway, and there to remain before his warehouse for a long and unreasonable time, by which the people of the said state were, during that time, much impeded and obstructed, &c.)

For placing casks in the highway.

That A. B., late, &c., on, &c., at, &c., with force and arms, &c., in and upon a certain road and highway called in the township and county, &c., the said road then being a common road and highway for all the citizens of this commonwealth to go, pass and travel, at their will, with their horses, carts and carriages, ten wooden casks unlawfully and injuriously did put, place and cause to be put and placed, and that the said ten wooden casks, by the said J. B. in the common road and highway put and placed and caused to be put and placed, from the day of in the year aforesaid, to the day of in the month and year aforesaid, in the county aforesaid, the said J. B. did voluntarily permit to be and remain.

By reason whereof the common road and highway aforesaid for all the time aforesaid, at the county aforesaid, was so obstructed that the good citizens of this commonwealth, in and along the said road and highway, about their necessary business, with their horses, carts and carriages could not go, pass and travel so freely as of right they ought, to the great damage and common nuisance and hinderance of all the citizens of this commonwealth in and along the said road passing, &c., to the evil example, &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

(*k*) Dickinson's Q. S. 6th ed. 421.

For leaving open an area on foot pavement in a street.(*l*)

(*Describe a public way as on p.* 403). And that A. B., late of, &c., on, &c., with force and arms at, &c., in a certain part of the said common highway and public street, there, to wit, in the foot pavement of the said street, before the dwelling house of him the said A. B., unlawfully and injuriously did leave open a certain area of the length of and of the breadth of belonging to him the said A. B., without putting or placing, or causing to be put and placed, any rails or other fence to enclose the same; and he the said A. B. from, &c., until, &c., at, &c., the said area so as aforesaid being in the said foot pavement of the said common highway and public street, unlawfully and injuriously did cause, permit and suffer to be, remain and continue open, by reason and means whereof the good people of the said state, during the time aforesaid, could not, nor yet can go, return and pass on foot in, by and through the said common highway and public street, and as they were used and accustomed and were wont and ought to do, without great peril and danger of their lives; to the great damage and common nuisance of all, &c., in, by and through, &c., going, returning and passing on foot, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For laying dirt in a footway.(*m*)

That P. B., late of, &c., with force and arms at, &c., aforesaid, in a certain common footway there leading from that part of N. green which is in the parish aforesaid in the county aforesaid, towards and unto the parochial church of the same parish in the said county, did unlawfully and injuriously put, place and lay, and cause to be put, placed and laid, two cartloads of dirt and other filth in the said footway, from the said, &c., until the day of the taking of this inquisition, at, &c., aforesaid, and the same on, &c., at, &c., unlawfully and injuriously did permit and suffer to be and remain, by reason whereof the footway aforesaid, during the time aforesaid, was and yet is greatly obstructed and straitened, so that the said people of the said state through the same footway could not, during the time aforesaid, nor yet can go, return, pass, repass and labour as they ought and were wont to do; to the common nuisance and great damage, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For keeping a ferocious dog.

That A. B., late, &c., on, &c., at, &c., and on divers other days and times, with force and arms, near unto the common highway, and in and near the public streets there unlawfully and knowingly did keep and still doth keep, a certain dog of a ferocious and furious nature, and the said dog, on the day and year aforesaid, and on the said other days and times, at the county aforesaid, near unto the common highway and in and near the public streets, then and there unlawfully and knowingly did permit and suffer, and still doth permit and suffer

(*l*) Dickinson's Q. S. 6th ed. 419. (*m*) *Ib.* 420.

to go unmuzzled and at large, by reason whereof the good people of this commonwealth, and the citizens of the county of on the day and year aforesaid, and on the said other days and times at the county aforesaid, could not, nor can they now go, return, pass and labour in and through the said common highway and public streets, without great danger and hazard of being bit, maimed and torn by the said dog and losing their lives, to the great damage, terror and common nuisance of all the people and citizens aforesaid, in, by and through the said common highway and public streets then going and returning, passing, repassing and labouring, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For profane swearing in a public street.(*n*)

That A. B., being an evil disposed person, &c., did, in the public street of Jefferson, profanely curse and swear, and take the name of God in vain, to the evil example, &c., and to the common nuisance of the good citizens of the state, and against, &c.

For obstructing townways in Massachusetts, under statutes of 1786, *c.* 67, *s.* 7, *and* 1786, *c.* 81, *s.* 6.(*o*)

That A. B. of, &c., labourer, &c., and on divers other days and times between that day and the taking this inquisition, at, &c., with force and arms in and upon a certain townway there legally laid out, accepted and established as a townway in the said town of S. (which way leads and extends from the dwelling house of G. H. to the dwelling house of J. K. in the said town of S.), did unlawfully and injuriously put, place and erect a certain fence, in and upon and across the highway aforesaid; and the same fence did then and there unlawfully and injuriously continue and suffer to remain, from the said day of to the day of the finding of this bill; whereby the way aforesaid, for and during the whole time aforesaid, was wholly obstructed, so that the citizens of the commonwealth were prevented from passing and

(*n*) Taylor C. J.: "It was held, in the case of the State *v.* Waller, that if the offence with which the defendant then stood charged, had been laid as a common nuisance, and the jury had so found it, the judgment would have been supported. Drunkenness and profane swearing are placed on the same footing by the act of 1741, c. 30, and where committed in single acts, may be punished summarily by a justice of the peace. But where the acts are repeated, and so public as to become an annoyance and inconvenience to the citizens at large, no reason is perceived why they are not indictable as common nuisances. Several offences are stated in the books as so indictable, though not more troublesome to the public than the one before us. A common scold is indictable as a common nuisance; and with equal, if not stronger reason, I should think, a common, profane swearer may be so considered;" State *v.* Ellar, 1 Dev. 267, 268.

(*o*) Com. *v.* Gowen, 7 Mass. 378. This indictment was contested on two grounds: first, that no indictment lies for an obstruction to a townway, which it was urged was distinguishable from a public highway by being merely for the accommodation of the people of the town; and secondly, because the continuance of the nuisance was not averred to be with force and arms. These words, however, all the courts have now concurred in rejecting as superfluous in every case (Wh. C. L. 102; *ante*, p. 9), and the first point was not seriously pressed. The spirit of the ruling in Resp. *v.* Arnold, 3 Yeates 423, is, that a road to which the public has access, even though it may be technically called a private road, is to be protected from obstruction by indictment.

repassing and using the said way, as they have a right and have been wont to do; to the great injury and common nuisance of all the citizens of said commonwealth having occasion to pass, repass and use the way aforesaid, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

For blocking up the great square of a town house in Pennsylvania.(*p*)

That for a long time ago, before and until the time of the obstruction and nuisance hereinafter mentioned, there was, and still of right ought to be a certain common and public highway in the borough of Bedford and county aforesaid, commonly called and well known by the name of the public and great square of said borough, for all good citizens of this commonwealth to go, return, pass, repass and ride and labour on foot and on horseback, and with their cattle and carriages at their free will and pleasure, and that on, &c., a certain house, erection and building made of bricks, mortar and other materials, had been built and erected by certain persons to the jurors aforesaid as yet unknown, which said house, erection and building took in, encroached upon, stopped up and obstructed a certain part of the aforesaid common and public highway called the public and great square of said borough, being in length thirty-nine feet and upwards and in breadth twenty-one feet and upwards, whereby the said public and common highway was obstructed and stopped up, so that the good citizens of this commonwealth could not with their cattle and carriages, on foot and on horseback, go, return, pass and repass, ride and labour, at their free will and pleasure, as they had been accustomed to do; and that G. W. B. and J. W. D., late of the said county, yeomen, the said erection and building so as aforesaid built and erected, and as aforesaid taking in, encroaching upon, stopping up and obstructing a certain part of the aforesaid common and public highway, on, &c., and from that time until the day of taking this inquisition, with force and arms, at the borough of Bedford in the county aforesaid and within the jurisdiction of this court, unlawfully and injuriously did keep, maintain and continue and still doth keep, maintain and continue, whereby the said common and public highway during the time aforesaid, hath been and yet is obstructed and stopped up, so that the good citizens of this commonwealth during all that time, have been and yet are obstructed and hindered in going and returning, passing and repassing, riding and labouring on foot and on horseback with their cattle and carriages at their free will and pleasure in and along the said common and public highway, as they had been used and accustomed to do; to the great damage and common nuisance of all the good citizens of this commonwealth in and along the said public and common highway going, returning, passing, repassing, riding and labouring on foot and on horseback, and with cattle and carriages, &c. (*Conclude as in prior counts*).

(*p*) Com. v. Bowman, 3 Barr 203.

For erecting a wooden building on public square of a village in Vermont.(*q*)

That A. B. on, &c., with force and arms at, &c., did unlawfully and injuriously, in and upon a certain public square, and in the common highway there, called the public square, situate in the village of St. A., in the County of F., lying east of and adjoining the stage road leading through the village of St. A., put, place and set up, and caused to be put, placed and set up, one large wooden building forty feet and upwards in length, and thirty feet and upwards in breadth; and the said building so as aforesaid put, placed and set up in and upon the aforesaid public square and common highway, he the said C. W., upon and from the said twenty-eighth day of May, A. D. one thousand eight hundred and twenty-eight, till the present time, with force and arms, unlawfully and injuriously hath upheld, maintained and continued, and still doth uphold, maintain and continue, whereby the said public square and common highway, on, &c., and during all that time, was and has been greatly obstructed, narrowed and straitened, so that the citizens of this state, in and upon and through said public square and common highway, all that time could not, nor can now go, return, pass and repass as they ought and were accustomed to do; to the great damage and nuisance of all the citizens of this state going and returning, passing and repassing in and upon and through the said public square and common highway, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For throwing dirt upon a public lot.(*r*)

That A. B., late of, &c., yeoman, on, &c., and from that day until the taking of this inquisition, at, &c., with force and arms, &c., unlawfully and obstinately did place, put and keep, and caused to be placed, put and kept on a certain lot or piece of ground situate, lying and being at the corners of Spruce, Front and Dock streets, in the said city, and near and adjoining to the public streets and highways, to wit, Spruce, Front and Dock streets in the said city, and also near the dwelling houses of divers citizens of this commonwealth, certain large quantities, to wit, one hundred cartloads of the filth, dung, manure, dirt, excrement and scrapings from the surface of the wharves, gutters and streets in the said city, whereupon divers fetid, noisome, hurtful, pernicious and unwholesome smells, on the days and times aforesaid, did and still do arise and proceed, whereby the air there was and still is corrupted, infétid and infected, and the healths of the liege citizens of this commonwealth there inhabiting, residing and passing, have been and still are endangered and impaired, to the great damage and common nuisance of all citizens of this comonmwealth there inhabiting, residing and passing, to the evil example, &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

(*q*) State *v.* Wilkinson, 2 Verm. 480.

(*r*) This indictment was framed in 1810, by P. A. Browne, Esq., then prosecuting attorney in Philadelphia.

For stopping an ancient water-course, whereby the water overflowed the adjoining highway and damaged the same.(*s*)

That P. Q., late of, &c., on, &c., with force and arms at, &c., a certain ancient water-course adjoining to a common public highway, within the same parish, leading from the said town of B. in the county aforesaid, towards and into the city of G., in the County of G. aforesaid, with gravel and other materials, unlawfully and injuriously did obstruct and stop up, and the said water-course so as aforesaid obstructed and stopped up from, &c., aforesaid, until the day of the taking of this inquisition, at, &c., aforesaid, unlawfully and injuriously did continue, by reason whereof the rain and waters that were wont and ought to flow and pass through the said water-course, on the same day and year aforesaid, and on divers other days and times afterwards, between that day and the day of the taking of this inquisition, did overflow and remain in the said common highway there, and thereby the same was and yet is greatly hurt, damaged, impaired and spoiled, so that the good people of the said state, through the same way, with their horses, coaches, carts and carriages, then and on the said other days and times could not, nor yet can go, return, pass, repass, ride and labour as they ought and were wont to do; to the great damage and common nuisance of all the good people of the said state through the same highway going, returning, passing, repassing, riding and labouring, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For diverting a water-course running into a public pond or reservoir.(*t*)

That from time whereof, &c., there has been and still is a common water-course, near a certain place called F., within the parish of B., in the said County of L., which continually during all the said time, at all times of the year, hath run and been used, and accustomed and of right ought, without any obstruction or impediment, to run out of a certain place called the Great Wash, situate and being in the parish of S., in the county aforesaid, into and along the common highway there, leading from to and into a certain pond and reservoir in the said common highway there, and from the said pond and reservoir into the lands of H. D., at which said water-course, pond and reservoir, the inhabitants of the said parish of B., and all other the citizens of the said state, in and through the said common highway passing and repassing, all the said time have used, and of right been accustomed to water their horses and other cattle at their free will and pleasure. And the jurors, &c., present that P. Q., late of, &c., on, &c., at, &c., aforesaid, in and across the said water-course, in the said highway there, a certain mound, bank or dam did then and there make, erect and build, and the same did raise so high, that the said water in its said ancient course was obstructed, and into the said pond and reservoir did not run as it was used and accustomed and ought to do, so that the inhabitants of the said parish and all

(*s*) Dickinson's Q. S. 6th ed. 419. See for another form for same, p. 416.
(*t*) Dickinson's Q. S. 6th ed. 420.

other the citizens of the said state in and through the said common highway passing and repassing, were and still are deprived of the use of the said pond and reservoir of water for their cattle, and hindered from enjoying the same as they ought and were wont to do; to the great damage and common nuisance, not only of all the inhabitants of the said parish of B., but of all other the citizens of the said state, in and through the said common highway passing and going, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For obstructing a water-course, called "Peg's Run."(*u*)

That S. G., late of, &c., yeoman, on, &c., at, &c., unlawfully and injuriously did put and place divers quantities of earth, gravel and other materials on a piece of land adjoining the public highway, and near a certain ancient water-course called Peg's Run, there being, and the same from the year and day aforesaid, to the day of taking this inquisition, did and yet doth injuriously and unlawfully continue, by reason whereof the rain and waters which were wont and ought to flow and pass to and through the same water-course, on the said first mentioned day and year, and at divers other days and times afterwards between that day and the taking of this inquisition, did overflow and remain on the said piece of ground, and then and there and at the said days and times did become stagnant, putrid and noxious, from whence unwholesome damps, fogs and smells did arise, whereby the air was greatly corrupted and infected, to the great damage and common nuisance of the liege subjects of this commonwealth dwelling thereabouts, and all others passing and repassing on the said highway and near the said stagnant waters, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said S. on, &c., at, &c., unlawfully and injuriously, a certain ancient water-course called Peg's Run with earth, gravel and other materials did obstruct and stop up, by reason whereof the rains and waters that used to flow through the same water-course did overflow the adjacent lands, and remain and become putrid, stagnant and noxious, and did send forth unwholesome and infectious damps, fogs and smells, whereby the air was greatly corrupted and infected, to the great damage, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For permitting waters of a mill to overflow.(*v*)

That A. B., "being possessed of a certain mill and mill-dam with their appurtenances, situate near and adjacent to a certain common highway and public road, and the dwelling houses of divers of the good citizens of this commonwealth," did on, &c., and on divers days before and since, unlawfully and injuriously permit the water of the mill-pond to overflow the adjacent lands, as well of others as his own, and also the public road or highway, by means whereof the

(*u*) Framed by Mr. Bradford in 1784.

(*v*) This count was sustained in Virginia, on demurrer, in Stephen *v.* Com., 2 Leigh 759.

land so overflowed was rendered and kept marshy, and filled and covered with noxious weeds and putrid vegetation, whereby the air became corrupted and infected, to the great damage and common nuisance, &c.

For obstructing an ancient water-course, whereby a public highway was overflowed and spoiled.(*w*)

That P. A., late of, &c., yeoman, on, &c., at, &c., a certain ancient water-course called the Raystown branch of Juniata, and a certain other ancient water-course called Danning's creek, which said ancient water-course called the Raystown branch of Juniata, running from Londonderry township in the county aforesaid, and which said ancient water-course called Danning's creek, running from St. Clair township in the county aforesaid, and uniting in and running through Bedford township in the county aforesaid, and running between the said townships of Londonderry and St. Clair and the township of Hopewell in the said county, across and through which the commonwealth's highway, or a road leading from the town of Bedford in the county aforesaid, towards and unto the crossings of Juniata in the county aforesaid, was laid out in due form of law, did obstruct and stop up, and the said water-courses so as aforesaid obstructed and stopped up from the said, &c., until the day of the taking of this inquisition, at the township of Bedford in the county aforesaid, unlawfully and injuriously hath continued and still doth continue, by reason whereof, the rain and waters that were wont and ought to flow and pass through the said water-courses, on the same day and year and divers other days and times afterwards between that day and the day of the taking of this inquisition, did overflow and remain in the commonwealth's highway or road aforesaid, in the township of Bedford aforesaid, and thereby the same highway or road was and yet is greatly hurt and spoiled, so that the liege subjects of the commonwealth, through the same highway or road, with their horses, coaches, carts and carriages, then and at other days and times, could not nor yet can go, return, pass, ride and labour as they ought and were wont to do, to the great damage and common nuisance of all the liege subjects of the commonwealth through the same highway or road going, returning, passing, riding and labouring, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For erecting a dam on a navigable river.(*x*)

That defendant on, &c., at, &c., did erect and build, set up, repair

(*w*) R. *v.* Arnold, 3 Yeates 417. This indictment was sustained by Yeates and Smith, Justices, at a circuit court in Bedford, 1802. It was held that it was not necessary to state how far in length or breadth the water stood on the road. See *ante*, p. 414.

(*x*) Com. *v.* Church, 1 Barr 105. This indictment was quashed by the Quarter Sessions of Dauphin County, on the ground that the proceeding was not in accordance with the act of 22d March, 1803, which prescribed the only method by which such a nuisance could be abated. The judgment was reversed by the Supreme Court, which held, that a dam in a stream which was a highway, was *prima facie* indictable as a nuisance, not in subordination to the act of 1803, but according to the course of the common law. This indictment, however, was not examined in any other aspect.

and maintain, a certain dam of the length of one hundred feet, of the breadth of twelve feet and of the height of six feet, in the river Swatara, in the township of Lower Swatara in the county aforesaid, and in that part of said river declared by an act of assembly of the Commonwealth of Pennsylvania, a public stream and common highway, within and across a part of the said river Swatara, within the township of Lower Swatara and the county aforesaid, by means of which the navigation and free passage of, in, through, along and upon said river Swatara is greatly obstructed; and the said dam so as aforesaid erected, built and set up, did repair, maintain and continue, from the said, &c., until the day of the taking of this inquisition, with force and arms, at the township and county aforesaid, and the same dam does still keep up, maintain and continue, to the great damage and common nuisance, obstruction and impediment of all the good citizens of this commonwealth passing and navigating on and through the said public stream and highway, with their arks, craft, boats and vessels, about their necessary business, with their goods and chattels and merchandise, contrary, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For erecting obstructions on a navigable river.(*y*)

That a certain part of the river situate and being between and and also wholly situate and being in the said county of is, and from time whereof the memory of man is not to the contrary, hath been an ancient river, and an ancient and common highway for all the citizens of said commonwealth with their ships, lighters, boats and other vessels to navigate, sail, row, pass and repass, and labour at their will and pleasure, without any impediment or obstruction whatever. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., late of, &c., at, &c., fisherman, on, &c., and on divers other days and times between that day and the day of the taking of this inquisition, at, &c., in the said county of unlawfully, wilfully and injuriously did erect, place, fix, put and set in the said river and ancient and common highway there, a certain, (*here describe the obstruction according to the fact*), and that the said A. B., from the day and year first aforesaid, hitherto, at, &c., aforesaid, the said unlawfully, wilfully and injuriously hath continued, and still doth continue, so erected, placed, fixed, put and set in the said river and ancient and common highway aforesaid; by means whereof the navigation and free passage of, in, through, along and upon the said river and ancient and common highway there, on the same day and year aforesaid, and from thence hitherto hath been, and still is greatly obstructed, straitened and confined; so that the citizens of said commonwealth navigating, sailing, rowing, passing, repassing and labouring with their ships, lighters, boats and other vessels in, through, along and upon the said river and ancient and common highway there, on the same day and year aforesaid, and from thence hitherto, could not nor yet can navigate, sail, row,

(*y*) Taken by Mr. Davis, Prec. 190, from 2 Stark. 661.

pass, repass and labour with their ships, lighters, boats and other vessels, upon and about their lawful and necessary business, affairs and occasions, in, through, along and upon the said river and ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do; to the great damage and common nuisance of all the citizens of said commonwealth navigating, sailing, rowing, passing, repassing and labouring with their ships, boats, lighters and other vessels in, through, along and upon the said river and the ancient and common highway there; to the great obstruction of the trade and navigation of and upon the said river, and against, &c. (*Conclude as in book* 1, *chap.* 3).

For obstructing a river which is a public highway, by erecting a fish trap or snare in it called "putts."(z)

That the river Severn, that is to say, that a certain part of the said river lying and being in the County of Gloucester, is, and from the time whereof the memory of man is not to the contrary hath been an ancient river, and the ancient and common highway for all the good people of the said state, with their ships, barges, lighters, boats, wherries and other vessels to navigate, sail, row, pass, repass and labour, at their will and pleasure, without any impediment or obstruction whatsoever. And the jurors aforesaid upon their oath aforesaid, do further present, that J. S., late of the parish of B. in the county aforesaid, fisherman, on, &c., and on divers other days and times between that day and the day of taking of this inquisition, with force and arms, at the parish aforesaid in the county aforesaid, unlawfully, wilfully and injuriously did (erect, fix, put, place and set up in the said river and ancient and common highway there near a certain place called Gay's Spard, a certain snare, trap, machine and engine commonly called putts, for the taking and catching of fish, and composed of wood, wooden stakes and twigs; and that he the said J. S., on, &c., in the year last aforesaid and on divers other days and times between that day and the day of the taking of this inquisition, at the parish aforesaid in the county aforesaid, in the said river and ancient and common highway there, the said snare, trap, machine and engine called putts, unlawfully,

(z) This form is taken from Arch. C. P. 5th Am. ed. 757. The indictment is at common law, and the punishment is fine or imprisonment, or both. Mr. Archbold remarks, that to divert a part of a public river, whereby the current of it is weakened and rendered incapable of carrying vessels of the same burthen as it could before, is a common nuisance; 1 Hawk. c. 75, s. 11; but if a ship or other vessel sink by accident in a river, although it obstructs the navigation, yet the owner is not indictable as for a nuisance, for not removing it; R. *v.* Watts, 2 Esp. 675; see R. *v.* Russel and others, 9 D. & R. 566; 6 B. & C. 566; R. *v.* Ward, 4 A. & E. 384; 6 N. & M. 38; R. *v.* Tindall, 1 N. & P. 719; 6 A. & E. 143; R. *v.* Morris, 1 B. & Ad. 441; R. *v.* Randall, C. & M. 496.

The procedure by indictment at common law, is still in force in Pennsylvania, notwithstanding the cumulative remedies given by statute. In Massachusetts the provincial statute of 8 Anne, c. 3, for preventing obstructions in rivers, remains in full vigour; Com. *v.* Ruggles, 10 Mass. 391; though a transient and temporary sein or net is not within the act; *ib.* But no indictment lies for obstructing a stream not navigable.

wilfully and injuriously did continue, and still doth continue, so erected, fixed, put, placed and set in the said river and ancient and common highway as aforesaid); by means whereof the navigation and free passage of, in, through, along and upon the said river Severn and the ancient and common highway, on the day and year aforesaid and on the said other days and times, hath been, and still is greatly straitened, obstructed and confined, to wit, at the parish aforesaid in the county aforesaid, so that the good people of the said state navigating, sailing, rowing, passing, repassing and labouring with their ships, barges, lighters, boats, wherries and other vessels in, through, along and upon the said river and ancient and common highway there, on the same day and year aforesaid, and on the said other days and times, could not nor yet can go, navigate, sail, row, pass, repass and labour with their ships, barges, lighters, boats, wherries and other vessels, upon and about their lawful and necessary affairs and occasions, in, through, along and upon the said river and ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do; to the great damage and common nuisance of all the good people of the said state navigating, sailing, rowing, passing, repassing and labouring with their ships, barges, lighters, boats, wherries and other vessels in, through, along and upon the said river Severn and ancient and common highway there, to the great obstruction to the trade and navigation of and upon the said river, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For damming creek.(*a*)

That, &c., on, &c., at, &c., did unlawfully, injuriously and knowingly erect, or cause to be erected, a certain dam across the Onondagua creek, a common and ancient water-course, at the town of Salina, &c., by means of which the water flowing in the creek was stopped, dammed up, &c., and flowed back in and up the surface of large tracts of adjoining land, by means whereof the mud, wood, leaves, brush, and the animal and vegetable substances and other filth collected and brought down the channel of said water-course by the natural flowing of the waters, then became and were, during all the time aforesaid, collected and accumulated in large quanties in the channel of the said water-course, and on the lands overflowed as aforesaid; and the said mud, wood, &c., so there collected, &c., became and were and still are very offensive, and the waters became and are corrupted; and by means whereof divers nauseous, unwholesome and deleterious smells and stenches did arise, &c., so that the air was and still is corrupted and infected, to the great damage and

(*a*) People *v.* Townsend, 3 Hill's R. 479. This count seems to have been sustained by the Supreme Court, who held, Bronson J. dissenting, that the allegation that by reason of the dam, the animal and vegetable substances *brought down the stream were collected and accumulated in large quantities, and become offensive, and corrupted the water*, &c., was sustained by proof showing the injury to have resulted from the *alternate rise and fall of the water* in the pond, or from *the action of the sun upon the vegetables growing on the margin*, &c.; and this, notwithstanding the stream on which the dam stood, was not a public highway.

common nuisance of the good and worthy citizens of this state there passing and repassing, dwelling and inhabiting, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Obstruction of fish in the river Susquehanna, under the act of 9th March, 1771.(*b*)

That on, &c., at, &c., A., &c., did erect, build, set up, repair and maintain, and did assist and abet in erecting, building, setting up, repairing and maintaining a certain mound, made of logs and stones, of the height of seven feet and length of eighteen yards, commonly called a fishing battery or wharf, in the river Susquehanna, in that part thereof declared to be a public highway, to wit, between Burkholder's island and the eastern shore of the said river, in the said township and county, for the taking of fish in the said river; and the said mound, made and erected as aforesaid, from the said, &c., until the day of taking this inquisition, with like force and arms, at the township aforesaid, have kept up and still do keep up, to the great obstruction and hinderance of the fish, fry and spawn in passing up and down said river, and to the common nuisance of all the liege citizens of this commonwealth, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

For obstructing a harbour by erecting in it piles, &c.(*c*)

That before the committing, &c., to wit, from time whereof, &c., hitherto, there has been and was and still is a certain ancient port and harbour, commonly called the harbour of Scarborough in the County of York, to wit, at Scarborough within the said county, used by the liege, &c., for the purposes of safe and commodious navigation, for the importation and exportation of goods, and for the receiving and sheltering, in times of tempests and other times of danger and distress of weather, ships and vessels navigating to and along the northern coasts of that part of the united kingdom called England, and to and from the eastern seas and other places; that the defendants, well knowing, &c., on, &c., and on divers other days and times between that day and the day of the taking of this inquisition, to wit, on each and every day between, &c., with force, &c., within the said County of Y., to wit, at, &c., unlawfully, wilfully and injuriously did erect, place, fix, put, sink and set in the said port and harbour, and in the sea near to the shore with the said port and harbour, divers stages, erections and buildings projecting into the said port and harbour, composed of piles, posts, planks and timbers, and also divers large quantities of earth, stones, sand and rubbish, to wit, one hundred thousand cartloads of, &c.; and unlawfully and injuriously kept and continued and caused and procured to be kept and continued, the

(*b*) Werfel *v.* Com., 5 Binn. 65. The indictment was held to set forth properly the offence created by the fourth section of the act of 9th March, 1771.

(*c*) R. *v.* Tindall, 6 A. & E. 143. A special verdict was rendered on which a verdict of not guilty was entered. There seems to have been no doubt, however, that the facts set forth in the indictment, formed a criminal offence.

said stages, &c., so projecting into the said port and harbour as aforesaid, and the said piles, &c., so erected, &c., in the said port and harbour and in the sea near to the shore in the said port and harbour, for a long space of time, to wit, from thence hitherto within the county aforesaid, to wit, at, &c.; and thereby, during the time aforesaid, greatly obstructed, choked up, narrowed and otherwise injured the said port and harbour and rendered the same insecure and incommodious, whereby the said port and harbour then and there became and was and from thence hath been and still is greatly obstructed and choked up, narrowed and rendered insecure and incommodious, so that the good people of said state could not, nor yet can use the said port and harbour for the exportation and importation of goods and merchandises there and for the receiving and sheltering of ships and vessels in times of tempests and other times of danger and distress of weather, and for other purposes of safe and commodious navigation, and could not and cannot use the said port and harbour without imminent hazard and danger of destruction of their ships, lighters, boats and other vessels, and danger and peril of the lives of those navigating the same, and loss and damage of the goods and merchandises laden on board thereof, to the great damage and common nuisance, &c., and other persons using the said port and harbour as aforesaid, against, &c. (*Conclude as in book* 1, *chap.* 3).

For negligently permitting fences to remain during the crop season less than five feet high, under the North Carolina statute.(*d*)

That N. B., late of, &c., on, &c., and continually before and after that time, during the crop season of the year, then and there being the occupier and cultivator of a farm as owner of the same, and being bound during the said crop season to keep up his fences around his cultivated fields five feet high, unlawfully, wilfully and negligently did permit his said fences around his said fields to be and remain during crop season of the year aforesaid, less than five feet high, there being no navigable stream nor deep water-course around the same, to the common nuisance, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

General form for nuisances in carrying on unwholesome occupations near to habitations or public ways.(*e*)

That A. B., late of, &c., yeoman, on, &c., and on divers days and times between that day and the day of the taking of this inquisition,

(*d*) State *v.* Bell, 3 Iredell 506.

(*e*) The features peculiar to these, as well as to all other kind of nuisances, have been already specified, *ante* p. 402. It remains to notice the general character of the offences themselves. Any trade, however innocent in itself, and useful in its objects, will be a nuisance if carried on in an improper place to the injury of the health or quiet of a neighbourhood; Lansing *v.* Smith, 8 Cow. 146. And if, as in the case of stench produced in a manufacture, the effect be not to render the adjacent places of residence absolutely unwholesome, but to make the comfortable enjoyment of life and property impossible to a number of persons, the same liability will be incurred; R. *v.* White and Ward, 1 Burr. R. 333; R. *v.* Davey, 5 Esp. 217; R. *v.* Neil, 2 C. & P. 485; People *v.* Cunning-

with force and arms, at, &c., in the near neighbourhood of divers public streets in the said county, where divers good citizens of the

ham, 1 Denio 524; Com. *v.* Vansyckle, 7 Pa. L. J. 82. It admits of some question, whether where health is not affected, the public good resulting from an establishment in some respects offensive may be taken into consideration by the jury in determining whether, on the whole, it ought to be suppressed as a nuisance to the public. See 1 Russ. on Crimes 297. In a late case of much consideration, Rex *v.* Ward, 4 A. & E. 384; it was held, to be no answer to an indictment for a nuisance in a harbour, by erecting an embankment, that although the work was in some degree a hinderance to navigation, it was advantageous in a greater degree to other uses of the port; R. *v.* Tindall, 6 A. & E. 143; R. *v.* Morris, 1 B. & Ad. 441. In an early case in Pennsylvania, the defendant being charged with a nuisance in the erection of a wharf, offered witnesses to prove that the wharf had been beneficial to the public, and therefore not to be regarded as a nuisance; but M'Kean C. J. said, "this would only amount to matter of opinion, whereas it is on facts the court must proceed; and the necessary facts are already in proof. Besides it would be no justification. The evidence is inadmissible;" Caldwell's case, 1 Dall. 150. See also Com. *v.* Vansyckle, 7 Pa. L. J. 82; *post*, p. 425. Length of time will not justify a public nuisance under any circumstances, even if twenty years' acquiescence concludes private rights at the beginning of that period, so as to oust all remedy by action; People *v.* Cunningham, 1 Denio 524; Elkins *v.* State, 2 Humph. 543; Mills *v.* Hall and Richards, 9 Wend. 315; Com. *v.* Alburger, 1 Whart. 469; Bliss *v.* Hall, 4 Bing. N. C. 185; Com. *v.* Tucker, 2 Pick. 44; Elliotson *v.* Feetham, 2 Bing. N. C. 134; 1 Hawk. b. 1, c. 32, s. 8; Rex *v.* Cross, 3 Campb. 227; Weld *v.* Hornby, 7 East 199; Leeds *v.* Shakerley, Cr. El. 751. It is true that in R. *v.* Neville, Peake's C. N. P. 91, Ld. Kenyon said, that in neighbourhoods where offensive trades have been borne with for many years, they are not indictable nuisances unless materially increased by a new manufacture; and see R. *v.* Watts, M. & M. 281. The practical result often is that length of time, accompanied by particular circumstances of public convenience of one kind, opposed to the public inconvenience of another, will sometimes go a great way in making both judges and jurors very unwilling to convict. One case is instanced in R. *v.* Smith, 4 Esp. 111, and another is continually occurring respecting the subject of this precedent; viz. the deposit of dung, fish, sea-weed and other descriptions of manure for short periods near the places where they are collected, in order to be taken to neighbouring fields for the improvement and promotion of agriculture. Large quantities of manure are frequently collected in large cities, and laid in heaps on the banks of canals and navigable rivers, for conveyance by barges and boats. In these and such like instances, the general benefit appears to counterbalance the local inconvenience, especially if the offensive matter remain no longer on each occasion than the necessity of the case requires. But see R. *v.* Gore (the Pudelock case), 8 D. P. C. 102; and R. *v.* Pollock and others, Q. B. Trin. 1838, Gas Works in Westminster referred to by Mr. Starkie; also R. *v.* Ward, 4 A. & E. 384; 6 N. & M. 38. It seems, however, that the maxim *sic utere tuo ut alienum non laedas*, applies as soon as the growth of human habitations near an offensive manufacture makes it injurious to them; see Cooper *v.* Barba, 3 Taunt. 110 (cited 1 B. & Ad. 880); Bliss *v.* Hall, 5 Scott 500; 4 Bing. N. C. 183, S. C.; Elliotson *v.* Feetham, 2 *ib.* 134; 2 Scott 174; see Flight *v.* Thomas, 10 A. & E. 590; Wh. C. L. 506.

The open carrying on of scandalous or immoral trades, or keeping indecent brothels, gaming houses and disorderly places of resort of any kind, is an indictable nuisance; and in the case of brothels and gaming houses, subjects the parties offending, in England, to the punishment of hard labour; 7 and 8 Geo. IV. c. 29, s. 4. And these are offences for which a married woman may be indicted, either separately or jointly with her husband; the charge being the criminal *management* of the house, which the law presumes to be principally in the woman's department; 4 Bla. C. 29; R. *v.* Williams, 1 Salk. 383. If a person, being only a lodger and having only a single room, makes use of it for the purpose of open and flagrant immorality, so as to annoy the neighbours, the occupier may be indicted for keeping a bawdy house, as if the whole house were so tenanted; R. *v.* Pierson, 2 Ld. Raym. 1197. But an indictment cannot be sustained in England against a woman for being a common bawd, and inducing parties to meet and commit fornication; for the bare solicitation of chastity is there not an offence at common law, but punishable in the ecclesiastical courts; Hawk. b. 1, c. 74. In this country, however, from the absence of ecclesiastical courts, the law is otherwise, as not only is the solicitation of chastity an independent offence, State *v.* Avery, 7 Conn. 267, but all open immorality, whether consisting in public drunkenness or public lasciviousness, is indictable as a nuisance, as will be noticed at the foot of next page.

At common law, as will be seen, it is an indictable offence to keep a house of ill-fame for lucre; Jennings *v.* Com., 17 Pick. 80; or to let a house, knowing it so to be used for the purposes of prostitution; Com. *v.* Harrington, 3 Pick. 26; though in New York the last point was ruled differently, and it was laid down that to rent a house to a woman of ill-

said commonwealth are constantly passing and repassing, and of divers dwelling houses in the said county, inhabited and occupied by divers other good citizens aforesaid, (*here state the nuisance*), to the

fame, with the intent that it should be kept for purposes of public prostitution, is not an offence punishable by indictment, though it be so kept afterwards; Brockway *v.* People, 2 Hill 558. Perhaps, however, the doctrine held in the latter case was afterwards somewhat qualified, as it was declared that when it appears that the owner of lands has either erected a nuisance or continued it, or in any way sanctioned its erection or continuance, he is indictable; People *v.* Townsend, 3 Hill 479. Owners of reversions are indictable for nuisance created by the occupier's use of premises calculated to create nuisance, if there be privity of contract between them; or where the reversion has been sold, if the former reversioner was liable; as in R. *v.* Pedley, 1 A. & E. 822; 3 N. & M. 627, a case in which sinks were left in a neglected state; 2 Ld. Raym. 1089; see *post*, p. 429. Ground near a highway, within two miles of London, was kept for shooting at targets and at pigeons; in consequence of which numbers of persons assembled outside the ground, and in the fields adjacent, to shoot at those birds which escaped, causing thereby great noise and disturbance, and doing injury with the shots fired. The owner of the shooting ground was indicted for causing and occasioning such persons to assemble near and about his premises, discharging fire-arms and making a great noise and riot, whereby the king's subjects were disturbed and put in peril; and it was held that he was so indictable, as the acts of such persons were the probable consequences of his keeping a ground for shooting pigeons in such a vicinage, for which he is answerable as if it was his actual object; R. *v.* Moore, 3 B. & Ad. 184. Drawing together by whatever means, numbers of disorderly persons, as by rope dancing and gaming houses, &c., cannot but be inconvenient to the neighbourhood, and is indictable; Hawk. P. C. b. 1, c. 75, s. 6, 7; Betterton's case, 5 Mod. 142; Skinner 625.

The making great noises in the night time, R. *v.* Smith, 2 Stra. 704; exposing persons infected with contagious or loathsome diseases in public, R. *v.* Vantandillo, 4 M. & S. 73; see *post*, p. 428; and keeping ferocious animals without proper control, Burns' J., *tit. Nuisance* I., are indictable nuisances.

In indictments in Massachusetts, it is said, it is sufficient to charge the defendant with keeping "a house of ill-fame," "a disorderly house," or "a common gaming house;" Com. *v.* Pray, 13 Pick. 359; 1 T. R. 754. An indictment charging the defendants with "keeping a disorderly house, and unlawfully procuring, for his lucre and gain, men and women of evil name and fame to frequent it at unlawful times, permitting them there to be and remain drinking, tippling and misbehaving themselves, to the great damage and common nuisance of all the liege citizens," &c., is sufficient; Com. *v.* Stewart, 1 S. & R. 342. A verdict finding a defendant "guilty of keeping a disorderly house and disturbing his neighbours," is bad; Hunter *v.* Com., 2 S. & R. 298; (but see Com. *v.* Pray, 13 Pick. 359; 1 T. R. 754). And where the defendant was indicted for keeping "a disorderly common tippling house," and the jury found a special verdict, "that the defendant, on one occasion, kept a house in which there was a collection of twenty or thirty negroes more than belonged to the place, who got drunk, danced and disturbed the neighbourhood with noise and uproar;" it was held, that the facts found by the special verdict did not constitute the offence of keeping "a disorderly common tippling house;" Dunnaway *v.* State, 9 Yerg. 350. Where an indictment charged that the defendant was a common, gross and notorious drunkard, and that he on divers days and times got grossly drunk, the judgment was arrested, for private drunkenness is not an indictable offence; it becomes so by being open and exposed to public view, so as to become a nuisance; State *v.* Waller, 3 Murph. 229. An indictment for a public nuisance, in frequenting and haunting houses of ill-fame, must expressly charge, that "the defendant, knowing the house to be a house of ill-fame, did openly and notoriously haunt and frequent the same;" Brooks *v.* State, 2 Yerg. 482; see *per contra*, State *v.* Cagle, 2 Humph. 414. On a presentment for open and notorious lewdness, it is no defence that the parties verbally contracted marriage and lived together as man and wife, according to the common law. The mode of contracting and solemnizing marriages, prescribed by the statute, must be strictly adhered to, otherwise the parties are liable to indictment; Grisham and Jane Ligan *v.* State, 2 Yerg. 589. It is said to be a misdemeanor to exhibit stud horses in a city; Nolin *v.* Mayor, 4 Yerg. 163. An indictment lies against a master for permitting his slaves to pass about in the public highway in a state of nakedness. It is not necessary that it be proved that the slave did exhibit him or herself in such a state of nakedness by any command of the master. That the master caused and permitted it, may be inferred from circumstances satisfactory to the mind of the jury; Britain *v.* State, 3 Humph. 203. In an indictment for exposing the person, it is sufficient, if it be charged to have been done "to public view in a public place." It is not necessary to aver that the prisoner was seen by citizens; State *v.* Roper, 1 Dev. & Bat. 208.

great damage and common nuisance of all the good citizens of this commonwealth, there inhabiting and residing, passing and repassing, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For carrying on the trade of a trunk maker near to houses, so as to become a nuisance.(*f*)

That A. B., late of, &c., on, &c., and on divers days and times between that day and the taking of this inquisition at, &c., in a certain workshop there situate, near the dwelling houses of divers citizens of the said state and also divers public highways, there unlawfully and injuriously did set up, exercise and carry on the trade and business of a trunk maker, and on, &c., and on the other days and times aforesaid, there, at unseasonable hours in the morning and in the day time, and at late hours of the nights of the days aforesaid, unlawfully and injuriously did make, and did cause and procure to be made, divers loud and annoying sounds and noises, by then and there hammering and striking, and causing and procuring to be hammered and stricken, divers trunks and boxes made of wood, iron and copper, and divers pieces of wood, tin, brass, copper, iron and other metals, with divers large hammers and other instruments made of wood and iron, by reason whereof the good people of the said state residing in the said dwelling houses near to the said workshop, on the several days and times aforesaid, were and still are greatly annoyed, disturbed and incommoded in the use, occupation and enjoyment of their said dwelling houses, and greatly interrupted in the exercise and pursuit of their lawful business and transactions, and deprived of their natural sleep and rest and rendered and made in other respects uncomfortable, and thereby also the good people of the said state, in and through and along the common highway aforesaid, passing, repassing and travelling, were and are greatly annoyed and disturbed; to the great damage, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For erecting a soap manufactory near a highway and dwelling house.(*g*)

That A. B., of, &c., on, &c., at, &c., near to a public street and common highway there, and also near to the dwelling houses of divers citizens there situate and being, did unlawfully and injuriously erect and build, and cause and procure to be erected and built, a certain building for the purpose of making and manufacturing soap therein, and did unlawfully and injuriously make, set up and place, and did cause and procure to be made, set up and placed in the said building, divers furnaces, stoves, cauldrons, coppers and boilers, to wit, (*here insert the number of each,*) for the purpose of boiling, melting and mixing tallow, soap-lees, and other materials used in the making and manufacturing of soap; and that the said A. B. did,

(*f*) Dickinson's Q. S. 6th ed. 424.

(*g*) This indictment is taken by Mr. Davis, Prec. 191, from 2 Stark. C. P. 657; 2 Chit. 651, 655. Add, if necessary, another count for continuing the building, &c.; for a precedent for this, see 2 Stark. C. P. 658.

on the day and year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at, &c., unlawfully and injuriously boil, melt and mix together, and did cause and procure to be boiled, melted and mixed together in the said furnaces, stoves, cauldrons and boilers respectively, so made, set up and placed in the said building as aforesaid, divers large quantities of tallow, soap-lees and other materials used in the making and manufacturing of soap, for the purpose of making and manufacturing the same into soap; and did then and there make and manufacture, and did cause and procure to be made and manufactured, divers large quantities of soap from the same tallow, soap-lees and other materials; by reason of which said premises, divers noisome and unwholesome smokes, vapours, smells and stenches, on the days and times aforesaid, were emitted and issued from the said building, so that the air, on the several days and times aforesaid, at &c., was thereby greatly filled and impregnated with the said smokes, vapours, smells and stenches, and was rendered and became, and was corrupted, offensive and unwholesome; to the great damage and common nuisance of, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For keeping gunpowder in a city.(*h*)

That C. S. and L. S., late of, &c., on, &c., and on divers other days and times between that day and the day of taking this inquisition, with force and arms at, &c., near the dwelling houses of divers good citizens of the state, and also near a certain public street, there did (negligently and improvidently) keep, and still keep and maintain in a certain house, and then and there on the day and year aforesaid, at aforesaid, unlawfully and injuriously (negligently and improvidently), in the said house did receive and keep, and still keep, fifty barrels of gunpowder (the said house being then and there insecure and unfit for the reception and detention of gunpowder as aforesaid), whereby divers good citizens there residing and passing, are in great danger, to the damage and common nuisance of, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For keeping hogs in a city. First count, placing hogs in a certain messuage, &c., and feeding them, so as to generate a stench, &c.(*i*)

That E. V., late of, &c., on, &c., at, &c., near to divers public

(*h*) That portion of this form not in brackets, was before the Supreme Court of New York in People *v.* Sands, 1 Johns. 78, and its adequacy as an indictment at common law was examined with great learning by Kent C. J., Spencer, Livingston and Thompson Js. Judgment was arrested, though it was intimated that if the gunpowder had been charged to have been kept negligently and improvidently, there would have been enough on which to rest a verdict.

(*i*) Com. *v.* Vansyckle, 7 Pa. L. J. 82. This case was tried before Sergeant J., at Nisi Prius, and a verdict of guilty was rendered, on which, however, there was no judgment, the nuisance being previously abated. The chief points taken on the indictment at the trial were, 1st, that there was a variance between the pleading and the evidence, the first averring that the hogs were fed on offals, &c., but the latter showing that they were fed on grain; and 2d, that the remedy at common law was superseded by the act constituting the Board of Health. Both points were overruled by the court; see *ante*, pp. 422–3.

streets, being the common highways of the said commonwealth, and also to the dwelling houses of divers citizens of the said commonwealth then and there situate, did unlawfully and without sufficient cause, place in a certain messuage or tenement, and in the appurtenances thereto, a great number of hogs, to wit, one thousand, and the said hogs then and there, to wit, on the said first day of March as aforesaid, and on divers other times and seasons, unlawfully and injuriously did feed and cause to be fed with the offals and entrails of beasts and other filth, by means whereof divers noisome and unwholesome smells and stenches during the time aforesaid, and large quantities of noxious and unwholesome smokes and vapours on the days and times aforesaid, then and there were emitted, sent forth and issued from the same building; and the air in the neighbourhood thereof and for a great distance round, on the days and times aforesaid, was thereby greatly filled and impregnated with many noisome offences and unwholesome smells, stinks and stenches, and has been corrupted and rendered very insalubrious, to the great damage and common nuisance, &c., to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Keeping hogs near the dwelling houses of divers citizens, &c., and near the public highways.

That the said E. V., at, &c., on, &c., and at divers other times and seasons between the day aforesaid and the taking of this inquisition, with force and arms, &c., near the dwelling houses of divers good citizens of the said commonwealth and also near divers public streets and common highways there situate, there did and yet doth keep a large number of hogs, to wit, one thousand; and the said hogs, on the days aforesaid and the times and seasons aforesaid, unlawfully and injuriously did feed and yet doth feed with slop, fermented grain, the offal and entrails of beasts and other filth, by reason whereof divers large quantities of noisome, noxious and unwholesome smokes, smells and stenches, on the days and times aforesaid, then and there were emitted, sent forth and issued, and the air thereabouts, on the days and times aforesaid, was thereby greatly filled and impregnated with many noisome offences and unwholesome smells, stinks and stenches, and has been corrupted and rendered very insalubrious, to the great damage and common nuisance, &c., to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count, after averring defendant to be the owner of a large building, &c., charges him with introducing into it great numbers of hogs, &c.

That upon the day and year aforesaid, at the county aforesaid, there was and long before had been and ever since hath been and still is a certain house commonly called the "pigs' boarding house," and a certain yard to the same house belonging, which said last mentioned house and yard are near adjoining to the Schuylkill river, wherein a great number of the good citizens of the said commonwealth are constantly passing and repassing, and to divers public streets and highways within the city and county as aforesaid. And the inquest aforesaid do further present, that the said E. V. well knowing the premises last aforesaid to be close adjoining the highways

and roads as aforesaid, upon the said first day of March as aforesaid, and at divers other times and seasons between that day and the taking of this inquest, with force and arms, &c., at the county aforesaid, that is to say, at the said last mentioned house commonly called the "pigs' boarding house," and at and within the said yard thereto adjoining, did unlawfully gather and collect together a great number of hogs and pigs, to wit, the number of one thousand, to the common nuisance and great injury, &c., as aforesaid, and did then and there at the times and seasons last aforesaid, unlawfully, wilfully and injuriously lay, place and put, and cause and procure to be laid, placed and put, other great quantities of offals, entrails and pieces of stinking carrion and dead carcasses of beasts and other filth, together with great masses and loads of slop and of fermented grain and other filth, slop and trash, by reason whereof the air at and near the said house and yard, and the highways, public streets, dwelling houses and other buildings adjacent and contiguous thereto, at and upon the divers times and days last above mentioned, and between those times and days and the taking of this inquisition, at the county aforesaid, was and yet is filled, tainted and impregnated with noxious, hurtful and offensive stinks and smells, to the common nuisance and great injury, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For boiling bullock's blood for making colours, near to public ways.(*j*)

That T. D., late of, &c., on, &c., and on divers other days and times between that day and the day of the taking of this inquisition, at, &c., aforesaid, in a certain building belonging to the dwelling house of the said J. B. there situate and being, and also near the dwelling houses of divers citizens of the said state, and near divers public streets and common highways there, did unlawfully boil and cause to be boiled a great quantity of bullock's blood and other filth for the making and mixing of colours, whereby divers noisome and unwholesome smells, on, &c., aforesaid, and on the said other days and times during the time aforesaid, at, &c., aforesaid, did from thence arise, so that the air was thereby greatly corrupted and infected, to the great damage and common nuisance, &c.(*k*), against, &c. (*Conclude as in book* 1, *chap.* 3).

For keeping a distillery near public streets.(*l*)

That A. B., &c., on, &c., and on divers other days, &c., at, &c., kept and maintained a distillery for manufacturing ardent spirits, and in so doing made large quantities of swill and slops, and unlawfully and

(*j*) Dickinson's Q. S. 6th ed. 426; see *ante*, p. 423. If the prosecutor be one of the persons whose comfort the annoyance particularly affected (and the indictment be moved by *certiorari*), and a conviction ensue, he will be entitled to his costs as a "party grieved," within 5 Wm. and Mary c. 11, s. 3.

(*k*) Bac. Abr. *tit. Nuisances;* 16 East 194; and Reg. *v.* Heage (Inhab.), 5 Esp. 217; R. *v.* Davey, *ib.*

(*l*) This is the substance of the indictment in People *v.* Cunningham, 1 Denio 525.

wilfully caused and permitted divers carts, &c., with teams to remain in Front street, which is averred to be a public street and highway near the distillery of the defendants, for the purpose of receiving the slops, &c., and that said street is and was during, &c., used for the people of the state with their horses, carriages, &c., to ride, drive, walk, &c., and that the defendants on, &c., at, &c., in delivering the said slops, &c., into the said carriages, &c., did unlawfully and wilfully make great quantities of offensive filth in and upon the said public street, &c., and did unlawfully and wilfully cause offensive smells and stenches arising from the slops and from the horses, &c., used in the carriages, to issue, impregnating the air and rendering the same uncomfortable, and did unlawfully, &c., cause, permit and suffer the carriages and the horses to be, remain and continue in and upon the said street, &c., to wit, for six hours on each of the said days, whereby the common highway aforesaid then and on the said other days, &c., was obstructed, straitened, filthy, &c., so that the people, &c., could not pass, repass, &c., as they ought and were wont, &c.

For exposing a child infected with small-pox in the public streets.(*m*)

That on, &c., E. R., an infant of tender age, to wit, about the age of four years, was infected, ill and sick of and with a certain contagious, infectious and dangerous disease and sickness called small-pox, at, &c. And that M. B., the wife of C. B., late of, &c., aforesaid, having the care and nurture of the said E. R., well knowing the premises aforesaid, afterwards, and whilst the said E. R. was so infected, ill and sick as aforesaid, to wit, on, &c., aforesaid, with force and arms at, &c., aforesaid, unlawfully and injuriously did take and carry the said E. R. into and along a certain open public street and passage called Market street, situate in the parish of St. John, in the town of N., in the County of N. aforesaid, used for all the good people of the said state on foot to go, return and pass in, along and through, in which said public street and passage there were divers good people of the said state, and near unto and by divers dwelling houses, habitations and residences of the good people of the said state then and there dwelling, inhabiting and residing, and unto and into a certain common highway, situate and being in, &c., aforesaid, used for all the good people of the said state on foot and with coaches, carts and carriages to go, return, pass, ride and labour in, along and through, in and along which said common highway there the good people of the said state were then going, returning, passing, riding and labouring, and amidst and among the good people of the said state who then and there, to wit, in the same common highway in the parish and county aforesaid, had met and assembled together; and that the said M. B. afterwards, and whilst the said E. R. was so infected, ill and sick as aforesaid, to wit, on, &c., and on divers other days and times between that day and the day of in the same year, at, &c., aforesaid, wrongfully and injuriously did take and carry the said

(*m*) Dickinson's Q. S. 6th ed. 428; see R. *v.* Vantandillo, 4 M. & S. 73; R. *v* Sutton, 4 Burr. 2116; R. *v.* Barrel, 4 M. & S. 272.

E. R. into and along the aforesaid open and public street and passage called, &c., and near unto and by the aforesaid dwelling houses, habitations and residences of the good people of the said state there dwelling, inhabiting and residing, and also near unto and by the good people of the said state in the said open and public way and passage, on, &c., and on the said other days and times there being, to the great and manifest danger of infecting with said contagious, infectious and dangerous disease and sickness called the small-pox, all the good people of the said state, who, on the several days and times aforesaid, were in and near the aforesaid open and public way and passage, dwelling houses, habitations, residences and common highway, and who had not had the said disease and sickness; to the great damage and common nuisance, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That the said M. B. well knowing that the said E. R. was so infected, ill and sick as aforesaid, afterwards, and whilst the said E. R. was so infected, ill and sick, to wit, on the said, &c., and on divers other days and times between that day and the said, &c., in the same year, with force and arms at, &c., aforesaid, unlawfully and injuriously did take and carry the said E. R. into and along the aforesaid open public highway and passage called, &c., situate and being, &c., and near unto and by the aforesaid dwelling houses, habitations and residences of the good people of the said state there dwelling, inhabiting and residing, and also near unto and by the good people of the said state in the said open public way and passage, on, &c., and on the said other days and times as last mentioned, there being, to the great and manifest danger of infecting with the said contagious, infectious and dangerous disease and sickness called the small-pox, the good people of the said state, who on the said, &c., and on the said divers other days and times last mentioned, were in the said open and public way and passage, and who dwelled, inhabited and resided there and near thereto, and who were liable to take the said disease and sickness, to the great damage and common nuisance, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against owner of land for erecting offensive buildings.(*n*)

That the defendant on, &c., at a certain place commonly called Diamond alley, near unto divers public streets and dwelling houses,

(*n*) R. *v.* Pedley, 1 A. & E. 822. The second count charged the defendant with continuing the necessary and sink before that time made, &c., by persons unknown, and laid the nuisance as before. The third count charged that the defendant near, &c., (as before), did put, place and leave and did cause and procure to be put, placed and left, divers large quantities of ordure, &c. The fourth count charged the defendant with permitting and suffering the nuisance (as in the third count, except that the nuisance was said to be created by persons unknown) to remain. On the trial before Ld. Denman C. J., it was proved that the defendant was in the receipt of the rents of twelve dwelling houses, which were let for short periods to tenants, and that two necessary houses and a sink belonging to them, were used in common by the persons occupying the dwelling houses. It did not appear whether any of the present tenants commenced occupying the dwelling houses before the defendant began to receive the rents; but the necessary houses and sink were constructed and used by the tenants of those premises before his time. There was no distinct proof of any actual demise, of the necessary houses and sink, but they had regularly

unlawfully did make, erect and set up two buildings called necessary houses, for the common use of divers persons residing in and frequenting Diamond alley, and did also make and cause to be made a certain open sink for the reception of ordure, &c., and then and there, and on divers other days and times between, &c., divers persons residing in and frequenting Diamond alley, did resort to and use, and yet do resort to and use the said necessary houses, and did place and leave, and cause to be placed and left, in the said open sink, divers large quantities of ordure, &c., by reason of which, &c., (*stating the nuisance resulting*).

For keeping a privy in a street.(*nn*)

That C. W., late of, &c., yeoman, on, &c., and from that day until the day of finding this inquisition, at, &c., unlawfully and obstinately did keep and maintain and yet doth keep and maintain, near one of the public streets in the said city, to wit, High or Market street, and also near the dwelling house of C. B. and A. T. and of divers other citizens of the said city there situate, a certain privy or house of office, and from the filth and human excrement therein contained divers fetid, nauseous, hurtful, pernicious and unwholesome smells, on the days and times aforesaid did and still do arise and proceed, whereby the air there was and still is corrupted, infetid and infected, and the health of the said C. B. and A. T., and divers other good citizens of this commonwealth there inhabiting, residing and passing, has been and still is endangered and impaired, to the great damage and common nuisance, &c., there inhabiting, residing and passing, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For keeping a privy near an adjoining house.(*o*)

That W. R., late of, &c., yeoman, on, &c., and from that day until the finding of this inquisition, at, &c., did keep and maintain, and yet doth keep and maintain, unlawfully and obstinately, near the dwelling

been cleansed by the persons occupying the dwelling houses, until the time of the nuisance, when the cleansing had been neglected. The nuisance had arisen since the defendant began to receive the rents. The only method of draining the places from which the nuisance proceeded, would be to cut through a close belonging to the defendant. Some evidence was given to show an implied admission by the defendant that he himself was bound to do the cleansing. The jury, under the direction of the chief justice, found a verdict of guilty; subject to a motion for setting aside the verdict and entering an acquittal.

The conviction was sustained by the court, it being ruled generally that if the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term, and that the same principle extended to cases where he lets a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant. It was declared by Littledale J., that if a party buy a reversion during a tenancy and the tenant afterwards, during his term erect a nuisance, the reversioner is not liable for it; but if such reversioner relet, or having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance, and that such purchaser is liable to be indicted for the continuing of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest, or abating the nuisance.

(*nn*) This form, though sustained by the courts in Philadelphia, cannot be so depended upon as the next.

(*o*) Drawn in 1789 by Mr. Bradford, then attorney-general of Pennsylvania.

house of divers citizens of the state there situate and adjoining the dwelling house of one P., a certain privy or house of office, so filled with filth, dung and human excrement, that the same flowed, issued and came, and yet doth flow, issue and come through the walls of and into the said dwelling house so adjoining as aforesaid, and by reason whereof divers fetid, noisome and unwholesome smells during the time aforesaid, did and yet doth arise, and the air thereby was and still is greatly corrupted and infected, to the great damage and common nuisance of all the liege subjects of this state thereabouts resident, to the evil example, &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

Disorderly house, &c. Form used in New York.

That A. B., late of, &c., labourer, on, &c., and on divers other days and times between that day and the day of the taking of this inquisition, at the city and ward and in the county aforesaid, did keep and maintain, and yet keep and maintain, a certain common, ill governed and disorderly house, and in said house, for own lucre and gain, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together, then and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said men and women, in said house, at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain, drinking, tippling, gambling, whoring and misbehaving themselves, unlawfully and wilfully did permit, and yet permit, to the great damage and common nuisance of the people of the State of New York, there inhabiting, residing and passing, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Gaming house, &c.

That the said A. B., afterwards, to wit, on the said day of in the year aforesaid, and on divers other days and times as aforesaid, with force and arms, at the ward, city and county aforesaid, a certain common gaming house, there situate, for lucre and gain, unlawfully and injuriously did keep and maintain, and in the said common gaming house, there unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to be and remain in the said common gaming house, and to game together, and play at cards, dice and billiards, (*adding other games, &c.*), for money, on the said day of in the year one thousand eight hundred and aforesaid, and on the said other days and times, there did unlawfully and injuriously procure, permit and suffer; and the said persons, in the said common gaming house, there on the day of aforesaid, and on the said other days and times, by such procurement, permission and sufferance of the said A. B., did game together and play at cards, dice and billiards, (*as above*), for money, to the great damage and common nuisance of all the people of the State of New York, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Disorderly house. Form in use in Massachusetts.

That A. B., of Boston aforesaid, yeoman, on, &c., at, &c., and on divers other days and times, as well before as since, did keep and maintain a certain common house of ill-fame there situate, resorted to for the purpose of prostitution and lewdness; and in said house, for own lucre and gain, certain persons, whose names to said jurors as yet are not known, as well men as women, of evil name and fame and of dishonest conversation, to frequent and come together then, and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said men and women in said house at unlawful times, as well in the night as in the day, then and on said other days and times, there to be and remain whoring, (*insert other acts of disorder, as the facts may be*), and otherwise misbehaving themselves, unlawfully and wilfully did permit and suffer, to the great injury and common nuisance, &c., against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

For keeping a common bawdy house in Massachusetts.(*p*)

That A. B. of, &c., labourer, on, &c., and on divers other days and times as well before as afterwards, to the day of taking this inquisition, at, &c., a certain common house of ill-fame, unlawfully and wickedly did keep and maintain; and the said house, for the sake of lucre and gain, divers evil disposed persons, as well men as women, and common prostitutes, on the days and times aforesaid, as well in the night as in the day, there unlawfully and wickedly did receive and entertain; and in which house the said evil disposed persons and common prostitutes, by the consent and procurement of the said A. B., on the days and times aforesaid, there did commit whoredom and fornication; whereby divers unlawful assemblies, riots, affrays, disturbances and violations of the peace of the said commonwealth, and lewd offences, in the same house, on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated; to the great damage and common nuisance, &c., in manifest destruction and subversion of, and against good morals and good manners, and against, &c.(*q*) (*Conclude as in book* 1, *chap.* 3).

(*p*) 2 Chit. 40; Cro. C. C. 302 (8th ed.) See note (*b*) 2 Chit. 40, where it is said that this is the common printed form used in England. It is not necessary, says Mr. Davis, Prec. 193, to state particulars; as the names of those who frequented the house; 2 Burr. 1232; 1 T. R. 752, 754. But evidence of particular instances of illicit intercourse may be given in evidence under the general charge. If the person be only a lodger and make use of her room for disorderly purposes, she would be responsible. See *ante*, foot of p. 422.

(*q*) This count is sustained in Jennings *v.* Com., 17 Pick. 81; and it was held that the common law misdemeanour it specified did not merge in the offence created by stat. 1793, c. 59, s. 8. A second count accompanied it of the same structure, with the exception of the omission of the averment of lucre. Whether or no this averment was essential it was not necessary to decide, as there was already one clearly good count with which to support the verdict. I apprehend, however, that the averment can be safely dispensed with in those cases where the evidence does not support it, as the non-acceptance of money certainly does not lessen the outrage committed on the morals and peace of the community.

Disorderly house. Form used in Philadelphia.

That A. B., late of, &c., yeoman, &c., and on divers days and times between that day and the day of the taking of their inquisition, with force and arms, at the county aforesaid and within the jurisdiction of this court, did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed and disorderly house; and in said house for own lucre and gain, certain persons, as well men as women of evil name and fame and of dishonest conversation, to frequent and come together there, and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said men and women in said house, at unlawful times, as well in the night as in the day, then and on the same other days and times, there to be and remain drinking, tippling, and otherwise misbehaving themselves, unlawfully and wilfully did permit and suffer, and yet doth permit and suffer, to the great damage and common nuisance, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Tippling house.

That the said A. B., on the same day and year aforesaid, at the county aforesaid and within the jurisdiction of the same court, did sell and retail, and cause to be sold and retailed, within the said county, less than one quart of rum, wine, brandy and other spirituous and vinous liquors, then and there delivered at one time and to one person, and to more than one person, without having first obtained license agreeably to law for that purpose, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form for same.(*r*)

That defendant, on, &c., at, &c., and on divers other times and seasons between that time and the taking of this inquisition, kept, &c., "a disorderly and ill-governed house, and did then and there unlawfully cause and procure for his own lucre and gain certain persons, as well men as women of evil name and fame and of dishonest conversation, to frequent and come together, in his said house, at unlawful times, as well in the night as in the day, and did permit them there to be and remain drinking, tippling and misbehaving themselves, to the great damage and common nuisance, &c., to the evil example, &c."

Disorderly house, under Vermont Rev. Stat. s. 9, *c.* 99.(*s*)

That G. N., late of, &c., on, &c., and on divers other days and times

(*r*) Com. *v.* Stewart, 1 S. & R. 343. "The case of King *v.* Higginson, 2 Burr. 1232," said Tilghman C. J., in examining the count, "is very much like this. The only difference is that instead of drinking, tippling, &c., Higginson is charged with procuring persons to come to his house, and permitting them to remain there 'fighting of cocks, boxing, playing at cudgels and misbehaving themselves, to the great damage and common nuisance, &c.' The same objection was made to that indictment, yet it was held good. Besides, it is of great weight that this form of indictment is of ancient date in this state, and there have been many convictions under it. I am therefore of opinion that it is sufficient;" see also Hunter *v.* Com., 2 S. & R. 298.

(*s*) "After a careful perusal of this indictment," said the Supreme Court of Vermont, in

between that day and the day of taking this inquisition, with force and arms at, &c., in the County of Chittenden aforesaid, feloniously a certain house of ill-fame, commonly called a bawdy house, resorted to for the purposes of prostitution and lewdness, unlawfully and wickedly did keep and maintain, and in the said house, for filthy lucre and gain, divers evil disposed persons, as well men as women and whores, on the days and times aforesaid, as well in the night as in the day, there unlawfully and wickedly did receive and entertain, and in which said house the said evil disposed persons and whores, by the consent and procurement of the said G. N., on the days and times aforesaid, there did commit whoredom and fornication, whereby divers unlawful assemblies, riots, routs, affrays, disturbances and violations of the peace, and dreadful, filthy and lewd offences in the same house, on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated, to the great damage and common nuisance, &c., to the evil example, &c., in manifest destruction and subversion of morality and good manners, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Keeping a disorderly house, and fighting cocks, &c., at common law.(*t*)

That P. Q., late of, &c., and R. S., late of, &c., on, &c., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid in the county aforesaid, did keep and maintain, and yet do keep and maintain, a certain common, ill-governed and disorderly house, and in the said house, for their own lucre and profit(*u*) certain evil and ill-disposed persons of ill-name and fame(*v*) and of dishonest conversation, to frequent and come together, then, and the said other days and times, there unlawfully and wilfully did cause and procure, and the said persons in the said house then, and the said other days and times, there to be and remain, fighting of cocks, boxing, playing at cudgels and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit; to the great damage and common nuisance, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

State *v.* Nixon, 18 Verm. 70, "we see no reason to doubt its sufficiency." The keeping a house of ill-fame, it was ruled, is a local offence, and must be described in an indictment, as committed in a particular town, and the prosecutor is confined in his proof to the town, and cannot, as in other cases, prove an offence within the county; but a more particular description of the house is not required.

(*t*) Dickinson's Q. S. 6th ed. 424. Cock-fighting was prohibited as in itself an illegal pastime, in 39 Ed. III.; see 11 Rep. 87; and an indictment will lie for it at common law; Squires *v.* Whisken; 3 Campb. 148; R. *v.* Higginson, 2 Burr. R. 1233. See also penalties inflicted by 5 and 6 Wm. IV. c. 59, s. 3; and 2 and 3 Vict. c. 47, s. 47, for keeping cock-pits; see 2 Shower 38; 4 Com. Dig. *tit. Justices of Peace* (B. 42); Bac. Abr. *Gaming* (A. 2).

(*u*) An indictment for abduction of a girl having a portion of £ 1300, against 3 Hen. VII. c. 2, laid the offence "for lucre of the gain of the said portion;" Fulwood's case, Cro. Car. 483; for "lucre and luxuriousness are the ends of such an act;" *ib.* 485; Dickinson's Q. S. 6th ed. 425.

(*v*) Need not be named; 2 Burr. 1232, R. *v.* Higginson; from which this form is taken; Dickinson's Q. S. 6th ed. 425.

Disorderly house. Form used in South Carolina.

That A. B., on, &c., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms at, &c., unlawfully did keep and maintain a certain common-ill-governed and disorderly house, situate in the district and state aforesaid; and in the said house, for the lucre and gain of the said certain persons, as well men as women, of evil name and fame and of dishonest conversation, then and on the said other days and times, there unlawfully and willingly did cause and procure to frequent and come together, and the said men and women, in the said house of the said then, and on the said other days and times, as well in the night as in the day, there to be and remain, drinking, tippling, whoring and misbehaving themselves, unlawfully and wilfully did permit, and yet do permit; to the great damage and common nuisance, &c., to the great displeasure, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Letting house to woman of ill-fame, at common law.(*w*)

That R. H., of, &c., physician, on, &c., at, &c., did let out and accommodate a certain room in the house of him said H., in Elliott

(*w*) Com. *v.* Harrington, 3 Pick. 26. Parker C. J., said in substance, "that the court were of opinion that there was nothing in the first objection to the conviction, namely, that the lease was not proved to have been made on the day alleged in the indictment. Time does not enter into the constitution of the offence, and this case differs, therefore, from an indictment for usury, where it is necessary to set forth the time of making the usurious contract.

"The principal objection, however, was that the facts alleged do not constitute an indictable offence. It is found that the defendant let the house to a woman of ill-fame, knowing her to be such, with the intent that it should be used for the purposes of prostitution, and that it was so used. There is no statute against such an offence, and the question then is, whether it is indictable at common law. It has been compared to cheating on false pretences, which was not indictable at common law, and which has been made so by a statute. But the cases are different, inasmuch as cheating acts only upon the individual defrauded; whereas this offence is of a public nature, and obviously injurious to the public morals. The real question is, whether exciting, encouraging and aiding one to commit a misdemeanor, is not of itself a misdemeanor. And we find that it has been held so to be in the case of The King *v.* Phillips, 6 East 464, in which it was decided, that an endeavour to provoke another to commit the misdemeanor of sending a challenge to fight, is itself a misdemeanor; it being the object of the law to prevent the commission of offences. On this ground we think the indictment is sustainable. In Rex *v.* Scofield, Cald. 397, it was held that the intent may make an act, innocent in itself, criminal. To apply this principle to the present case: The letting of a house is in itself an innocent act, but the defendant let his house for the purposes of prostitution, and he knew that it was used accordingly. Now keeping a bawdy house is an offence at common law, and letting a house for such purpose must therefore be a misdemeanor.

"A case has been cited in which a party was allowed, in a civil action, to recover a compensation for washing clothes for the defendant, although the plaintiff knew that the defendant was a prostitute, and that the clothes were used for the purposes of allurement. But this indictment goes further. It alleges not only that the defendant knew that his house would be put to an unlawful use, but that he let it for that very purpose. And there is a case in 1 Esp. 13 (Girardy *v.* Richardson), in which Ld. Kenyon held that a party letting his house for such a purpose is not entitled to recover rent.

"King *v.* Higgins, 2 East 5, is a strong case to show that the common law will, *proprio vigore*, punish in a case like the one before us. There a man solicited a servant to steal his master's goods, and it was held a misdemeanor to solicit a person to commit a crime.

"It being found here that the defendant's house was let to be used for an unlawful pur-

street, so called, in said Boston, for his own gain and reward, and for a certain rent and sum of money to him to be paid therefor, to one S. B., with intent and design that she the said B. should then and there in the room aforesaid, have, receive and entertain divers male persons to the jurors unknown, with whom to commit the crime of fornication and whoredom, and did continue to let out and accommodate the said room to said B., from that day continually to the day of the taking of this inquisition, for the purpose aforesaid, in which said room the said B. then and on divers other days and times between said day and the day of the taking of this inquisition, there did commonly with the knowledge and consent of said H., commit whoredom and fornication, with divers persons whose names are to the said jurors unknown, to the great damage and common nuisance, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Keeping a gaming house, at common law.(*x*)

That defendant at, &c., on, &c., and at divers other times between that day and the finding of this inquisition, unlawfully did keep and maintain a certain common gaming house; and in the said common gaming house, for lucre and gain, on, &c., and on the said other days and times, there unlawfully and wilfully did cause and procure divers idle and evil disposed persons to frequent and come to play together at a certain unlawful game of cards called rouge et noir; and in the said common gaming house, on, &c., and on the other days and times, there unlawfully and wilfully did permit and suffer the said idle and evil disposed persons to be and remain playing and gaming at the said unlawful game of rouge et noir, for divers large and excessive sums of money; to the great damage and common nuisance, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Gaming room.

That the said J. S., afterwards, to wit, on, &c., and on divers other days and times between that day and the day of taking of this inquisition, with force and arms, at the parish aforesaid in the county aforesaid, unlawfully did keep and maintain a certain common gaming room in the house of one J. N., there situate; and in the said common gaming room &c., (*as in the last count, only substituting*: "gaming room" *for* "gaming house.")

pose, and his gain was found upon such use of it, the court do not think a statute necessary to make his offence indictable. The only case which looks to the contrary is the one in 2 Ld. Raym. 1197, where an indictment against a person for being a bawd was held ill, that being a spiritual offence. The reason does not hold here, as we have no spiritual court, and it does not appear that a person may not here be indicted for being a bawd.

"Though we have strong doubts in this case from the argument of Mr. Dunlap, and from the circumstance that no case has been found of an indictment for this offence in England, we have nevertheless come to the conclusion that there is no objection to this indictment on the ground of variance, and that the facts set forth constitute an indictable offence."

(*x*) Arch. C. P. 5th Am. ed. 752. This precedent was held good in R. *v.* Rogier, 2 D. & R. 431; 1 B. & C. 272; see Hunter *v.* Com., 2 S. & R. 298. Holroyd J., in R. *v.* Taylor, 3 B. & C. 502, intimated that it would be enough simply to charge the defendant with keeping a common gaming house; and such, on a kindred case, is the leaning of the Supreme Court of Massachusetts; Com. *v.* Pray, 13 Pick. 359.

Keeping a common gaming house at common law. Another form, omitting the averment in last of playing rouge et noir.(*y*)

That M. M., late of, &c., being an idle and ill-disposed person, on, &c., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms at, &c., a certain common gaming house there situate, for his lucre and gain, unlawfully and injuriously did keep(*z*) and maintain, and in the same

(*y*) Dickinson's Q. S. 6th ed. 425; see 3 B. & C. 502, R. *v.* Josiah Taylor. "Keeping the house" for the specified purpose, is the offence; and therefore, like keeping a bawdy house, general evidence will support an indictment; J. Anson *v.* Stewart, 1 T. R. 754.

(*z*) Keeping a common gaming house, and for lucre and gain unlawfully causing and procuring divers idle and ill-disposed persons to frequent and come to play together at a game called rouge et noir, and permitting the said idle, &c., to remain playing at the said game for divers large and excessive sums of money, is indictable at common law; R. *v.* Roger, 1 B. & C. 275; 2 D. & R. 431, S. C.; Dickinson's Q. S. 6th ed. 425. "See," says Mr. Chitty, 3 C. L. 673, "other precedents, 41 Went. 156; 6 *ib.* 384; 1 Bro. 237. For keeping a common raffling shop; Trem. P. C. 241. See in general Hawk. b. 1, c. 92; Com. Dig. Justices of the Peace, B. 42; Abr. Gaming; Burns J., Gaming; Williams J., Gaming, 4 Bla. Com. 171–174. All common gaming houses are nuisances, not only from the encouragement to dissipation which they afford, but also from the disturbance they occasion to the people who live near them, by the numbers of idle persons whom they bring together and the quarrels they necessarily occasion; Hawk. b. 1, c. 75, s. 6; and in a late case, it was held that the keeping of a common gaming house, and for lucre and gain unlawfully causing and procuring divers idle and evil disposed persons to frequent and come to play together at a game called 'rouge et noir,' and permitting the said idle and evil disposed persons to remain playing at the said game, for divers large and excessive sums of money, is an offence indictable at common law; 1 B. & C. 272; 2 D. & R. 431; and it shall seem that an indictment, merely charging the defendant with keeping a common gaming house, would be good; per Holroyd J., *ib.*; see also Bac. Abr. Gaming, and Com. Dig. Justices of the Peace, B. (42) (A)."

On this point, Bronson C. J., in People *v.* Jackson, 3 Denio 101, says: "We have not enacted the statute 33 Hen. VIII. c. 9, s. 11, against gaming houses; (see 1 Hawk. P. C. 721, Curwood's ed.). Still I have no doubt that the keeping of a common gaming house is indictable at the common law; (The King *v.* Rogier, 1 B. & C. 272; The People *v.* Sergeant, 8 Cowen 139). It is illegal because it draws together evil disposed persons, encourages excessive gaming, idleness, cheating and other corrupt practices, and tends to public disorder. Nothing is more likely to happen at such places than breaches of the public peace; (1 Hawk. P. C. 693, s. 6; Roscoe Cr. Ev. 663, ed. of 1836; 1 Russ. on Cr. 299, ed. of 1836; 3 Chit. C. L. 673, note, ed. of 1819; Arch. C. P. 600, ed. of 1840). But it is not so of a house or room for the illegal sale of lottery tickets. Men do not congregate at such places. On the contrary, they go in one at a time, and the business is transacted behind screens and in corners where there is no witness. There is enough of evil in it, but no tendency to breaches of the public peace. It is true that an unauthorized lottery is a public nuisance; (1 Rev. Stat. 665, s. 26). But a place for the sale of tickets is not a lottery. Keeping an office or other place for registering tickets in an unauthorized lottery is expressly forbidden, (s. 34); but there is no prohibition against keeping an office or place for the sale of tickets. I see no principle on which the first count can be supported.

"The second count charges the keeping of an ill-governed and disorderly room *for the sale of tickets.* The pleader has substituted the sale of tickets for such things as are usually done in bawdy houses. This count is worse than the others."

The statute 33 Hen. VIII. c. 9, s. 11, enacts 'that no person shall for his gain, lucre or living, keep any common house, alley or place of bowling, coyting, cloysh, cayls, half-bowl, tennis, dicing-table, carding or any unlawful game, then or thereafter to be invented, on pain of forfeiting forty shillings a day. But upon this clause it has been decided that if the guests in an inn or tavern call for a pair of dice or tables, if the house be not for gaming, lucre or gains, but they only play for recreation and for no gain to the owner of the house, this is not within the statute, nor is such person that plays in such house that is not kept for lucre or gain, within the penalty of that law; Dalt. c. 46. By 5 Geo. VI. c. 83, s. 4, every person playing or betting in any open or public place, at or with any table or instrument of gaming, at any game or pretended game of chance, may be treated

common gaming house, on the said, &c., and on the said other days and times there, unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to frequent and come together to game and play, and the same idle and ill-disposed persons to be and remain in the said common gaming house, and to game and play together, on the said, &c., at, &c., and on the said other days and times there, did unlawfully and injuriously procure, permit and suffer, by means whereof divers noises, disturbances and breaches of the peace of the said state, then and on the said other days and times, were there occasioned and committed; to the great encouragement of idleness and dissipation, to the great damage and common nuisance, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

Like the first only saying: "a certain common gaming room in a certain house."

Third count. The game played being hazard.

That the said M. M. on, &c., and on divers other days and times between that day and the said, &c., with force and arms at, &c., aforesaid, a certain other gaming house there situate, unlawfully and injuriously did keep and maintain, for the gaming and playing at a certain and unlawful game with dice called hazard,(*a*) and in the said last mentioned common gaming house, on, &c., in the year aforesaid, and on the said last mentioned days and times, there unlawfully and unjustly did cause, procure, permit and suffer divers idle and ill-disposed persons to frequent and come together to game and play together at the said unlawful game called hazard, and the said last mentioned idle and ill-disposed persons to be and remain in the said last mentioned common gaming house, and to game and play together at the said unlawful game called hazard, on the said, &c., and on the said last mentioned other days and times there did unlawfully and injuriously procure, permit and suffer the said last mentioned persons, in the said last mentioned gaming house there, on the said, &c., and on the said other days and times, by such last mentioned procurements, permission and sufferance of the said M. M., did game and play

as a vagrant within the act, but playing at bowls is not within the act; 1 Cowp. c. 35; Paley 85, 110.

A house in which a faro table is kept for the purpose of common gambling, is *per se* a nuisance, and it is not necessary to constitute it such, that there should be proof of frequent affrays and disturbances committed there; State *v.* Doom, Charlton 1; Bac. Abr. tit. Nuisance, 1 Hawk. P. C. c. 76, s. 6; R. *v.* Dixon, 10 Mod. 336; 1 Russ. on Cr. 321.

The facts which may be given in evidence to one indicted as a common gambler, are not merely those perpetrated within the county where the bill is found; foundation being first shown by proof of the *corpus delicti*, it may be proved that he kept a faro bank or gaming table, or had otherwise been guilty of unlawful gaming, in other counties; Com. *v.* Hopkins, 2 Dana 420; *sed quere.*

A single act of gaming, unaccompanied with circumstances of aggravation, is, it is said, not such a misdemeanor as will authorize a court to require sureties for good behaviour; Estes *v.* State, 2 Humph. 469.

An indictment under the South Carolina act of assembly of 1816, to prevent gaming, against a person for permitting persons to play cards at his house, being a public house, is not good, unless it state that the persons were playing at such games as were not excepted in the act, and where a conviction had taken place on such an indictment the judgment was arrested; Reynolds *v.* State, 2 N. & M'Cord 365.

(*a*) See stat. 33 Hen. VIII. c. 9; 1 Hawk. c. 92; and 42 Geo. III. c. 119, respecting Little Goes; Dickinson's Q. S. 6th ed. 426.

together at the said unlawful game called, &c.; to the great danger, &c., (*as in the first count*).

Fourth count.

Like the third saying: "common gaming room," &c., *as in the second.*

Same, and permitting persons unknown to play at E. O.(*b*)

And the jurors, &c., do further present, that W. W. being such idle, &c., and not minding, &c., on, &c., aforesaid, and on divers other days, &c., with force and arms at, &c., aforesaid, a certain common gaming house there situate, for his lucre and gain, unlawfully and injuriously did keep and maintain, and in the said last mentioned gaming house a certain common gaming table called an E. O. table, for the use and purpose of divers idle and ill-disposed persons whose names are to the jurors aforesaid unknown, to resort and frequent, and come together to play at a certain unlawful game called E. O., did then and there, to wit, on, &c., aforesaid, and on the said other days and times there, unlawfully and injuriously keep and maintain, and did cause and procure and permit and suffer divers idle, &c., to frequent and come together to game and play at and with the said common gaming table, at the aforesaid game called E. O., and the said idle, &c., to be and remain at the said last mentioned common gaming table, at the aforesaid unlawful game called E. O., then and there, to wit, on, &c., at, &c., and on the divers other days and times at, &c., did unlawfully and injuriously procure, permit and suffer, to the great encouragement of idleness and dissipation, to the great damage and common nuisance of all the liege subjects of our said lord the king, and against the peace, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

Like the third, with the same difference between the second and first, viz. the substitution of "a certain common gaming room." *Add a count merely charging the defendant with keeping a* "common gaming house," *for which see Holroyd J. in B. & C.* 272, *though per contra, Com.* v. .

Gaming house. Form in use in New York.

That A. B., late of, &c., yeoman, on, &c., and on divers other days and times between that day and the day of taking this inquisition, with force and arms at, &c., a certain common gaming house there situate, for his lucre and gain unlawfully and injuriously did keep and maintain, and in the said common gaming house then and there unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to be and remain, and the said idle and ill-disposed persons on, &c., in the year last aforesaid, and on divers other days and times between that day and the day of taking this inquisition, to game together and play at cards, dice, billiards, in the said common gaming house aforesaid, then and there did unlawfully and injuriously

(*b*) 3 Chit. C. L. 674.

procure, permit and suffer, and the said idle and ill-disposed persons then and there in the said common gaming house aforesaid, on the day and year last aforesaid, and on the said other days and times, by such procurement, permission and sufferance of the said A. B., did game together and play at cards, dice, billiards, (*stating other games if any*), for money, to the great damage and common nuisance, &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

Against innholder in Massachusetts for suffering cards to be played, under stat. 1798, *c.* 20.(*d*)

That A. B., late &c., innholder, on, &c., at, &c., being then a person there licensed as an innholder according to law, &c., and being then and there in the exercise of said employment as innholder, did unlawfully suffer and allow sundry persons, &c., to play at cards (and other unlawful games) in the dwelling house of him the said B., occupied and improved by him, being the same dwelling house in which he was licensed to keep his inn as aforesaid, against the peace, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That the said on the day and year aforesaid, and at the place and county aforesaid, being there duly licensed as an innholder as aforesaid, and in the exercise of said employment as innholder, unlawfully did suffer and allow a great number of persons so to play in his inn at cards and keeno table, for money, against the peace, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Against an innholder, in Massachusetts, for allowing ninepins, &c., to be played on his premises.(*e*)

That A. B., on, &c., at, &c., not being then and there licensed as an innholder, victualler or retailer of spirituous liquors, for hire, gain and

(*d*) This form, with the exception of the averment in brackets, which was struck out as surplusage, and with the introduction of the allegation here inserted, that the defendant was in exercise of his employment as innkeeper, seems to have been approved by the Supreme Court in Com. *v.* Bolkom, 3 Pick. 281; see Com. *v.* Arnold, 4 Pick. 251.

(*e*) Com. *v.* Goding, 3 Mete. 291; Com. *v.* Stowell, 9 Mete. 573.

In the latter case, Dewey J. said: "The case of Com. *v.* Goding, 3 Mete. 130, is a decisive authority to show that the game of bowls is an unlawful game within the provisions of the Rev. Stats. c. 50, s. 17. The next question raised is, whether it be competent to charge the defendant for two distinct offences, under that statute. If the offence charged was the keeping, in his dwelling house, of tables for the purpose of playing at billiards, which is the offence first described in this section, the argument that this was one continuing offence, and not susceptible of a division, or properly chargeable as distinct offences, would deserve consideration. But the case before us does not present that question.

"The statute provides that, 'if any person not licensed as an innholder, victualler or retailer of spirituous liquors, shall keep or suffer to be kept, in any house, building, yard, garden or dependency thereof, by him actually used or occupied, any tables for the purpose of playing at billiards, for hire, gain or reward, *or* shall for hire, gain or reward, suffer any person to resort to the same for the purpose of playing at billiards or any other unlawful game, every person so offending shall, for every such offence, forfeit,' &c.

"It is this latter offence, and not the act of keeping a house or place for playing at billiards, &c., which is the subject of the present indictment. The offence here charged is not a continuing offence. It consists in permitting persons, for hire and reward, to resort to a building used by the defendant, for the purpose, on their part, of playing at bowls.

reward, unlawfully did suffer certain persons, whose names to the jurors are unknown, to resort to a certain building there situate, and by said A. B. then and there actually used and occupied for the purpose of playing at bowls and ninepins, the same being then and there an unlawful game, against the peace, &c. (*Conclude as in book* 1, *chap.* 3).

Against same for keeping gaming cocks, under Rev. Stat. c. 47, *s.* 9.(*f*)

That T., &c., at, &c., on, &c., did have in his the said T.'s house, in said W., certain game-cocks, the said game-cocks being then and there implements of gaming, the said T. being then and there duly licensed, according to law, as an innholder, and the said house being the same in which the said T. was so licensed, according to law as an innholder, as aforesaid; and he the said T., being then and there in said house, in the occupation of an innholder as aforesaid, under said license, and he the said T. did then and there suffer certain persons then and there resorting to said house, to wit, A. B., &c., and C. D., &c., then and there to use and exercise, within his the said T.'s said house, the game of cock-fighting, the same being an unlawful game, to wit, with the game-cocks aforesaid; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Against tavern-keeper for permitting unlawful gaming in Pennsylvania.(*g*)

That A. B., &c., on, &c., and at divers other days and times between that day and the day of the taking this inquisition, with force and arms, &c., at, &c., then and at the said other days and times being a tavern-keeper and a retailer of spirituous liquors within the said county, unlawfully did permit and allow divers games of address and hazard at cards to be practised and played at for money within his house in the said county; and then and the said other days and times,

This offence may be repeated from day to day, and in connexion with different individuals, and of course may be the subject of distinct indictments, or distinct counts in the same indictment.

"Such being the nature of the offence, it is properly charged on a single day certain, and not on divers days and times.

"It is then objected to the sufficiency of this indictment, that it does not allege that the persons who resorted to the building used by the defendant, actually played there at the game of bowls. But the statute offence is complete, if they were permitted by the defendant to resort to a building by him used for the purpose of playing at bowls. The indictment is, we think, sufficient in this respect.

"It is further objected to the indictment, that it does not allege that any persons resorted to the building of the defendant for the purpose of playing at bowls. This objection arises upon the collocation of the words 'for the purpose of playing at bowls.' These words, alleging the purpose, &c., are supposed by the counsel for the defendant to be solely applicable to the building, and introduced to define the character of the house, and not the purpose for which the visitors resorted to the house. This, as it seems to us, is an erroneous reading of the indictment. The allegation of 'the purpose of playing at bowls,' seems more distinctly to be applied to the persons who resorted to the house.

"The allegation is, that the building was actually used and occupied by the defendant, and that while it was thus occupied and used, he, for hire and reward, permitted certain persons to resort thereto for the purpose of playing at bowls. The language is reasonably certain, and brings the case within the statute."

(*f*) Com. *v.* Tilton, 8 Metc. 234.

(*g*) This indictment originally appeared in Reed's Digest.

in his said house, did permit divers persons to the inquest aforesaid unknown, to be and remain playing, betting and gaming for money, at cards and other unlawful games; to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a person in same, for keeping a gambling device called sweat-cloth.(*h*)

That L. W., late of, &c., yeoman, on, &c., at, &c., unlawfully did publicly and privately set up, erect, make, exercise, keep open, show and expose to be played at, drawn at and thrown at by dice, numbers and figures, a certain play and device called sweat-cloth, and then and there unlawfully did cause and procure to be set up, erected, made, exercised, kept open, showed and exposed to be played at, drawn at and thrown at, by dice, numbers and figures, a certain play and device called sweat-cloth, contrary, &c., to the common nuisance, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Common gaming house.

That the said L. W., on the day and year aforesaid, at the county aforesaid and within the jurisdiction of this court, with force and arms, &c., did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed and disorderly gaming house there situate, and then in his said gaming house did cause, entice and procure divers disorderly and idle persons to come and resort, and then and there in his said house, the same disorderly and idle persons to be and remain drinking, tippling, gaming and playing at unlawful games with dice, numbers and figures, for money, liquor and other valuable things, unlawfully did procure, permit and suffer, to the common nuisance, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Gambling under Pennsylvania act of 1847. *First count, keeping a room for gambling.*(*i*)

That T. E. J. K., late of, &c., yeoman, and R. B., late of, &c., yeoman, on, &c., at, &c., unlawfully did keep a room to be used and occupied for gambling, and did knowingly permit the same to be used and occupied for gambling, to the great scandal of public morals, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Exhibiting gambling apparatus.

That the said T. E. J. K. and the said R. B., on the day and year aforesaid, at the county and within the jurisdiction aforesaid, unlawfully did keep and exhibit a certain gaming table, and devices and apparatus to win money thereat and therewith, contrary to the form of the act of the general assembly in such case made and provided, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Aiding persons unknown in keeping a gambling table.

That the said T. E. J. K. and R. B., on the day and year aforesaid,

(*h*) Drawn in 1808, by Mr. Thomas Sergeant, then deputy attorney-general.
(*i*) These counts were sustained in Com. v. Kerrison, Philadelphia, Sept. T. 1847.

at the county and within the jurisdiction aforesaid, unlawfully did aid and assist certain persons whose names are to the inquest aforesaid as yet unknown, to keep a certain gaming table, and device and apparatus thereto belonging, to win and gain money thereat and therewith, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Persuading J. S. to visit a gambling room.

That the said T. E. J. K. and R. B., on the day and year aforesaid, at the county and within the jurisdiction aforesaid, did unlawfully persuade and prevail on one J. W. S., by means of an invitation then and there given by the said T. E. J. K. and R. B., to the said J., to visit a certain room then and there kept for the use of gambling, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a tavern-keeper for holding near his house a horse race, under the Pennsylvania statute.(*j*)

That S. B., late of, &c., yeoman, on, &c., at, &c., the said S. then and there being the keeper of a public house, a certain horse race on, &c., had, holden and run, near the house of the said S. B., at which said horse race, divers sums of money and other valuable things were betted, staked and striven for, and were lost and won, did incite, promote and encourage, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That afterwards, to wit, on the day and year last aforesaid at the county aforesaid, a certain horse race was had, holden and run, near the house of the said S. B., at which said horse race divers sums of money and other valuable things were betted, staked and striven for and were lost and won, and that certain evil and ill-disposed persons being then and thus assembled together and attending at and upon the said horse race, the said S. B., on the day and year aforesaid, at the county aforesaid and within the jurisdiction of this court, &c., to the said evil and ill-disposed persons so assembled together and as aforesaid then and there, had holden and run, divers quantities of wines, spirituous liquors, beer, cider and other strong drink did furnish, contrary &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For a masquerade, under Pennsylvania statute of 15*th February*, 1808.(*k*)

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the of upon their oaths and affirmations respectively do present, that late of, &c., on, &c., at, &c., did set on foot, promote and encourage a masquerade within the aforesaid, to the great danger, &c., to the common nuisance, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*j*) This form was prepared by Jared Ingersoll, Esq., the then attorney-general of Pennsylvania.

(*k*) 4 Smith L. 490.

Gaming with persons of colour, under the South Carolina statute.

That A. B., being a white person, on, &c., at, &c., unlawfully did game at a certain game played with and did then and there unlawfully bet upon a certain game, then and there played with by the said and to which the said then and there part ; and then and there unlawfully and willingly was present, aiding and abetting the said in then and there playing with at a certain game of chance, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Gaming in Alabama. First count, playing at cards.

That A. B. late of, &c., on, &c., in the county aforesaid, did play at a game with cards in a tavern there situate, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That the said A. B. late of, &c., on the day and year aforesaid, in the county aforesaid, did play at a game with cards in a house where spirituous liquors were then and there retailed, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That the said A. B. late of said county, on the day and year aforesaid, in the county aforesaid, did play at a game with cards in a public place, against, &c. (*Conclude as in book* 1, *chap.* 3).

Keeping a gaming table in Alabama.(*l*)

That R. W. W., late of, &c., on, &c., in the county aforesaid, did keep and exhibit a certain gaming table, called a faro-bank, played with cards, and kept for gaming, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

At common law, for nuisance in an open profanation of the Lord's day, by keeping shop.(*m*)

That A. B., late of, &c., butcher, on, &c., and continually afterwards until the day of taking this inquisition, at, &c., was and yet is a com-

(*l*) State *v.* Whitworth, 8 Port. 435.

(*m*) Dickinson's Q. S. 6th ed. 389.

Particular instances of profanation of the Lord's day, or Sunday, are by several statutes made punishable before magistrates; but it is also said to be indictable at common law. 2 East P. C. c. 1, s. 3; and, as it seems, as a breach of public decency. Mr. East goes on to mention the above precedent, citing an early edition of the Crown Circuit Comp. 155, and 1 Hawks. c. 6, s. 1, 2, 3. "At sessions," says Hawkins (ed. 1787), book 1, c. 6, "it is usual to indict for the nuisance in keeping open shop," and cites Crown Circuit Comp. 372. The eighth and latter editions of that work, however, omit the above precedent. A butcher might kill or sell victuals on Sunday before 3 C. I. c. 1; accordingly, an indictment against a butcher for exercising his trade on a Sunday, was held bad on demurrer, for not concluding against the form of the statute;" R. *v.* Brotherton, Stra. 702. *Quere*, for the act makes it only the subject of a penalty recoverable before a justice. See also 4 Bl. C. 63; 1 Taunt. 134.

In Middlesex, precepts have for many ages issued each term from the crown office, directed to the constables in the different districts, to make returns to the grand jury, by way of presentment of all nuisances and profaners of the Lord's day, &c., in order that they may be proceeded against according to law. These returns, when made, are considered as presentments, and may be prosecuted as such, or as indictments; 1 Chit. C. L. 4th

mon Sabbath breaker and profaner of the Lord's day, commonly called Sunday; and that the said A. B., on, &c., being the Lord's day, and on divers other days and times, being the Lord's days, during the time aforesaid, at, &c., in a certain place there called, &c., did keep a common, public and open shop, and in the same shop did then and on the said other days and times, being the Lord's days, there openly and publicly sell and expose to sale flesh meat to divers persons to the jurors aforesaid as yet unknown;(*n*) to the common nuisance,(*o*) &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Keeping shop open, or trafficking on the Sabbath, on Charleston Neck.(*p*)

That A. B., being the owner and occupier of a grocery store and retail shop, situate in the parish of St. Philip, in the district of Charleston, and state aforesaid, and within the limits of Charleston Neck, in which said store and shop, spirituous liquors were and are usually vended, on, &c., being the Sabbath day, with force and arms, at, &c., unlawfully did, (*stating offence*), against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Doing business on Sunday, against the Massachusetts statute.(*pp*)

That A. B., late of, &c., on, &c., that day being Lord's day, and between the hour of twelve of the clock at night on the Saturday night preceding said Lord's day, and the time of the sun's setting on said Lord's day, at, &c., did keep open his shop, there situate, for a long time, to wit, for the space of one hour, for the purpose of doing labour, business and work therein, not being works of necessity or charity, namely, selling goods and merchandise therein on said Lord's day, as aforesaid, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

ed. 310. In practice, however, after appearance entered for defendant, the proceeding is in general abandoned; 7 & 8 Geo. IV. c. 38, does not extend to prevent presentments (at least in Middlesex), by constables against persons, for that they "being common Sabbath breakers and profaners of the Lord's day, commonly called Sunday, did on certain Sabbath days and hours during the celebration of divine service, keep open shop, and therein openly sell divers goods." This subject having been brought before the Court of King's Bench, in Trin. T. 1837, by the grand jury of Middlesex, Mr. Justice Littleton, in his charge to them on 11th November, 1837, stated that the presentments of nuisances, &c., by the constables to the grand juries, were of the most remote antiquity, and must be considered deliberately by the latter, who must proceed to present such offences of profanation of the Sabbath as should be returned to them, and thus afford the opportunity of proceeding on such presentments, to any person who might take them up. He also declared that Sunday trading, if carried on to any extent which creates a nuisance (see 1 Taunt. 134), or obstruction, was indictable at common law; but that a mere act of selling on the Lord's day was not now more indictable than it had been for the last seven hundred years. Dickinson's Q. S. 6th ed. 389.

By a Saxon law of king Athelstan, cited 2 Inst. 226, "Die autem dominicio nemo mercaturam facito; id quod si quis egerit, et ipsa merce, et triginta præterea solidis mulctator."

The constitutionality of laws of this class, has recently been vindicated in Com. v. Specht, Supreme Court of Pennsylvania, June, 1848.

(*n*) If they are known, their names must be stated. Dickinson's Q. S. 6th ed. 390.

(*o*) This allegation was omitted in R. v. Brotherton, Stra. 702, as well as "against the form of the statute." Such an act done in a corner might perhaps not be indictable at common law. Drury v. Desfontaines, 1 Taunt. 134; Dickinson's Q. S. 6th ed. 390.

(*p*) Taken from the printed form in use in Charleston.

(*pp*) Taken from the printed form in use in Boston.

That A. B., of, &c., on, &c., that day being Lord's day, and between the midnight preceding and the midnight succeeding said day, at Boston aforesaid, he then and there being a person keeping a certain house, shop and place of public entertainment and refreshment, there situate, did then and there suffer certain persons whose names to said jurors are not known, to the number of to abide and remain in his said house, shop and place of business, drinking and spending their time idly, said persons not being travellers, strangers or lodgers in his house and shop and place of business aforesaid, and did then and there, and between the midnight preceding and the midnight succeeding said Lord's day, entertain said persons to the said number of in his said house, shop and place of business, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That A. B., of, &c., on, &c., between the midnight preceding and the sun-setting of said day, that day being the Lord's day, did, at Boston aforesaid, do certain work, labour and business, not being works of necessity and charity, to wit, did then and there work, labour, and do business, work and labour in against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That A. B., of, &c., on, &c., at, &c., he then and there not being licensed as an innholder, tavern-keeper, common victualler, or retailer of wine, rum, brandy or other spirituous liquor, did sell to a person whose name is as yet unknown to said jurors, a certain quantity of intoxicating liquor, to wit, one-half of a gill of intoxicating liquor, the same day of being Sunday, and the time of said sale of said intoxicating liquor being between the hour of twelve of the clock on the Saturday night preceding said Sunday, and the time of the sun-setting on said Sunday, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Offering putrid meat for sale.(*q*)

That C. C., late of, &c., butcher, on, &c., unlawfully, knowingly and mischievously, at, &c., in the public market there situate, did expose and offer for sale as good, sound and wholesome meat and provisions, to divers liege subjects of the Commonwealth of Pennsylvania, fifty pounds' weight of beef and upwards, the same beef then and there being infected, putrid, corrupted and unsound and unwholesome meat and provisions, he the said C. then and there well knowing the said beef to be as aforesaid putrid, infected, corrupted, unsound and unwholesome, to the great damage of the health, and to the nuisance, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form for the same.(*r*)

That S. S., Jr., late of, &c., farmer, on, &c., at, &c., did then and there unlawfully, falsely, maliciously, mischievously and deceitfully

(*q*) Drawn by Mr. Bradford.

(*r*) State *v.* Smith, 3 Hawks 378.

Taylor C. J.: "The first exception, taken both as a ground for a new trial, and in arrest of judgment, that there is no charge of the defendant's being a trader in beef, cannot be

sell and dispose of to one D. C. and others, certain unwholesome and poisonous beef, and did then and there receive pay for the same, to the great injury of the said D. C. and his family, to the great nuisance, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Exhibiting scandalous and libellous effigies, and thereby collecting a crowd, &c. First count.(*s*)

That the said R. C., afterwards, to wit, on, &c., and on divers other days and times, as well on the Lord's day, commonly called Sunday, as on other days, between the said, &c., and the day of taking this inquisition, and for divers long spaces of time, to wit, for the space of ten hours in each of the several days last aforesaid, at, &c., at the windows of a certain messuage, shop and premises, of and belonging to the said R. C., there situate, and being in and near to a certain common and public highway there, called Fleet street, and to the

sustained; for the fact charged in the indictment and with the circumstances accompanying it, is indictable by whomsoever committed. It is not necessary to state in such indictment that the defendant acted in violation of any duty imposed on him by his peculiar condition; for it is a misdemeanor at common law knowingly to give any person injurious food to eat, whether the defendant be excited by malice or a desire of gain. The charge in Treeve's case was, for wilfully, deceitfully and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man. It was laid as an offence at common law; and an exception was taken in arrest of judgment, that it was not indictable; as it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty. The defendant was, in fact, a contractor with the public for supplying the prisoners with provisions, but that was not stated in the indictment, nor was it held necessary to state it; and the conviction was supported upon the broad ground, that the giving of unwholesome victuals, not fit for man to eat, whether from motives of gain, from malice or deceit, was clearly an indictable offence. (2 East P. C. 821).

"There are several precedents of indictments for the same offence, variously modified, stated in 2 Chit. C. L. 556, on which convictions have been had, upon undoubted principles of law. It is true, that a very ancient statute was passed, further to aggravate the punishment for selling unwholesome provisions, but as I have met with no prosecutions upon it, the common law may be supposed to have been weakened by the legislature's making declarations against offences which were criminal by the common law, when properly understood. Of this, several remarkable instances are stated in Barrington on the Statutes 313. It seems, upon the whole, that the public health, whether affected through the medium of unwholesome food, or poisoning the atmosphere, or introdubing infectious diseases, is anxiously guarded by the common law. There ought to be judgment for the state."

Hall J.: "I coneur in opinion, that the act charged in the indictment is an indictable offence. In 4 Bl. 162, it is said, that it is an offence against public health, to sell unwholesome provisions. From this it might be inferred, that unless the public were concerned in the act, it was not a public offence, as in the case of The King *v.* Baldock, for supplying the prisoners with unwholesome food, he being a public contractor for that purpose (2 Chit. C. L. 556), and the case of The King *v.* Treeve, who was indicted for the same offence (2 East C. L. 821). But it is laid down by both these writers, that the person charged need not be a public contractor; that it is a misdemeanor at common law to give any person unwholesome food, not fit for man to eat, *lucri causa*, or from malice or deceit, apart from other considerations which entered deeply into the demerits of Baldock and Treeve. See also 6 East 133, 141; 2 East C. L. 823; 2 Ld. Raym. 1179; 3 Ld. Raym. 487. The offence is one that common prudence cannot guard against, and what is most important, the consequences cannot be calculated. I think judgment should be given for the state."

Henderson, J. concurred.

(*s*) R. *v.* Carlisle, 6 C. & P. 636.

The defendant was convicted and sentenced before Mr. Justice Park, Mr. Baron Bolland, and Sir John Cross, knight.

dwelling houses and residences of divers the liege subjects of our said lord the king, there inhabiting and residing, unlawfully did publicly exhibit and expose, and did cause to be publicly exhibited and exposed, divers, to wit, three scandalous and libellous effigies and figures, that is to say, one effigy and figure intended to represent and representing the devil with a pitchfork, and one other effigy and figure intended to represent and representing a bishop of the established church of the said united kingdom; the said two last mentioned effigies and figures being placed together, and one arm of the said effigy and figure representing the bishop being placed within one arm of the said effigy and figure representing the devil; and underneath the said two last mentioned effigies and figures was a certain inscription and paper writing, in large letters and characters, as follows, that is to say, "Spiritual Brokers;" and one other effigy and figure, representing and intended to represent the person of a man in the ordinary dress of a tradesman, and underneath the said last mentioned effigy and figure was a certain other inscription and paper writing, in large letters and characters, as follows, that is to say, "Temporal Brokers;" and between the said two effigies and figures in this count first mentioned, and the said effigy and figure in this count last mentioned, and near to all the effigies and figures in this count aforesaid, was a certain other inscription and paper writing, in large letters and characters, as follows, that is to say, "Props of the Church;" and also divers scandalous and libellous placards and paper writings, one of which said placards and paper writings was as follows, that is to say, "No Church Rates;" one other of which said placards and paper writings was as follows, that is to say, "Church Robberies;" one other of which said placards and paper writings was entitled as follows, that is to say, "Battle of Church Rates;" and one other of said placards and paper writings was entitled as follows, that is to say, "Another Seizure;" near to the said common and public highway called Fleet street, and to the dwelling houses and residences aforesaid, and within view of persons passing and repassing in and along the said highway, with intent to attract the notice and attention of persons passing and repassing in and along the same highway, to the effigies and figures, inscriptions, placards and paper writings, in this count aforesaid, and thereby on the several days in that behalf aforesaid, and as well on the Lord's day, commonly called Sunday, as on the said other days, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, he, the said R. C., unlawfully did cause and procure and occasion divers persons, that is to say, forty persons, as well men as women and children, and idle, dissolute and disorderly people, wrongfully and injuriously to assemble, stand, be and remain in the highway aforesaid, and near to the dwelling houses and residences aforesaid, for divers long spaces of time, to wit, for the space of ten hours in each of the several days in that behalf aforesaid, looking at the said last mentioned effigies and figures, and reading the said last mentioned placards and paper writings so by him the said R. C. exhibited and exposed in manner and with intent aforesaid; by means of which said several premises, in this count aforesaid, the common

and public highway aforesaid, on the several days and times in that behalf aforesaid, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, was greatly obstructed and straitened, so that the liege subjects of our said lord the king, during the times in this count aforesaid, could not go, return, pass and repass in and along the said common and public highway, and to and from the said dwelling houses and residences situate and there being near to the said messuage, shop and premises of the said R. C., so freely and conveniently as they had been used and accustomed to do, and of right ought to have done, and still of right ought to do, to the great damage and common nuisance of all the liege subjects of our said lord the king, in and along the said common and public highway called Fleet street, and to and from the dwelling houses and residences aforesaid, going, returning, passing and repassing, and near to the aforesaid messuage, shop and premises of the said R. C., dwelling and residing, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said R. C., afterwards, to wit, on &c., and on the said several other days in that behalf hereinbefore mentioned, with force and arms, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, unlawfully and injuriously did put, place and exhibit and expose, and cause and procure to be put, placed, exhibited and exposed, divers, to wit, three other effigies and figures, that is to say, one effigy and figure intended to represent and representing the devil with a pitchfork, one other effigy and figure intended to represent and representing a bishop of the established church of the said united kingdom, and one other effigy and figure at the windows and on the outside of a certain messuage and shop there situate and being adjacent to a certain other common and public highway there called Fleet street, and to the dwelling houses and residences of divers liege subjects of our said lord the king, situate there, and did unlawfully and injuriously keep and continue and cause to be kept and continued, the same effigies and figures, so there put, placed, exhibited and exposed, as last aforesaid, for divers long spaces of time, to wit, for the space of ten hours in each of the several days in that behalf aforesaid, he the said R. C., at the several times he so put, placed and exhibited, and exposed the said effigies and figures in this count aforesaid, and continued the same so put, placed, exhibited and exposed as aforesaid, well knowing that the said highway would thereby be obstructed in the manner in this count hereinafter mentioned; and that the said R. C., on the several days in that behalf aforesaid, and for divers long spaces of time, to wit, for the space of ten hours in each of the said several days, and as well on the Lord's day, commonly called Sunday, as on the said other days, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, by means of the putting, placing, exhibiting and exposing the said last mentioned effigies and figures, and keeping and continuing the same so put, placed, exhibited and exposed at the windows, and the outside of the said messuage and shop, as in this count aforesaid, wilfully, un-

lawfully and injuriously did cause and procure and occasion divers persons, as well men as women and children, and idle, dissolute and disorderly people, that is to say, forty persons, to assemble, stand and be and remain in the said last mentioned highway, whereby the same highway, on the several days and times in that behalf aforesaid, and as well on the Lord's days, commonly called Sundays, as on other days, was greatly obstructed and straitened, so that the liege subjects of our said lord the king, during the said times, could not go, return, pass and repass in and along the same highway, so freely and conveniently as they had been used and accustomed to do, and of right ought to have done, and still of right ought to do, to the great damage and common nuisance of all the liege subjects of our said lord the king, in and along the same highway going, returning, passing and repassing and there inhabiting and residing, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Keeping a house in which men and women exhibit themselves naked, &c., as "model artists."(*t*)

That E. F. late of, &c., on, &c., and on divers other days and times between that day and the day of the taking of this inquisition at, &c., did keep and maintain, and yet doth keep and maintain a certain common, ill-governed and disorderly house, and in his said house for his own lucre and gain certain persons, as well men as women, of evil name and fame and of dishonest conversation, did permit to frequent and come together, and the said men and women then and on the said other days and times there unlawfully and wilfully did cause and procure in his said house, publicly to expose and exhibit themselves for the lucre and gain of him the said E. F., to divers persons in his said house assembled, in various scandalous, lewd, lascivious, obscene and indecent groupings, attitudes, postures and positions, to the manifest corruption of the morals as well as of youth as of other good and worthy citizens of the State of New York, in open violation of decency and good order, to the great damage and common nuisance, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said E. F., afterwards, to wit, &c., and on divers other days and times between that day and the day of the taking of this inquisition, at, &c., unlawfully did publicly exhibit and show, and cause and procure to be publicly exhibited and shown for money, certain persons, men as well as women, whose names are to the jurors aforesaid unknown, in various impudent, lascivious, lewd, wicked, scandalous and obscene groupings, attitudes, positions and postures, to the manifest corruption of the morals as well of youth as of other good and worthy citizens of the State of New York, in open violation of decency and good order, to the great damage and common nuisance,

(*t*) This form was drawn in New York, in March, 1848, for the purpose of reaching the "Model Artists." A conviction under a similar indictment, was sustained in Philadelphia, in June, 1848.

&c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

That the said E. F., afterwards, to wit, on the day and year last aforesaid, at the ward, city and county aforesaid, was the keeper of a certain public place of amusement known and designated as the Chatham Theatre, at which public place of amusement the said E. F. did exhibit and cause and procure to be exhibited for money, certain persons, men as well as women, in various lascivious, wicked, impudent, lewd, obscene and indecent groupings, attitudes, postures and positions, to the manifest corruption of the morals as well of youth as of other good and worthy citizens of the State of New York, in open violation of decency and good order, to the great damage and common nuisance, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

That the said F., afterwards, to wit, on the day and year last aforesaid, at the ward, city and county aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at the ward, city and county aforesaid, with force and arms wickedly and unlawfully did exhibit and show for money to divers persons whose names are to the jurors aforesaid unknown, a certain lewd, wicked, scandalous, infamous and obscene representation, exhibiting certain living men and women, whose names are to the jurors aforesaid also unknown, in divers lewd, lascivious, wicked, indecent and obscene groupings, attitudes, postures and positions, to the manifest corruption of morals, in open violation of decency and good order, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Bathing publicly near public ways and habitations.(*u*)

That H. O. G. late of unlawfully, deliberately and wilfully did expose and exhibit himself naked near to and in front of divers houses of the good people of the said state, situate at, &c., aforesaid, and also near to a certain public and common highway there, and also in the presence of the good people of the said state, both male and female, with intent to vitiate and corrupt the morals of the said people of the state, to the common nuisance, &c., and against, &c.(*v*) (*Conclude as in book* 1, *chap.* 3).

That the said H. O. G. on, &c., at, &c., unlawfully, deliberately and wilfully did expose himself naked to divers of the good people of the state, against, &c. (*Conclude as in book* 1, *chap.* 3).

(*u*) Dickinson's Q. S. 6th ed. 393.

(*v*) Undressing on a beach and bathing in the sea, so near inhabited houses as to be distinctly visible from them, is an offence, though the houses are recently erected, and the bathing at that place was previously general; R. *v.* Crunden, 2 Campb. 89; 1 Sid. 68; 1 Keb. 620; 2 Stran. 796; State *v.* Millard, 18 Verm. 574; Dickinson's Q. S. 6th ed. 394; 2 Chit. C. L. 41.

Public exposure of naked person.(*w*)

That J. S., late, &c., being a scandalous and evil disposed person, and devising, contriving and intending the morals of divers good people of the said state to debauch and corrupt, on, &c., at, &c., on a certain public and common highway there situate, in the presence of divers good people of the said state then and there being, and within sight and view of divers other liege subjects through and on the said highway then and there passing and repassing, unlawfully, wickedly and scandalously did expose to the view of the said persons present and so passing and repassing as aforesaid, the body and person of him the said J. S. naked and uncovered for a long space of time, to wit, for the space of one hour, to the great scandal, &c.

Exposing the private parts in an indecent posture.(*x*)

That H. O. G., late of, &c., and intending as much as in him lay to vitiate and corrupt the morals of the good people of the said state, and to stir up and excite in their minds filthy, lewd and unchaste desires and inclinations, on, &c., at, &c., unlawfully, wickedly, deliberately and wilfully did expose and exhibit his private parts, in an indecent posture, situation and practice, to the good people, both male and female, of the said state, with intent to vitiate and corrupt the morals of the good people, and to stir up and excite in their minds filthy, lewd and unchaste desires and inclinations, against, &c. (*Conclude as in book* 1, *chap.* 3).

Same, under s. 8, *c.* 444 *Vermont Rev. Stats. First count, exposure to divers persons, &c.*(*y*)

That A. B., on, &c., did expose and exhibit his private parts, in a most indecent situation and posture, to divers persons, with intent to excite in their minds lewd and unchaste desires and inclinations, &c.

(*w*) This form is given by Mr. Archbold (C. P. 5th Am. ed. 774), who cites the following authorities; R. *v.* Sir Charles Sedley, 10 St. Tr. Ap. 93; 1 Sid. 168; 1 Keb. 620; and see R. *v.* Gallaro, 1 Sess. Ca. 231; R. *v.* Crunden, 2 Campb. 89; 1 B. & Ad. 933; Reg. *v.* Powell, 3 Q. B. 180; 2 Gale & D. 518.

(*x*) Dickinson's Q. S. 6th ed. 394.

When an indictment contained two accounts, two instances of exposure were allowed to be given in evidence, viz. one on each of two separate days, or two separate instances on the same day; for, as the day laid in the first count was immaterial, exposure on another day may be proved on that count. Then as the second count charged the offence as done on the "day and year aforesaid," a second exposure, viz. the day laid in the first count may be shown; and if different days are laid in different counts, any number of acts of exposure may be shown; Rowbattel's case, 1 Lew. C. C. R. 83.

(*y*) State *v.* Millard, 18 Verm. 575. The opinion of the court was delivered by Williams C. J.: "In this case the respondent excepted to the charge of the court, and also to their decision, in overruling the motion in arrest; on both which points we think the decision was correct.

"The statute—Rev. Stat. 444, s. 8—provides, that if any man or woman, married or unmarried, shall be guilty of open and gross lewdness and lascivious behaviour, &c., he shall be imprisoned in the common gaol not more than two years, or fined not exceeding three hundred dollars. No particular definition is given, by the statute, of what constitutes this crime. The indelicacy of the subject forbids it, and does not require of the court to state what particular conduct will constitute the offence. The common sense of community, as well as the sense of decency, propriety and morality, which most people entertain, is suf-

Second count. Exposure in the presence of one Polly P.

That the said A. B. on, &c., did commit open and gross lewdness and lascivious behaviour, and did then and there lewdly and lasciviously expose his private parts in a most indecent posture and situation, in the presence of one P. P., with intent to excite in her mind, &c., (*as in last count*).

Third count. Exposure in the presence of Polly P. and divers other persons to the jurors unknown.

That the respondent, said A. B., &c., intending to corrupt the manners and morals of the people, did commit open and gross lewdness and lascivious behaviour, and did then and there lewdly and lasciviously expose and exhibit his private parts in the presence of one P. P., and in the presence of divers other persons to the jurors unknown, &c.

Another form for the same in North Carolina, there being no allegation of the presence of lookers-on.(z)

That S. R., late of, &c., on, &c., at, &c., being an evil disposed person, and contriving and intending to debauch and corrupt the morals

ficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it.

"That the conduct of the respondent, in this case, was lewd and lascivious, is beyond question. A public exposure of himself to a female, in the manner this respondent did, with a view to excite unchaste feelings and passions in her and to induce her to yield to his wishes, is lewd, and is gross lewdness, calculated to outrage the feelings of the person to whom he thus exposed himself, and to show that all sense of decency, chastity or propriety of conduct, was wanting in him, and that he was a proper subject for the animadversion of criminal jurisprudence.

"That this lewdness was *open*—which under this statute must be considered as undisguised, not concealed, and opposite to private, concealed and unseen—is also evident. There was no desire or wish for concealment; and, so far as the female was in his view, he exposed himself to her with the intent and design that she should see him thus exposed. The crime cannot be made to depend on the number of persons to whom a person thus exposes himself, whether one or many. Indeed, the offence in this case is more glaring and gross than in the case of Sir Charles Sedley, 1 Sid. 168; 1 Keb. 620, or of the man who bathed in a public place; Rex *v.* Crunden, 2 Campb. 89. In those cases there was a disregard of decency, without any design to outrage the feelings of any individuals, or to excite any improper desires or feelings in them. In the case before us, such motives evidently actuated the respondent.

"I am not prepared to say, that the conduct of the respondent would not have been indictable at common law, notwithstanding the intimation to the contrary in the case of Fowler *v.* The State, 5 Day 81. There is a precedent of an indictment against one Bennett, in 2 Chit. 41, on which he was convicted, which would have been sustained by the same evidence produced against this respondent.

"Of the soundness of the decision in Commonwealth *v.* Catlin, 1 Mass. 8, we have nothing to say, and only remark that, in that case, the lewdness was designed to be private, and it was rather accidental that the offenders were discovered; and in this particular the case is essentially different from the one before us.

"No other objections have been urged in the argument. The indictment, in the second and third counts, has followed the words of the statute. Judgment must be rendered on the verdict, and the respondent sentenced."

(z) State *v.* Roper, 1 Dev. & Bat. 208.

Gaston J., after stating the case, proceeded: "We consider it a clear proposition, that every act which openly outrages decency, and tends to the corruption of the public morals, is a misdemeanor at common law. A public exposure of the naked person, is among the most offensive of those outrages on decency and public morality. It is not necessary to the constitution of the criminal act, that the disgusting exhibition should have been actually seen by the public; it is enough if the circumstances under which it was obtruded, were such as to render it probable that it would be publicly seen; thereby endangering a shock to modest feeling, manifesting a contempt for the laws of decency. In the description of every indictable offence, it is always advisable that the charge should be made to conform

of the citizens of said county, on a certain public highway in said county, did indecently and scandalously expose to public view the private parts of him the said R., to the evil and pernicious example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Lewdness and lascivious cohabitation in Massachusetts. First count, lascivious behaviour by lying in bed openly with a woman.

That A. B. of, &c., on, &c., and from that day to the day of being then and there a married man (and having a lawful wife alive), did commit open, gross lewdness and lascivious behaviour, and did then and there lewdly and lasciviously lie on a bed with one C. F. (a singlewoman), she the said C. F. then and there not being the wife of the said A. B., against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Lascivious behaviour, by putting the arms openly about a woman, &c.

That said A. B. at, &c., on the day and year aforesaid, being then and there a married man and having a lawful wife alive, was guilty of open, gross lewdness and lascivious behaviour, by openly, lewdly, grossly and lasciviously putting his arms about the said C. F., (she the said C. F. then and there being a singlewoman, and not being the wife of the said A. B.), against, &c.(*a*) (*Conclude as in book* 1, *chap.* 3).

to approved precedents. A departure from them is viewed with suspicion. Yet where there are no precise technical expressions and terms of art required, so appropriated by the law to the description of an offence as not to admit a substitute for them, it is sufficient that the indictment charges in intelligible language, with distinctness and certainty, all the substantial circumstances which constitute the offence. In 2 Chit. C. L. 41, we have a precedent of the indictment which was used in the case of The King *v.* Crunden. It consists of two counts. The first charges that he exposed himself naked, and in an indecent posture near to and in front of divers houses, and also near to a certain public highway, and also in the presence of divers of king's subjects: the second charges, that he exposed himself naked to divers of his majesty's subjects. In 2 Campbell's Rep. p. 89, we have a report of the case. The defendant was convicted on evidence that he bathed in the sea, dressing and undressing on the beach, opposite to the East Cliff at Brighton, on which cliff there was a row of inhabited houses, from the windows of which he *might* be distinctly seen, as he was undressed and swam in the sea. The allegation, that this indecent exhibition was made in the presence of divers persons, was satisfied by proof that it took place in their vicinity, and so that it might have been seen. The allegation means no more, and any other allegation which distinctly and especially avers as much, will as effectually answer to describe the offence. The averments in this indictment, that on a certain public highway the defendant did indecently and scandalously expose to *public view*, can mean nothing less than that the indecent exposition was so made that it might have been seen by *numbers*. The necessary constituents of the crime are therefore stated, and there was no error in overruling the motion in arrest." To the same effect is Fowler *v.* State, 5 Day 81; State *v.* Grisham, 2 Yerg. 589. *See p.* 455; *see also next note.*

(*a*) These counts were framed under the stat. of 1784, c. 40, and were brought before the Supreme Court in Com. *v.* Catlin, 1 Mass. 9. Nothing but secret lewdness was proved on trial (the principal witness having peeped through the window), and as the jury were directed to acquit, the indictment was not tested. The averments in brackets are not in the original, though it would be safer to insert them. The offence charged in the first count is clearly a misdemeanor at common law (see Wh. C. L. 507), though it is questionable whether to indict it as such, it should not be charged as a common nuisance; State *v.* Waller, 3 Murph. 229. One instance of carnal connexion, it is ruled, is not enough under the statute; there must be a continuance of cohabitation, of a public nature, tending to corrupt public morals; Com. *v.* Calef, 10 Mass. 153. But I apprehend that "putting his arms about" an unmarried woman in public, has now become too principal a part of the dances of the nation—said by Mr. Bentham to be part of its common law—to be dealt with by indictment.

Lascivious cohabitation at common law.(*b*)

That A. B., yeoman, and C. D., spinster, being scandalous and evil disposed persons, on, &c., at, &c., devising and intending the

(*b*) State *v.* Grisham, 2 Yerg. 589. "It is insisted for the plaintiff in error," said the court, "that to support the criminal allegations in the presentment, which it is argued, amount to open and notorious lewdness, the acts stated must be shown to have been committed in public, such as in the streets of a town, or elsewhere exposed to the view of divers persons. And the case of Com. *v.* Catlin (1 Mass. Rep. 8), was cited. That was an indictment brought on a statute of the State of Massachusetts, the provisions of which are not stated in the report, and the statute itself has not been seen. The report of the case in the book is, that on an indictment under the statute for open and gross lewdness and lascivious behaviour, evidence of lewdness, or such behaviour in secret, will not support the indictment. This case, therefore, wholly dependent upon the particular provisions of a statute, can have but little, if any application to the present case, which is a presentment at the common law. It will not, therefore, be remarked upon or further noticed.

"The common law is the guardian of the morals of the people, and their protection against offences notoriously against public decency and good manners; and Blackstone says, that open and notorious lewdness, either by frequenting houses of ill-fame, which is an indictable offence, or by some grossly scandalous and public indecency, is cognizable by the temporal courts. At one time in England, the superintending care and concern of the law for the advancement of public morality, was carried to so great an extent, that incest and adultery were made capital offences, and the repeated act of keeping a brothel, or committing fornication, were (upon a second conviction), made felony without the benefit of the clergy. This statute was made during the commonwealth, when the ruling powers, says Blackstone, found it to their interest to put on the semblance of very extraordinary strictness and purity of morals; but it was not thought proper at the restoration to revive this statute and renew it, being of such unfashionable rigour; since which time these offences have been left to the feeble coercion of the spiritual, and the temporal courts take no cognizance of the crime of adultery, otherwise than as a private injury; see 4 Bla. Com. 64, 65.

"This is the substance of Judge Blackstone's review of the law of England upon the offences of adultery and fornication, and the other offences noticed; upon which it appears that even in England at this day, the case made by this record is the proper subject of an indictment, that is, a grossly scandalous and public indecency, for which the punishment is by fine and imprisonment. When Judge Blackstone says, that the crime of adultery is not taken into cognizance by the temporal courts, this is to be understood of secret and private adultery; for if open and notorious, it comes within his description of a grossly scandalous and public indecency.

"But let it be understood that the temporal courts in England have no cognizance of the crime of adultery or fornication, when secret and private and confined to single instances, yet they are not thereby legalized or rendered dispunishable as not being offences; they continue offences there still, but their cognizance is transferred and assigned to the spiritual court, who punish according to the rules of the canon law. It cannot follow as a consequence, that an offence which is common to both the law of England and this state, and is animadverted upon by the law of England, and punished by the spiritual court there, shall escape like animadversion of the law and punishment here, because we have not a spiritual court; but it rather follows from analogy that our county court of pleas and quarter sessions have the jurisdiction in these matters, as we find that matters, the proper tribunal of which was the spiritual court in England, are in this state, when not repugnant to our constitution and form of government, assigned to the county courts, as the probate of wills and testaments, the granting of letters of administration, &c.

"But in addition to analogy, we have the express authority of the common law, as declared by the judges in the courts of justice, who, as Blackstone observes, are the living oracles and depositories of the law (see 1 Bl. Com. 68, 69,); that all offences against good morals are cognizable and punishable in the temporal courts, that are not particularly assigned to the spiritual court. Thus, in the case of The King *v.* Sir Francis Blake Delaval (Burr. Rep. 1434), Ld. Mansfield says: 'It is true that many offences of the incontinent kind, fall properly under the jurisdiction of the ecclesiastical court, and are appropriated to it; but if you except those appropriated cases, this court is the *custos morum*, (the guardian of the morals of the people), and has the superintendency of offences *contra*

morals of the citizens of the said state to debauch and corrupt, on, &c., and on divers other days and nights between that day and the day of taking this inquisition, and for all the time aforesaid, in the county aforesaid, in the presence and view of divers good citizens, and in the face of the country, unlawfully, wilfully, wickedly and scandalously did then and there live, cohabit and use together as man and wife, in lewd acts of fornication and adultery, openly, notoriously and publicly, they not being married, to the great scandal of the said good and worthy citizens of the said state, to the manifest corruption of their and the public morals, in contempt of the said state and the laws of the land, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Lewdness, &c., by a man and woman unlawfully cohabiting and living together.(c)

That on, &c., and upon divers other days between that day and the day of the filing of the indictment, E. C. of the County of Sevier, labourer, and B. B. of the same county, spinster, being persons of evil disposition, and designing to corrupt the morals of the people of the said state, unlawfully, openly and publicly did live, dwell and cohabit together in lewdness and adultery, in the County of Sevier, they being unmarried to and with each other, &c.

bonos mores' (against good manners); and upon this ground he adds, 'both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here.' Thus we find the common law (independent of any statutes), is the guardian of the morals of the people, takes cognizance of offences against good manners, and this cognizance belongs to the temporal courts in England, in all those cases where there is not an appropriation of them to the spiritual court.

"The result of this view of the law is, that acts or conduct notoriously against public decency and good manners, constitute an offence at common law, cognizable by the temporal courts, even in England, as in the case above cited, of the King *v.* Delaval, which was for notoriously living with a kept mistress, and in the cases of Sir Charles Sedley and Curl, above mentioned, who had been guilty of offences against good manners. Now, what is the gist of the above prosecutions? It is this, that the act or acts, or particular conduct charged, lie notorious and against good manners, not that they should have been committed in the public streets elsewhere exposed to the view of divers spectators. Such an exhibition as th cessary to satisfy the term notorious, and portray its character and import. ion of the term notorious, or notoriously, in the constitution of an offence of the e spoken of, is sufficiently answered if the act is done in such a manner, or under such circumstances, as necessarily to become public, or generally known in the neighbourhood; as in the case before Ld. Hardwicke, where it appeared in a cause in the Court of Chancery, that a man had formally assigned his wife over to another man, Ld. Hardwicke directed a prosecution for that transaction, as being notoriously against public decency and good morals.

"Thirdly, it is objected that there is error in the charge of the court. As to this, it need only be observed, that if there is any error in the charge, it is in favour of the plaintiffs in error, in requiring circumstances not necessary to be shown in the proof in the present case, for the purpose of supporting the prosecution, as presenting themselves at public worship," &c.

(*c*) State *v.* Cagle, 2 Humph. 414.

In this case the judgment was arrested by the Circuit Court, upon the ground that the living, dwelling and cohabiting together in lewdness and adultery, being unmarried, is not charged in the indictment to have been notorious. The allegation of notoriety, however, if necessary, is sufficiently made by the terms "openly and publicly."

Notorious drunkenness.(*d*)

That R. T., on, &c., at, &c., and on divers other days before that time, was openly and notoriously drunk, to the disturbance of the public peace, to the great injury of the public morals of the good citizens of the state, and to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a common scold.(*e*)

That M. S., late of, &c., on, &c., and at divers other days and times as well before as since, at, &c., was and is a common scold and disturber of the peace of the neighbourhood, and of all faithful subjects of this commonwealth, to the common nuisance, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Barratry.(*f*)

That A. B., late of, &c., on, &c., and on divers other days and times, at, &c., was and yet is a common barrator; and that he the said A. B., on the said, &c., and on divers other days and times, in the county aforesaid, divers quarrels, strifes and controversies, among the honest and quiet good people of the state, did unlawfully move, procure, stir up and excite, to the common nuisance, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*d*) Tipton *v.* State, 2 Yerg. 542.

"As to the second reason in arrest of judgment, that the indictment does not charge the defendant as a common drunkard, and a nuisance to society, it cannot prevail. The assignment of this error is in effect substantially the same with the charge in the indictment, for the indictment does not charge a single act of drunkenness alone, but repeated acts of the like kind. It charges 'that the said Reuben Tipton, on the second day of August, 1830, and on divers other days before that time, was openly and notoriously drunk.' This shows that the offence was a common thing with the defendant. But it is argued, that a man may be drunk as often as he pleases in his own house, which is only a private injury to himself, and in which the public is not concerned. Suppose this reasoning were admissible, the indictment negatives its application in the present case, for the charge is, that the defendant was drunk, openly and notoriously, to the disturbance of the public peace, and to the great injury of the public morals of the good citizens of the state. Can it be said that this conduct is not an injury to the public and an evil example? The contrary but too often appears, and that too, either accompanied with or followed by fatal consequences.

"The pernicious influence of an evil example is plain to every reflecting mind, and the powerful influence of this vice upon society, not only in its effects on the relations of private life, but also as being the origin, the fomenter and the promoter of the greater portion of the public crime of the country, proves it to be, what it is, an indictable offence. The judgment of the Circuit Court was correct, and must be affirmed."

See *ante*, p. 423, n.

(*e*) This form is sufficiently explicit; James *v.* Com. 12 S. & R. 220; Com. *v.* Pray, 13 Pick. 359; 6 Mod. 311; 9 Cow. 587.

(*f*) Hawk. b. 2, c. 25, s. 59.

Barratry is the *habitual* moving and exciting or maintaining suits and quarrels, either at law or otherwise, Co. Lit. 368, and consists not in any single act, however flagrant, but in a succession of acts, constituting a course of behaviour; Hawk. b. 2, c. 25, s. 59. It is not, therefore, necessary to specify *in the indictment* the particular acts on which the prosecutor relies; but the court will compel him before the trial, to inform the defendant by a written notice of those particulars, and will exclude him from offering evidence of any others. Per Ashhurst J., in Anson *v.* Stuart, 1 T. R. 754; and see Dickinson's Q. S. 217, 218.

Against inhabitants of a township, for not repairing a highway situate within the township.(*g*)

That on, &c., there was and still is a certain common and public highway, leading from, &c., to, &c., used for all the good citizens of the said state, with their horses, coaches, carts and carriages to go, return, pass, ride and labour, at their free will and pleasure, and that a certain part of the said highway situate, lying and being in the township of, &c., containing in length, &c., and in breadth, &c., on, &c., and from thence continually afterwards until the day of the taking of this inquisition, at the township aforesaid in the county aforesaid, was and yet is very ruinous, miry, deep, broken and in great decay for want of due reparation and amendment of the same, so that the queen's subjects through the same way with their horses, coaches, carts and wagons could not during the time aforesaid, nor yet can go, return, pass, ride and labour, without great damage of their lives and loss of their goods: And that the inhabitants of the said township of, &c., in the county aforesaid, have used and been accustomed to repair and to amend, and of right ought to have repaired and amended, and still of right ought to repair and amend the said highway, so being in decay as aforesaid, when and so often as it hath been and shall be necessary; to the great damage and common nuisance, &c., through the same way going, returning, passing, riding and labouring, and against, &c.(*h*) (*Conclude as in book* 1, *chap.* 3).

(*g*) Dickinson's Q. S. 6th ed. 409.

In connexion with this class of indictments will be considered:

(1). The obligation to repair highways and bridges.

(2). Nuisances arising from a neglect of this obligation.

(3). Requisites of indictment for the offence.

(1). *Obligation to repair highways and bridges.*

At common law the obligation to repair all highways lies on the parishes through which they pass; each being liable to repair such portions or bounds as are situate in its respective limits; 1 Hawk. b. 1, c. 76, s. 5; and at common law a like obligation is imposed on counties to repair all public bridges within their boundaries; see p. 400 Dickinson's Q. S.; which obligation, since the statute of bridges, extends not merely to the bridge itself, but to the roads at each end; R. *v.* Yorkshire (West Riding Inhab.), 7 East 588, affirmed on error in Dom. Proc., 5 Taunt. 284, S. C. Nor does the rule differ in the case of a body corporate (or private person), liable by *prescription* to repair a bridge; and this, though the repairs done by the parties liable have been confined to the fabric of the bridge, and those to the approaches have been done by turnpike commissioners; R. *v.* Lincoln (Mayor and city of), 8 A. & E. 65; 3 N. & P. 273, S. C.; for as early as the reign of Edward the Third, the approaches to a bridge, the fabric of which, but not the *fines ejusdem pontis*, an ecclesiastical corporation sole was bound by prescription to repair, were yet held by the judges to be excrescences of the bridge itself, and as such, *prima facie* repairable by the same party as the bridge itself; Abbot of Combe's case, 43 Ass. 275, B. pl. 37; the extent of which last liability is fixed by 22 Hen. VIII. c. 5, s. 9, at three hundred feet "from any of the ends of it."

(*h*) See Reg. *v.* Heage (Inhab.), 2 Q. B. R. 128. Custom laid to repair *all common and public highways situate within the said township* is not necessarily bad, but it seems better to add in such a case "that would otherwise be repairable by the parish comprising such township;" R. *v.* Hatfield, 4 B. & Al. 75; R. *v.* Bridekirck, 11 East 304; see 1 B. & Al. 352, 356; for that averment does not make it necessary to prove that there are or have been ancient highways in the said township; R. *v.* Barnoldswich (Inhab.), 12 L. J. (M. C.) 44; 42 B. 499, S. C.

Dickinson's Q. S. 6th ed. 410.

Against a county for suffering a public bridge to decay.(*i*)

That on, &c., there was and from thence hitherto hath been and still is, a certain common and public bridge, commonly called High-

(*i*) Dickinson's Q. S. 6th ed. 412.

(2). *Nuisances by omitting to repair public highways and bridges.*

The consideration of prosecutions for the non repair of highways and bridges, differs essentially from that of other parts of the criminal law; for though in form they are criminal proceedings, in practice they are usually resorted to as modes of trying disputed questions of a liability to repair, for no action lies by an individual against the inhabitants of a county for an injury sustained in consequence of a public bridge being out of repair; Russell and others *v.* The Men Dwelling in the County of Devon, 2 T. R. 667, and cases collected; Rose *v.* Groves, R. L. J. (C. P.) 252. Not only on the account, but in consequence of the fact that the proceedings are different in each state, depending almost entirely on local legislation, no attempt is made to lay down the law on the subject as regulated by statute.

(3). *Requisites of indictment against parishes or counties for not repairing highways or bridges.*

Indictments against a parish for the common nuisance of not repairing highways, and indictments and presentments against a county for not repairing bridges, must allege affirmatively that the way or bridge is public; and that it lies *within* the parish or county which is alleged to be bound to repair; Halsey's case, Latch. 183, cited 1 H. Bla. 356. "To" *Kensington* held to exclude Kensington; *ib.* "From and to" do not necessarily exclude the place named; R. *v.* Knight, 7 B. & C. 413; though so held in R. *v.* Gamlingay, 3 T. R. 513; 1 Leach C. C. 528, S. C.; and again since R. *v.* Knight, in Reg. *v.* Botfield, 1 C. & M. 151; (R. *v.* Knight not cited). See R. *v.* Camfield, 6 Esp. 136; R. *v.* Steventon, C. & K. 55. "From and through" places named, is said to exclude the *termini;* R. *v.* Upton, 6 C. & P. 133, per Tindal C. J. As to "towards," see 3 A. & E. 181, Lempriere *v.* Humphrey; and 1 East 377; Wright *v.* Rattray (cited in 7 B. & C. 266; De Beauvoir *v.* Welch); Rouse *v.* Bardin, 1 H. Bla. 351. "Abutting on," see 3 A. & E. 183. "Towards and unto B.," are satisfied by a line of way to B., which turns backwards in the middle, and then returns to B. by a way recently dedicated; R. *v.* Devonshire (Marchioness), 4 A. & E. 232. "From and through the town of U. towards the parish of G.," excludes (Hammond *v.* Brewer, 1 Burr. 376), the *terminus* U., so as not to permit a prosecutor to show a road in U. to be out of repair; R. *v.* Upton-on-Severen, 6 C. & P. 134, per Tindal C. J.; for though a township is not necessarily conterminous with a parish, it may be bound by custom to repair a highway within it. "From the town of C. to a place called H. hill, and that defendant illegally erected gates *between* the said town of C. and H. hill," Patteson J., held the town excluded; Reg. *v.* Fisher *et al.*, 8 C. & P. 612; 2 Saund. 158, a. n. 69; Dickinson's Q. S. 401.

The indictment must also charge the bridge to be out of repair, and should conclude by alleging that the inhabitants of the county or parish, or that a corporation aggregate, or a railway or canal, &c., company, are bound to repair it; Reg. *v.* Birmingham and Gloucester Railway Company, 9 C. & P. 409; Parke B.; 1 Gale & D. 457, S. C.; 2 Q. B. R. 47, 233. If the bridge or way was a highway for all purposes (*i. e.* public), at the time of the nuisance committed in not repairing, &c., or obstructing it, the term *highway* is sufficient, the words "common and public" being mere repetition; 2 Saund. 158, n. (4), citing Aspindall *v.* Brown, 3 T. R. 265; but if the highway is stated to have been such from time immemorial, which is unnecessary, the prosecution would fail, should it appear that sixty years ago it was put an end to by the enclosure act, though it has been since used and repaired by the district indicted; 2 Saund. 158, d.; Dyer, fol. 33; R. *v.* Jones, 2 B. & Ad. 611; R. *v.* Hollingberry, 4 B. & C. 329; Reg. *v.* Westmark (Tithing), 2 M. & Rob. 305, Maule J. If there be a limitation in the right of way, as if it is only used by the public when it is dangerous to pass through an adjacent stream, such limitation should be stated; Allen *v.* Ormond, 8 East 4, n. (*a*); R. *v.* Northamptonshire (Inhab.), 2 M. & S. 262. An allegation of a "pack and prime" way is not supported by proof of a "carriage" way, and the defendant will be acquitted; R. *v.* St. Weonard's, 6 C. & P. 582, Alderson J. It is not necessary to state the *termini* of the way, but when stated they must be proved, and a variance in this respect will be fatal; Rouse *v.* Bardin, 1 H. Bla. 351; 6 C. & P. 582. It is usual to state the extent of the way which is out of repair; but it may be doubted whether this is necessary; however, though the court does not at present estimate the fine from the description of the length and breadth of the nuisance, its insertion cannot prejudice; 2 Saund. 158, n. 7. Objection to the too general description of a road in an indict-

bridge, otherwise Haigh-bridge, situate and being in the parish of B., in the County of N., in the common highway leading from the town of B. in the county aforesaid, towards and unto the town of C. in the same county, being a common highway for all the good citizens of the said state, on foot and with their horses, coaches, carts and other carriages to go, return, pass, repass, ride and labour, and that the said common and public bridge, on the said, &c., aforesaid, and continually from thence until the day of the taking of this inquisition, at the parish of B. aforesaid in the county aforesaid, was and yet is ruinous, broken, dangerous and in great decay for want of needful and necessary upholding, maintaining, amending and repairing the same, so that the good citizens of the said state in, upon and over the said bridge, on foot and with horses, coaches, carts and carriages could not, and cannot pass and repass, ride and labour, without great danger of their lives and loss of their goods, as they ought and were accustomed to do, and still of right ought to do: And that the inhabitants of the County of N. aforesaid, of right have been and still of right are bound to repair and amend the said common bridge, when and so often as it shall be necessary; to the great damage and common nuisance of all the said citizens, upon and over the said bridge, on foot and with their horses, coaches, carts and other carriages, about their necessary affairs and business going, returning, passing, riding and labouring; against, &c. (*Conclude as in book* 1, *chap.* 3).

Against the inhabitants of a parish for not repairing a common highway.(*j*)

That on, &c.,(*k*) there was and yet is a certain common and ancient highway(*l*) leading from, &c., towards and unto, &c., used for all the state's citizens, with their horses, coaches, carts and carriages to go, return, pass and repass, at their will and pleasure; and that a certain part of the same common highway situate, lying and being

ment can only be taken by plea in abatement; R. v. Hammersmith (Inhab.), 1 Stark. 357, *e. g.*, by stating that the road described in the plea was equally well known by the description given in the indictment. When the indictment is against an individual, or select body, on a peculiar obligation against common right, it is not sufficient to state a liability to repair, but it is necessary to show how that liability arises, as "by reason of the tenure or enclosure of certain lands;" or in the case of an extra parochial hamlet or hundred not otherwise liable, a usage "from time immemorial;" 2 Saund. 158, n. 9; R. *v.* Kingsmoor (Inhab.), 2 B. & C. 190. The inhabitants of the several townships in a parish may be conjointly indicted for not repairing a road in it; R. *v.* Auckland (Inhab. of three townships named), 1 A. & E. 744, S. C.; 1 M. & Rob. 286; see 2 B. & C. 166, R. *v.* Machynlesh; Dickinson's Q. S. 6th ed. 402.

(*j*) Dickinson's Q. S. 6th ed. 408.

(*k*) Allegation of the antiquity of the road is now commonly omitted, and the language generally runs as above, or that "long before, and at the time of the commencement of the nuisance hereinafter mentioned, there was, and of right ought to be," &c.; 3 T. R. 265. A way may be described as a common highway for carts, carriages, &c., though it has been always arched over, if, though not high enough to let every highway wagon pass under it, it will admit common carriages to pass; R. *v.* Lyon *et al.*, 1 C. & P. 527; R. & M. N. P. C. 150, per Littledale J.; Dickinson's Q. S. 6th ed. 409.

(*l*) Meaning a highway for *all manner* of things; R. *v.* Hatfield, Ca. t. Hard. 315. A road is not less *a highway* because part of it is *turnpike road;* Reg. *v.* Steventon, C. & K. 55; Dickinson's Q. S. 6th ed. 409.

in the parish, &c., of A. B., in the same (*county*), containing in length, &c., in breadth, &c., on, &c.,(*m*) and continually afterwards until the present day was, and yet is very ruinous, deep, broken and in great decay, for want of due reparation and amendments, so that the citizens of the state through the same way, with their horses, coaches, carts and carriages could not, during the time aforesaid, nor yet can go, return, pass or repass, as they ought and were wont to do: And that the inhabitants of the parish of A. B., aforesaid, in, &c., aforesaid, the said common highway (so in decay) ought to have repaired and amended, and still of right ought to repair and amend, when and as often as it should, shall or may be necessary; to the great damage and *common nuisance*(*n*) *of all the people* of the state through the same highway going, returning or passing, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a corporation of a town for suffering a water-course which supplied the inhabitants with water, and which they were bound to cleanse, &c., to be filthy and unwholesome.(*o*)

That from time whereof the memory of man is not to the contrary, there was, and still is a certain and ancient water-course(*p*), commonly called Trout Beck, leading from a certain place called the corporation dam, in the parish of, &c., in the County of B., to a certain place called the Falls, in the parish of, &c., in the suburbs of the town of B. aforesaid, in the County of B. aforesaid, used by all the people of the said state for the time being inhabiting and residing in and about the said parishes of and , to supply them with water for the use and benefit of themselves and their families; and that a certain part of the said common and ancient water-course in the parish of St. N. aforesaid, in the suburbs of the said town of B., in the County of B. aforesaid, containing in length five hundred yards, and in breadth ten feet, on, &c., and continually afterwards until the day of the taking of this inquisition, at, &c., aforesaid, was and still is foul, filled and choked up with mud, weeds, rubbish, dirt and other filth, whereby the course and passage of the water, which should and ought and before that time was used and accustomed to run and flow through the same water-course, was during all the time last aforesaid, and still is so greatly stopped and obstructed, that the people of the said state inhabiting and residing in and about the said parish of St. N., during all the time last aforesaid was, and still are

(*m*) Some day about the commencement of the nuisance. Only state the *termini*, when they can be readily ascertained, and no doubt can be raised respecting them. The way must be distinctly averred to be within the district sought to be charged with the repair; R. *v.* Pendervyn (Inhab.), 2 T. R. 513; R. *v.* Bishop's Nuckland (Inhab.), 1 A. & E. 744; Dickinson's Q. S. 6th ed. 409.

(*n*) *Necessary;* 1 Hawk. c. 32, p. 692; R. *v.* Hughes, 4 C. & P. 373; Stra. 686–688; 16 East 194; 1 Burr. 333; 1 Mod. 107; R. *v.* Davey, 5 Esp. 217, laid "inhabitants," but *semble*, wrong; Dickinson's Q. S. 6th ed. 409.

(*o*) Dickinson's Q. S. 6th ed. 418.

(*p*) If a water-course be stopped to the nuisance of the county, and *none appear bound by prescription* to clear it, those who have the right of fishing, and the neighbouring towns who have the immediate use, may be compelled to remove the obstruction; Hawk. b. 1, c. 75; Dickinson's Q. S. 6th ed. 418.

not only deprived of the benefit and advantages of the water, which, during all the time last aforesaid, should and ought to have run and flowed, and still of right ought to run and flow through the said water-course, in its usual and accustomed manner, but also the said mud and other filth during all the time last aforesaid became and were and still are very offensive and nauseous, and the said water thereby greatly corrupted, and unwholesome to be drunk by man, and by means thereof divers noisome and unwholesome smells did from them arise there, so that the air thereby was and still is greatly corrupted and infected: And that the mayor, bailiffs and commonalty of the said town of B., in the said County of B., for the time being,(*q*) the said common and ancient water-course so as aforesaid being foul, choked and filled up as aforesaid, ought to empty, cleanse and scour, until the said grievance have, from the time whereof the memory of man is not to the contrary, emptied, cleansed and scoured, and have used and been accustomed to empty, cleanse and scour, and still of right ought to empty, cleanse and scour, when and as often as the same should or shall be necessary; yet the said mayor, bailiffs and commonalty have not emptied, cleansed or scoured, nor caused to be emptied, cleansed or scoured, the said common and ancient water-course, so being foul, filled and choked up as aforesaid, as they ought to have done, and still of right ought to do, but during all the time last aforesaid, permitted and suffered, and still do permit and suffer the said water-course to be foul, filled and choked up as aforesaid, for want of emptying, cleansing and scouring the same; to the great damage and common nuisance of all the people of the said state, not only there residing and inhabiting, but also going, returning, passing and repassing by the same, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Information in New Hampshire against a town for refusing to repair, &c.

That, (*describing the road*) long before the commencement of the nuisance hereinafter mentioned, there was, ever since has been and still is, a common highway in the town of in said county, used by all the good citizens of said state in and through the same to pass and repass with their horses, carriages and teams at their will and pleasure; and that said highway, so situated in said beginning at (*giving the limits*), being rods in width and in length, was, on, &c., last past, ever since has been and still is rocky, rutty, broken, uneven, ruinous and in great decay in want of due reparation thereof, so that the good citizens of said state for and during the time aforesaid could not and still cannot pass and repass in and through the said part of said highway so in decay as aforesaid, as they used, were wont and ought to do, without great danger of their lives and loss of their goods; and that the said town of during all the time aforesaid were and still are by law holden and bound, the said part of said highway to repair, whenever the same should or may be necessary; yet the said town of during all the time last afore-

(*q*) See the indictment in R. *v.* Kingston Corporation, 6 M. & S. 365, n.; Dickinson's Q. S. 6th ed. 419.

said did refuse and neglect and still doth refuse and neglect to repair the said highway so in decay as aforesaid, to the great danger and common nuisance of said good citizens, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against the inhabitants of a town for not repairing a highway, in Massachusetts.(*r*)

That on, &c., there was and from thence hitherto hath been, and still is a public road and common highway, in the town of, &c., leading from in the said town of to in the same town, for all the citizens of said commonwealth, with their horses, teams, carts and carriages to go, return, pass, repass, ride and labour, at their free will and pleasure; and that the aforesaid public road and common highway situated as aforesaid, in the said town of on, &c., was, and from thence until the day of taking of this inquisition, hath been, and still is out of repair, ruinous, miry, broken and encumbered with rocks and stones, so as to be inconvenient and dangerous to the lives and safety of the citizens of this commonwealth having occasion to pass and repass, ride and labour upon the public highway and common road aforesaid, with their horses, teams, carts and carriages; and that the inhabitants of the said town of in their corporate capacity, are bound and obliged by the laws of this commonwealth to keep and maintain the public road and common way aforesaid, in safe, convenient and complete repair; yet the said inhabitants, during all the days and times aforesaid, at, &c., aforesaid, have, and still do neglect and refuse to keep the said public road and common highway in such repair; to the great injury and common nuisance of all the citizens of said commonwealth having occasion to pass, repass and labour upon the road aforesaid, with their horses, teams, carts and carriages; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Against supervisor in Pennsylvania for refusing to repair road.

That long before and at the commencement of the nuisance hereinafter mentioned, there was and of right ought to have been, and still of right ought to be, a certain public road and common highway leading from for all the citizens of the said commonwealth to go, return, pass and repass, ride and labour, on foot and on horseback, and with their horses, coaches, carts and carriages in and along the same, at their free will and pleasure; and that a certain part of the said public road and common highway situate, lying and being in the township of in the County of Columbia afosesaid, of the length of and of the breadth of feet, and also other parts of the said public road and common highway in the township

(*r*) This indictment is taken by Mr. Davis, Prec. 197, from 2 Stark. 667, and made conformable to the precedents used in Massachusetts.

The repair of public roads in Massachusetts, says Mr. Davis, Prec. 195, is provided for by statute of 1786, c. 81. If there be bridges or causeways on the road complained of, the fact may be alleged in the indictment thus: "and the several bridges, &c, situated on the same road," &c., are out of repair, &c.

aforesaid, were, on, &c., and from thence until the day of the finding of this inquisition, at the township of aforesaid, have been and still are so decayed for want of opening and repairing the same, that the citizens of the said commonwealth travelling along the said public road and common highway, with their horses, coaches, carts and carriages, cannot upon the same so safely pass and travel as of right they ought; and that late of, &c., and late of, &c., yeomen, were on, &c., duly elected by the qualified voters of the township of supervisors of the roads and public highways of the said township, to hold their said office for the term of one year, to wit, at the township aforesaid, at the county aforesaid, and within the jurisdiction of this court; and that the said and the said supervisors aforesaid, are bound and obliged by the laws of the said commonwealth to keep and maintain the public road and common highway aforesaid in safe, convenient and complete repair; yet the said and the said during all the days and times aforesaid, at township aforesaid, have and still do neglect and refuse to keep the said public road and common highway in such repair, to the great damage and common nuisance, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a supervisor in Pennsylvania for refusing to open a road, &c.(*s*)

That at the county Court of General Quarter Sessions of the Peace and Gaol Delivery, holden at Philadelphia in and for the County of Philadelphia, before P. F., W. R. and I. H., Esqrs., and their associates, justices of the same court, on, &c., a certain public road leading to Oxford church, and extending thence over N. and J. D.'s lands to J. F.'s line, thence along the line between the said F.'s and D.'s land to J. W.'s land, thence on the line between the said J. F.'s land and land of J. W. and R. W., to a corner, thence on the line between the lands of the said J. F. and R. W., to a corner stone, thence between the lands of the said J. F. and W. to the line of H. F.'s land on Rock run, thence crossing the said run over the said H. F.'s land, leaving part of a road before that time laid out on bad ground, to the line of land late S. R.'s, and thence on the line between the said R.'s and F.'s lands, to a road laid out from R. M.'s mill to Germantown, was laid out, &c., confirmed by the said justices at the same sessions, and the supervisors of the highways of the township and townships through which the said road runs were then and there by the same justices, at their said sessions, ordered and directed to open and clear the same as by law directed; of which J. S., late of the said county, yeoman, afterwards, to wit, on, &c., then and still being a supervisor of the roads and highways in and for the township of Bristol in the said county (the said township being one of the townships through which the said road runs), had notice; and the inquest aforesaid, upon their oaths and affirmations, do further present, that the said J. S., the duty of his said office of supervisor of the highways aforesaid, altogether disregarding, and well knowing the same

(*s*) This count was drawn by Mr. Bradford, in 1786.

road to be laid out as aforesaid, by the authority aforesaid, from the day and year last aforesaid until the day of the finding of this inquisition, at the township and county aforesaid, hath wholly, unlawfully and contemptuously neglected and refused to employ labourers to open and clear the same road, and hath wholly neglected to take care that the same road should be opened, cleaned and amended, as by law directed, so that the liege citizens of this commonwealth on and along the same road cannot pass and repass, to the great damage and common nuisance, &c. (*Conclude as in book* 1, *chap.* 3).

Against overseer in North Carolina for refusing to repair road.

That on, &c., there was and from thence hitherto there hath been, and still is a certain common and public highway leading from in the county of towards and unto in the same county, for all the good people of North Carolina to go, return, pass, repass, ride and labour, with their horses, coaches, carts and carriages, in and along the same, at their free will and pleasure, and that on the day aforesaid a certain part of the said highway, situate and being in the county of aforesaid, extending from and continuing to in length one hundred yards and in breadth fifteen feet, was and still is in the county aforesaid very ruinous, miry, deep, broken and in great decay, for want of due and necessary amendment and reparation of the same, so that the good people of North Carolina in and along the same highway, with their horses, carts and carriages, could not during the time aforesaid go, return, pass, ride and labour without danger to themselves and the loss of their goods, and that during all that time was overseer of the said highway, and ought as overseer to have repaired and amended the same; but that he unlawfully and negligently refused so to do, to the common nuisance, &c. (*Conclude as in book* 1, *chap.* 3).

Against commissioner in South Carolina for refusing to repair road.

That on, &c., there was and from thence hitherto there hath been, and still is a certain common and public road and highway, leading from towards and unto for all the good citizens of the said state to go, return, pass and repass, ride and labour, with their horses, coaches, carts, carriages and wagons, in and along the same, at their free will and pleasure; and that a certain part of the said common and public road and highway situate, lying and being in the district of aforesaid, extending from and containing in length divers, to wit, and in breadth divers, to wit, feet, on the aforesaid day of in the year last aforesaid, and from thence until the taking of this inquisition, at the place aforesaid, in the district and state aforesaid, was and still is very ruinous, miry, deep, broken and in great decay and want of repair and amendment, so that the good citizens of the said state in and along the said public road and highway, with their horses, coaches, carts, carriages and wagons, could not during the time aforesaid, nor yet can go, return, pass and repass, ride and labour, without great danger of their

lives and loss of their goods; and that being commissioner of that part of the said common and public road and highway, so being ruinous, miry, deep, broken and in great decay and want of repair and amendment, as aforesaid, and by law bound to keep the same in good order, repair and amendment, wholly and continually, from the aforesaid day of in the year last aforesaid, until the taking of this inquisition, at the place aforesaid in the district and state aforesaid, failed and neglected to repair, amend and put in good order the same, to the great injury and common nuisance, &c. (*Conclude as in book* 1, *chap.* 3).

Against overseer in Alabama for same.

That late of, &c., in said county, on, &c., in the county aforesaid, did fail and neglect to keep that part of said road, the bridges and causeways therein, within his precinct, clear and in good repair, and did then and there suffer the same to remain uncleared and out of repair for ten days at one time, to wit, between the day of last aforesaid, and the day of in the year of our Lord eighteen hundred and without being hindered by high water, bad weather or other sufficient cause, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said late of said county, overseer as aforesaid of the road aforesaid, on the day and year last aforesaid, in the county aforesaid, did fail and neglect to set up neat and permanent mile posts at the end of each mile, in continuation on that part of his said road within his precinct, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

VIOLATIONS OF LICENSE LAWS.

Presuming to be a common seller of wine under the Maine statute.(*t*)

That B. S. of, &c., on, &c., and on divers other days since that time and up to the present time, at Bath aforesaid, did take upon himself and presume to be a common seller of wine, brandy, rum and strong liquors by retail, and in less quantity than twenty-eight gallons, at one and the same time delivered and carried away, illegally and without license therefor, and did then and there as aforesaid, sell and cause to be sold to divers persons to the jurors unknown,

(*t*) State *v.* Stinson, 17 Maine R. 155.

"The stat. 1835, c. 193," said Weston C. J., "having provided that the penalties incurred under the act of 1834, c. 141, to which that was additional, might be recovered by indictment, it is necessarily implied that it must be in the name of the state. What penalty or forfeiture is incurred, and to what uses applied, depends on the law, and need not be set forth in the indictment. There is but one offence charged against the defendant, and that is, his being a common retailer without license. This, it is expressly averred, he did take sales to divers persons of divers quantities of said strong liquors, from a specified day to it upon himself to be. In order to avoid unnecessary prolixity, general averments of divers the finding of the indictment, have been received as a sufficient specification of the offence, which consists in being a common retailer without license."

See also State *v.* Cottle, 15 Maine 473.

divers quantities of said strong liquors, in less quantity than twenty-eight gallons by retail as aforesaid, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Selling liquors by retail in New Hampshire.

That A. B. of, &c., on, &c., at, &c., not being then and there a licensed taverner or retailer, did then and there unlawfully sell, (*stating the measure*), of spirituous liquors to one, (*stating the vendee*), contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Dealing in liquor, &c., without license, under s. 1, *c.* 83, *Vermont Rev. Stat.*(*u*)

That the respondents, on, &c., not having a license, &c., did deal in the selling of domestic distilled spirituous liquors in a less quantity at one time than twenty gallons, and did then and there sell to one J. G., one pint of alcohol, being domestic distilled spirituous liquor, &c.

Selling liquor by the small, under same.(*v*)

That C. A. M. of, &c., on, &c., at, &c., did sell and dispose of at his the said C. A. M.'s store in Rutland aforesaid, one gill of rum, one

(*u*) State *v.* Chandler and Keyes, 15 Verm. 425.

Hubbard J.: "Section first of chapter 83 of the revised statutes makes it unlawful for any person to sell any spirituous liquors in a less quantity than twenty gallons without a license. The 14th section of the same chapter provides, that any person who shall deal in the selling of foreign or domestic distilled spirituous liquors in a less quantity than twenty gallons at one time, shall be deemed to be a retailer within the meaning of this chapter. The chapter is entitled, of licenses to retailers, inn-keepers and victualling houses. The first section of the chapter defines the act that is unlawful if done without a license, and that is, to sell any foreign or domestic distilled spirituous liquors. This being the act that is forbidden to be done, of course for the doing of this the penalty is incurred. It is not any succession of acts of a similar character that constitutes the offence. The 14th section defines who are retailers, and by dealing in the selling the same is meant in the first section by the expression to sell. But there is another view of the case still more decisive. The 26th section of the same chapter provides that if any person shall be guilty of more than one distinct offence prohibibited in either of the three preceding sections, he may be prosecuted and subjected to the penalties for all such distinct offences at the same time. There would be a difficulty in understanding when a distinct offence had been committed, or how many had been committed, if it required any number or succession of acts of selling to constitute a distinct offence. The result, therefore, must be that the offence is manifest by the proof of a single act of selling."

(*v*) State *v.* Munger, 15 Verm. 290. In this case it was ruled:

1st. That in an indictment against a person for selling spirituous liquors by the small measure without a license, it is not necessary that it should be averred to whom they were sold, or the number of the persons.

2d. That an averment that the respondent sold rum, brandy and gin, is sufficient, without an averment that they were spirituous liquors.

3d. That the negation of license must be broad enough to cover all the sources from which it might have been obtained.

4th. That if the negation of license to sell is, as to quantity, co-extensive with the quantity charged to be sold, it is sufficient.

5th. That the general negation "not having a license to sell said liquors as aforesaid," relates to the time of sale and not to the time of finding of the bill, and is sufficient.

6th. It is not necessary that the offence of selling spirituous liquors without license should be charged to have been committed with force and arms. Where a distinct sale of spirituous liquors is alleged to have been made on a day certain, the count is not vitiated

gill of brandy and one gill of gin to divers persons, he the said C. A. M. not having a license to sell said liquors as aforesaid, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That the said C. A. M. not having a license to sell rum, brandy or gin by the half gill, gill or half pint, did on, &c., and at divers other times between the day last aforesaid and the time of this presentment, sell rum, brandy and gin by the gill, half gill and half pint at his the said C. A. M.'s store in Rutland aforesaid, to divers citizens of this state, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Selling liquor, &c., under Massachusetts Rev. Stat. c. 47, *s.* 1.(*w*)

That C. L., &c., at, &c., on,(*o*) &c., and from thence continually to the day of the making of this presentment, did presume to be, and during all the time aforesaid, was, in the dwelling house of the said C. L. there situate, by her the said C. L. then and there used, improved and occupied, a seller of rum, brandy, gin and other spirituous liquors, to be then and there, in the said dwelling house of her the said C. L., used, consumed and drank by the purchasers thereof; she the said C. L. not being then and there duly licensed according to law, to be an innholder or common victualler, against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form under same section.(*x*)

The jurors, &c., do present, that late of, &c., without any authority or license therefor duly had and obtained according to law, did presume to be and was a common seller of wine, brandy, rum and other spirituous liquors to be used in about the shop of him the said the said shop being a building of said against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

by adding an averment of sales at divers times between that and the finding of the bill, but the averment may be regarded as surplusage.

7th. That the respondent being one of the firm, and having made out a bill of the sale of goods at sundry times in his own hand-writing, upon which was entered the sale of spirituous liquors by the small measure at different times, and which had been receipted by him, such bill of sale was competent evidence to go to the jury to prove a sale, and the person to whom the sale was made need not be produced.

(*w*) Com. *v.* Leonard, 8 Mete. 529. Dewey J.: "This indictment may be sustained, although it does not charge, in direct terms, that the defendant was a *common* seller of rum, brandy, gin and other spirituous liquors. The statute itself (Rev. Stat. c. 47, s. 1), does not use the words 'common seller,' but the legal construction given to the statute has always been, that, in punishing the offence therein described, the legislature intended to punish the offence of being a common seller of rum, brandy, &c.; Com. *v.* Odlin, 23 Pick. 275; Com. *v.* Pearson, 3 Mete. 449. In the present case the form of the indictment, charging that the defendant, 'on the first day of May now last past, and from that day to the day of making this presentment, did presume to be, and during *all* the time aforesaid was a seller of rum, brandy, &c.,' does substantially charge the offence of being a common seller of rum, brandy, &c."

(*o*) Where the offence is laid in the text, with a *continuando*, no evidence can be received of sales *prior* to the date first laid; Com. *v.* Briggs, 11 Mete. 573.

(*x*) See Com. *v.* Odlin, 23 Pick. 275; Com. *v.* Pearson, 3 Mete. 449; and Com. *v.* Tower, 8 Mete. 527; where this form is sustained. Two defendants, it seems, may be joined in the same indictment, nor is it an objection that the offence is averred to be on a certain day, "and divers other times and days between that day and the taking of this inquisition;" Com. *v.* Tower, 8 Mete. 527.

Under Rev. Stat. c. 47, s. 2.(y)

That A. B. and C. D. on, &c., at, &c., did sell to one E. T. R. one gill of spirituous liquor to be used in and about their house there situate, without being first duly licensed, according to law, as an innholder or common victualler, with authority to sell spirituous liquor, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Another form under same.(z)

That A. B., &c., on, &c., at, &c., did sell to one W. B., spirituous liquor in less quantity than twenty-eight gallons, she the said A. B. not being duly licensed therefor, against, &c. (*Conclude as in book* 1, *chap.* 3).

Under Rev. Stat. c. 47, s. 2.(a)

That S. C. at, &c., on, &c., did sell to one A. B. one glass of brandy, to be by him the said A. B. then and there used, consumed and drank in the dwelling house of said S. C. there situate, he the said S. C. not being then and there duly licensed according to law to be an innholder or common victualler; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Another form under same.(b)

That S. C., &c., on, &c., at, &c., being duly licensed as an innholder, with authority only to sell wine, beer, ale, cider and other fermented

(*y*) Held good in Com. *v.* White and another, 10 Metc. 14.

(*z*) Com. *v.* Leonard, 8 Metc. 530.

Dewey J.: "This complaint may be supported under the third section of c. 47 of the revised statutes. It does not indeed allege that the spirituous liquor, sold by the defendant to William Beck, was not delivered and carried away all at one time; but that is immaterial, where the quantity sold was less than twenty-eight gallons. The sale of less than twenty-eight gallons constitutes an offence within that section. If the amount sold had exceeded twenty-eight gallons, then the offence would not be correctly charged, unless there were added the further allegation, that the same was not delivered and carried away all at one time.

(*a*) This form was sustained in Com. *v.* Churchill, 2 Metc. 119–125, under Rev. Stat. c. 47, s. 2, which was revived by stat. of 1840, c. 1. The court declined deciding, however, whether the indictment would have been defeated by the production by the defendant of a license to sell wine, beer, ale, &c., though not to sell brandy, rum or other spirituous liquor. Subsequently, however, it was held that when such a license was granted, the above indictment could not be sustained, and a form was suggested by the court as being the proper one in such cases, and which is given in the text; Com. *v.* Thayer, 5 Metc. 246.

(*b*) See last note, and further, Com. *v.* Thayer, 5 Metc. 246. In a subsequent complaint against same defendant, Com. *v.* Thayer, 8 Metc. 523, it was said that the qualified license of the defendant was to be thus pleaded, "he the said defendant not being then and there duly licensed, according to law, to be an innholder and common victualler, with authority to sell wine, brandy, rum and other spirituous liquors." "It was suggested," says Dewey J., "that the case of Com. *v.* Thayer, 5 Metc. 246, seems to require that in cases like the present, the indictment or complaint should set forth specially that the defendant was licensed as an innholder with authority to sell only wine and beer, &c. But that form of allegation was only stated as one mode of avoiding the objection which arose in that case, where the question was upon an indictment alleging that the defendant 'was not duly licensed as an innholder.' Such objection does not arise here, as the allegation in the complaint does negative the license to all spirituous liquors." See further, Com. *v.* Howell, 9 Metc. 571.

liquors, did, in violation of law, without any authority or license therefor duly had and obtained according to law, sell to one A. B. one glass of brandy to be by him the said A. B. then and there used, consumed and drank in the dwelling house of said S. C. there situated; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Another form under same.

That A. B. of said Boston, yeoman, on, &c., at, &c., without being duly licensed therefor as an innholder or common victualler according to the provisions of law and the provisions of the forty-seventh chapter of the revised statutes of said commonwealth, did then and there sell a certain quantity, to wit, half of a gill of spirituous liquor to a certain person whose name is C. D., to be used and drank in and about his the said A. B.'s building, salesroom and place of business used as a shop, there situate, against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form, under Rev. Stats. c. 47, *s.* 2, *where defendant is licensed to sell wine, &c.*(*c*)

That A. C. S., &c., on, &c., at, &c., did sell to one A. B. an half gill of spirituous liquor, to be by him the said A. B. then and there used about the dwelling house of the said A. C. S. there situate, he the said A. C. S. not being first duly licensed, according to law, as an innholder or common victualler, with authority to sell spirituous liquors, against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form under same.(*d*)

That A. B., &c., at, &c., on, &c., "did presume to be a seller of wine, brandy, rum and other spirituous liquors, to be used in and

(*c*) In Com. *v.* Thayer, 8 Metc. 523, as was just said, a form very similar to this was sanctioned, and in Com. *v.* Howell, 9 Metc. 571, a motion in arrest of judgment against an indictment in which the license was pleaded as it is in the text, was discharged.

(*d*) Com. *v.* Stowell, 9 Metc. 569. Each of the other counts omitted the allegation that the defendant presumed to be a seller of wine, brandy, &c., without being first licensed as an innholder, &c., and alleged a sale to an individual, in the form adopted in the latter part of the first count.

Dewey J.: "1. It is objected to the first count in the indictment, that it is bad for duplicity. The argument of the counsel for the defendant assumes that it charges two distinct offences, arising under different sections, viz. ss. 1 and 2 of c. 47 of the Rev. Stats. The answer to this objection is, that no offence is charged upon the first section. That offence is that of being a common seller of brandy, rum, &c.; and a proper indictment upon this section, for the offence of selling spirituous liquors, should contain the allegation that the party was such common seller. It is not indeed absolutely necessary to use the word 'common,' as prefixed to seller, if other equivalent words are introduced, as was held in Com. *v.* Leonard, 8 Metc. 529, where the allegation in the indictment, that the defendant, from a certain day stated, on divers days and times to the time of finding the indictment, was a seller of spirituous liquors, &c., was held sufficiently to set forth the offence under the first section. But it seems to us that a mere allegation that the defendant, on a certain day named, was a seller, &c., is not sufficient to charge the offence of being a common seller. There is, therefore, no offence charged in this indictment, upon the first section of the statute."

"3. It is next insisted, that the indictment is bad, because it does not allege that the

about his dwelling then and there situate, without being first licensed, according to law, as an innholder or common victualler, with authority to sell spirituous liquors; and did then and there sell to one T. L. C., one-half gill of spirituous liquor, to be used in and about his dwelling house then and there situate, without being first duly licensed, according to law, as an innholder or common victualler, with authority to sell spirituous liquors, against," &c. (*Conclude as in book* 1, *chap* 3).

Another form under same.(*e*)

That A. B., at, &c., on, &c., did sell to one one glass of brandy, to be by him the said then and there used, consumed and drank in the dwelling house there situate of him the said S., he the said S. not being then and there duly licensed according to law to be an innholder or common victualler; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Another form under same.(*f*)

That R. T. and C. L., both of, &c., at, &c., on, &c., and on divers other days and times between that day and the day of taking this in-

liquor was used in the house of the defendant, but, on the contrary, that it alleges the use of the same to have been in the house of Thomas L. Clark, the purchaser. By a strict grammatical construction, the allegation, 'did then and there sell to one Thomas L. Clark, one-half gill of spirituous liquor, to be used in and about his house then and there situate, without being first duly licensed,' &c., would authorize the words 'his house' to be taken to refer to the house of Clark, the vendee. But we do not feel bound to this very strict grammatical reading of this clause in the indictment.

"We may resort to the entire language of the whole paragraph; and if the charge be plainly indicated, and so set forth as to leave no real uncertainty as to the nature of it, it may be held good. See 21 Pick. 521. Looking at the whole count, we think it sufficiently alleges the use of the liquor in the house of the defendant.

"4. The remaining inquiry is, whether there be any proper allegation that the defendant was not duly licensed as an innholder or common victualler. So far as there is any question of uncertainty as to the person alleged not to be licensed, the views already presented on the preceding point apply, and fully meet this objection.

"The other specification of objection under this head, viz. that the form of the allegation should have been, that the defendant was licensed as an innholder, but with the right of vending only ale, beer, &c., as was suggested in Com. *v.* Thayer, 5 Metc. 247, is answered by the decision in Com. *v.* Thayer, 8 Metc. 523, where other equivalent words were held to be sufficient, and an allegation very similar to the present was decided to be good.

"All the objections, upon which the motion in arrest of judgment has been argued, are overruled."

(*e*) This count was sustained in Com. *v.* Churchill, 2 Metc. 118, 119.

(*f*) Com. *v.* Tower, 8 Metc. 527. The defendants moved that judgment be arrested from the insufficiency of the indictment.

Dewey J.: "1. It is no valid objection to this indictment, that it includes two persons. The acts therein charged, as constituting the offence, may well be done by two or more jointly; and whenever several may join in the offence, they may properly be united in the same indictment.

"2. The objection that this indictment is bad because it avers the offence to have been committed 'on the first day of May last past, and on divers other days and times between that day and the day of taking this inquisition, cannot avail. It is no objection that such continuous charge is made, and it accords with the forms usually adopted. Such was the case in Com. *v.* Odlin, 23 Pick. 275; and it seems well adapted to the description of the offence.

"3. It is then contended that the negative averment required to constitute a good in-

quisition, did presume to be, and were common sellers of wine, brandy, rum and other spirituous liquor, to be used and drank in the dwelling house of them the said R. and C. there situate, and by them the said R. and C. then and there actually used and occupied, without being first duly licensed therefor according to law, against, &c. (*Conclude as in book* 1, *chap.* 3).

Selling liquor without license, under Massachusetts Revised Statutes, c. 47, *s.* 3.(*g*)

That, &c., on, &c., at, &c., without any authority or license therefor duly had and obtained according to law, did presume to be, and was a retailer of spirituous liquors in less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell and retail two quarts of spirituous liquor to L. J., against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Another form under same.(*h*)

That A. B., on, &c., at, &c., and there on divers other days and times, between the first day of January last and the first Monday of

dictment for the offence, viz. the allegation that the party was not duly licensed to make such sale, was not properly set forth in this indictment. The argument assumes that the allegation, 'without being first duly licensed therefor,' must by strict grammatical rules, apply to the next antecedent sentence, and therefore only qualifies the allegation that the defendants occupied a certain dwelling house, and does not negative their authority to sell spirituous liquor. This is a reading of the indictment which we cannot sanction. The dwelling house is introduced as the place where the liquor was used, and the averment, 'without being first duly licensed therefor,' clearly refers to the sale of the liquors, and not to the place where they were used. See the State *v.* Jernigan, 3 Murph. 19.

"4. It is then said, that if this negative averment be not insufficient for the reasons last stated, it is defective, inasmuch as it only negatives a joint license to the two, and that this would be true, although one of the defendants had been duly licensed. Now, it seems quite clear that this is only a formal objection as upon proof of a license to either of the defendants; such license would constitute, as to that defendant, a good defence to this indictment. Further, we think that although it would have been more technically correct to have alleged that the defendants had not, nor either of them, any license to sell spirituous liquors, yet the allegation, in its present form, may be well taken to apply to both, and that individually and severally, as well as jointly."

(*g*) See Goodhue *v.* Com., 5 Metc. 553, where this form was held good. In Com. *v.* Kimball, 7 Metc. 304, an indictment under the same section, without any averment of the sale of a specific quantity to A. B., but with the charge inserted, "did presume to be and was a retailer *to one A. B.* of spirituous liquors," &c., was somewhat querulously sustained, it being said, "the expression is not one which is the best adapted to state this offence with the greatest precision and clearness, nor is it according to approved forms. It is not, however, such a defect as requires us to quash the indictment as insufficient." Afterwards, in Com. *v.* Simpson, 9 Metc. 138, it was determined that when the first segment of the indictment, charging the defendant with being a retailer of spirituous liquors, &c., was badly pleaded, it might be stricken out as surplusage, and judgment entered upon the averment of a single illegal sale contained in the latter branch of the count. See also Com. *v.* Pray, 13 Pick. 359; Com. *v.* Odlin, 23 Pick. 275.

(*h*) Com. *v.* Bryden, 9 Metc. 137.

The defendant, after *nolo contendere* entered, moved in arrest of judgment, because the indictment did not charge the time when he sold spirituous liquor in a less quantity than twenty-eight gallons, &c., with the certainty and precision required by law, so as to enable the court to render judgment of guilty, or so as to apprise him of the precise offence of which he stood charged, and enable him to prepare for his defence. This motion was overruled by the Municipal Court, and the defendant thereupon alleged exceptions.

Dewey J.: "Enough is set forth in the indictment to constitute the offence of a single

May, did presume to be and was a retailer and seller of wine, rum, brandy and other spirituous liquor in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time; he the said B. then and there not being duly first licensed as a retailer of wine and spirits, as is provided by law and in the forty-seventh chapter of the revised statutes of said commonwealth; and he did then and there sell and retail spirituous liquor to a person whose name is J. C., in a certain quantity less than twenty-eight gallons, and that delivered and carried away at one time, to wit, in the quantity of half a pint, against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form under same.

That A. B., of, &c., on, &c., at, &c., and there on divers other days and times between the first day of last and the said first Monday of did presume to be and was a retailer and seller of wine, brandy, rum and other spirituous liquors in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time; he the said then and there not being duly first licensed as a retailer of wine and spirits as is provided by law and in the forty-seventh chapter of the revised statutes of said commonwealth, and he did then and there sell and retail wine and spirituous liquors to a person and to persons whose names to said jurors are not yet known, in a certain quantity less than twenty-eight gallons, and that delivered and carried away at one time, against, &c. (*Conclude as in book* 1, *chap.* 3).

Violation of license laws in Rhode Island.

That A. B., of Warren, in the aforesaid County of Bristol, trader, alias grocer, alias merchant, between the first day of June in the year of our Lord one thousand eight hundred and forty-five and the tenth day of November in the year of our Lord one thousand eight hundred and forty-five, and within the said times, with force and arms, at Warren aforesaid in the aforesaid County of Bristol, did sell in the possessions of him the said A. B., to wit, in a certain shop, situate in the town of Warren in the aforesaid County of Bristol, strong liquor, to wit, rum, by retail in a less quantity than ten gallons, without license first had and obtained from the town council of the said town of Warren, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said A. B., between the said first day of June in the year of our Lord one thousand eight hundred and forty-five and the said tenth day of November in the year of our Lord one thousand eight hundred and forty-five, on divers Sundays within said last men-

act of selling spirituous liquor without being duly licensed, if we strike out all that part which charges generally that the defendant, 'on divers days and times between the first day of January and the first Monday of May, was a retailer and seller of wine, rum, brandy and other spirituous liquors.' This, we think, may be stricken out, upon the authority of Com. v. Pray, 13 Pick. 359, and the People v. Adams, 17 Wend. 475."

Exceptions overruled.

tioned times, with force and arms, at Warren aforesaid in the aforesaid County of Bristol, did sell and suffer to be sold in his possessions there situate, ale, wine and strong liquors by retail, in a less quantity than ten gallons, without license first had and obtained from the town council of the said town of Warren, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in New York.(*i*)

That J. A., at, &c., on, &c., and on divers other days and times between that day and the day of the finding of this indictment, to wit, &c., did sell by retail to divers citizens of this state, and to divers persons to the jurors aforesaid unknown, and did deliver in pursuance of such sale to the said divers citizens, and the said divers persons to the jurors aforesaid unknown, strong and spirituous liquors and wines, to wit, three gills of brandy, three gills of rum, three gills of gin, three gills of whisky, three gills of cordial, three gills of bitters, three gills of wine, to be drank in the house, store, shop and grocery of the said J. A., in the city of Utica aforesaid, without having obtained a license therefor as a tavern-keeper, and without being in any other way authorized, against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in New Jersey.

That A. B., late of, &c., on, &c., at, &c., unlawfully did sell by retail, and cause and knowingly permit to be sold to C. D. certain ardent spirits, the said ardent spirits then and there not having been compounded and intended to be used as medicine, by less measure than one quart, to wit, one , without license for that purpose first had and obtained in the manner prescribed by the statutes in that case made and provided, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That the said A. B., on, &c., at, &c., unlawfully did sell and cause and knowingly permit to be sold to the said C. D., a certain composition, of which ardent spirits did then and there form the chief ingredient, the said composition then and there not having been compounded and intended to be used as medicine, by less measure than one quart, to wit, one without license for that purpose first had and obtained in the manner prescribed by the statutes in that case made and provided, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That the said A. B., on, &c., at, &c., unlawfully did sell and cause and knowingly permit to be sold to the said C. D., certain mixed liquors, the said mixed liquors then and there being ardent spirits, by less measure than five gallons, to wit, without license for that purpose first had and obtained in the manner prescribed by the statutes in that case made and provided, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*i*) This form is found in People *v.* Adams, 17 Wend. 475. The *continuendo* and the superfluous allegations of rum, &c., at which the proof does not hit, may be discharged as surplusage.

Same in Pennsylvania(*j*)

That J. B., late of, &c., on, &c., and at divers other days and times, as well before as afterwards, at, &c., did keep a tippling house, with-

(*j*) Com. *v.* Baird, 4 S. & R. 141.

Duncan J.: "The motion in arrest of judgment will be first disposed of, in doing which it will be proper to consider the various legislative provisions on this subject. The act of 1710, 1 Smith's Laws 73, provides that no person, without license from the justices, shall keep a public house of entertainment, tippling house or dram shop, under the penalty of five pounds, one-half thereof to the governor, and the other half to the use of the poor of the city or township where the offence shall have been committed. By a supplement to this act, passed 26th August, 1721, 1 Smith's Laws 127, it is enacted, that no person not qualified as by the above recited act, shall presume to sell or barter with or deliver, any wine, rum, &c., which shall be used or drank in their houses, yards or sheds, or shall be so used or drank in any shelter, place or wood, near or adjacent to them, with their privity or consent, by any companies of negroes, servants or others, or retail or sell to any person or persons whatsoever, any rum, brandy or other spirits by less quantity or measure than one quart, nor any wine by any less measure or quantity than one gallon, nor any beer, ale or cider, by any less quantity than two gallons, and the same liquors respectively delivered to one person and at one time, under the same penalty as is prescribed by the act of 1710. By the act of 19th March, 1783, 3 Smith's Laws 65, it is provided, that if any person or persons shall hereafter retail and sell less than one quart of rum, wine, brandy or other spirits, to be delivered at one time to one person, without having first obtained a license agreeably to law for that purpose, he or they shall forfeit and pay for every such offence the penalty of ten pounds.

"The most solid objection to this indictment is the omission to state, that the liquor was delivered at one time and to one person; and I own that if this were *res integra*, it would be difficult to answer. But it will be observed, that the same words are used in the act of 1721, 'and the same liquors respectively delivered to one person and at one time;' and in the act of 1783, 'shall sell or retail less than one quart, and to be delivered at one time and to one person.' The only alteration in the act of 1817 is, that in the city and county of Philadelphia the offence is to consist of selling less than one pint, instead of one quart, the penalty is increased, and in the distribution of the penalty. Keeping a tippling house is still an offence. Keeping a tippling house in the city and county of Philadelphia, the overt act being the retailing of liquor by less measure than one pint, is punishable under this statute. This form of indictment having prevailed for eighty years, been adopted by successive attorney-generals, the provisions of the several acts being nearly if not altogether in the same words, the court will not say, that all the prosecutions during that long period of time are erroneous: for it is admitted that this has been the only form. A continued and cotemporaneous practice, under a statute, in a matter merely formal, ought not lightly to be disturbed. The court have less difficulty in deciding the remaining points. The only remedy is by indictment. The keeping a tippling house is an indictable offence. The general prohibition, under penalty, to sell liquors by less measure than one quart would, it is admitted, render the act indictable, unless some particular mode of recovering the penalty is prescribed; and the remedy by action is inferred from the use of the words 'costs of suit,' in the second section. This appears a forced inference, not warranted by a just construction of the whole act; for how in a *qui tam* action could the court sentence the offender, if convicted, to pay the penalty or to the penitentiary house, to be kept at hard labour? As to the offence being laid in the city, if it could not be so laid, it would follow, that where the retailing was in the county it would be exempted from punishment; for though the city might be in the county, the county could not be in the city. The city and county are to be construed disjunctively. Such is the manifest declaration of the legislature; for in the distribution of the penalty, one-half is to enure to the guardians of the poor of the township or district where the offence shall occur. Any other construction would render the act insensible and void; nor is there any such inflexible rule in the construction of penal statutes, that you must abide by the very letter; for in the construction of penal statutes the strict meaning of the expressions has been departed from, in order to comply with the manifest spirit and intention of the law; 1 Binn. 277. Nor does regard to criminals require such construction of the words perhaps not absolutely clear, as would tend to destroy and evade the very intention and meaning of the act. It is not unfrequent in the construction of statutes, to take the disjunctive as a copulative and the copulative as a disjunctive, in order to make the words stand with reason and the intent of the framers of the law; Plow. 296; 6 Cranch 7. They are so to be considered here. An act declaring that a particular act committed in the counties of Philadelphia and Bucks, should be punished in a certain

out any license so to do first had and obtained according to law, and then and there without such license, commonly and publicly did sell and utter, and cause to be sold and uttered to sundry persons divers quantities of rum, brandy and whisky and other spirituous liquors, by less measure than one pint, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form for same, being that used in Philadelphia.

That A. B., late of, &c., on, &c., at, &c., did sell and retail, and cause to be sold and retailed, less than one quart of rum, wine, brandy and other spirituous or vinous liquors, then and there delivered at one time and to one person, and to more than one person, without having first obtained license agreeably to law for that purpose, contrary &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in Virginia.(*k*)

That W. T., late of, &c., on, &c., unlawfully and without then having a license therefor according to law, at the store of said W. T., in the County of Wood, and within the jurisdiction of the County Court of said county, did sell by retail, whisky, brandy and other liquors to the jurors unknown, and mixtures thereof, to J. N., to be drank at the said place where sold as aforesaid, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Same in North Carolina.

That A. B., late of, &c., at, &c., on, &c., and on other days both before and since that day up to the taking of this inquisition, unlawfully and wilfully did sell and retail to one C. D., and to other persons to the jurors unknown, a quantity of spirituous liquors by the small measure, viz. by a measure less than one quart, he the said A. B. having there and then no license so to sell and retail, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in Alabama.

That A. B., late of, &c., on, &c., in the county aforesaid, did sell spirituous liquors, to wit, rum, brandy and whisky in less quantity than one quart, without license, to one C. D., and to divers other persons whose names are to the jurors aforesaid unknown, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

And the jurors aforesaid, upon their oath aforesaid, do further present, that said A. B., on the day and year aforesaid, in the county aforesaid, did sell ardent spirits, to wit, rum, brandy and whisky in quantities of one quart by the quart, without license, to one C. D., and to divers other persons whose names are to the jurors aforesaid unknown; and that the said rum, brandy and whisky was then and

manner, necessarily means in either county, for it could not be committed in both; it describes a certain district consisting of two counties; if not so considered, the offence never could be committed; it could not be committed in both counties."

(*k*) See Tefft *v.* Com., 8 Leigh 721.

there drank and consumed on the premises of him the said A. B., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in Kentucky.(*l*)

That A. B., on, &c., at, &c., did keep a tippling house by then and there selling, by the small and by retail in said tippling house, divers quantities of spirituous liquors, to wit, whisky, brandy, rum, gin, wine, &c., to divers persons to the jurors unknown, and by then and there permitting the same to be drank in said tippling house, he the said A. B. not then and there being a licensed tavern-keeper, &c.

Same in Tennessee.(*m*)

That D. S., late of, &c., on, &c., unlawfully did keep a tippling house, and then and there did vend and retail spirituous liquors in less quantities than one quart, and by the quart, intended to be drank in the premises, against, &c., and against,&c. (*Conclude as in book* 1, *chap.* 3).

Same in Mississippi.

That on, &c., A. B., &c., at, &c., did then and there unlawfully sell and retail vinous and spirituous liquors, to wit, wine, rum, gin, brandy, whisky, ale and porter, in a less quantity than one gallon, to one C. D., and to other persons to the jurors aforesaid unknown, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That on, &c., A. B. being then and there a tavern-keeper and inn-keeper, with force and arms at the county of aforesaid, did then and there unlawfully, gratuitously and without special charge therefor, offer, give and deliver vinous and spirituous liquors, to wit, wine, rum, gin, brandy, whisky, ale and porter, in a less quantity than one gallon, to one J. K., and to other persons to the jurors aforesaid unknown; which said J. K. and which said other persons, were then

(*l*) Overshine *v.* Com., 2 B. Mon. 344.

"The indictment," said the court, "with sufficient certainty, charges those acts which constitute keeping a tippling house. It not only charges the selling spirituous liquors by retail, but also the *permitting the same to be drank in the house*, and in this latter specification, differs from the case of Woods, &c. *v.* Com., (1 B. Mon. 74), in which the *selling* by retail only, was specified. And if it were conceded that the offence charged is one for which a presentment might be maintained, it would not follow that an indictment would not also be good. An indictment embraces all the requisites of a good presentment, and even more, namely, the signature of the attorney for the commonwealth, which cannot render it as bad as a presentment. Nor can the fact that an indictment has been found for an offence for which a presentment would lie, prevent the court from assessing the fine without the intervention of a jury in any case in which he could assess it upon a presentment. Nor is the objection that the foreman of the grand jury has signed the indictment under the words 'a true bill,' endorsed on the same, sustainable. The statute of 1814 (Stat. Law 1st, 541), according to its grammatical construction, requires indictments as well as presentments, to be *signed* by the foreman; it does not direct *where* the signature is to be placed; and though it may be implied that it was intended to be placed at the foot of the presentment or indictment, as the object of the signature was to show the court that it had been passed upon and found by the grand jury, this is as well shown by an endorsement of his signature as by placing it at the foot of the indictment, and either form, we have no doubt, will suffice."

(*m*) This count was upheld in Sanderlin *v.* The State, 2 Humph. 315.

and there the guests of the said A. B., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That on, &c., the said A. B. being then and there a tavern-keeper and innkeeper, with force and arms at the county of aforesaid, did then and there, by evasion, subterfuge and chicanery, sell and dispose of spirituous liquors, in violation of the plain intent and meaning of an act and law of the State of Mississippi, bearing date the ninth day of February, in the year of our Lord one thousand eight hundred and thirty-nine, and entitled "an act for the suppression of tippling houses, and to discourage and prevent the odious vice of drunkenness," contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Digging up and taking away a dead body from a church-yard, at common law.(*n*)

That A. B., late of, &c., on, &c., with force and arms, &c., at, &c., the church-yard of and belonging to the parish church of the same parish there situate, unlawfully did enter, and the grave there, in which the body of one M. B., deceased, had lately before then been interred and then was, with force and arms unlawfully, voluntarily, wilfully and indecently did dig, open, and afterwards, to wit, on the same day and year aforesaid, with force and arms at, &c., the body of him the said M. B., out of the grave aforesaid, unlawfully and indecently did take and carry away; against, &c. (*Conclude as in book* 1, *chap.* 3).

Removal of dead body under Massachusetts statute.(*o*)

That W. S. and J. K., late of, &c., on, &c., did unlawfully, feloniously, knowingly and wilfully remove and convey away from the said town of a certain human body, the body of J. M., who had deceased at W., previous to the said removing and conveying

(*n*) Dickinson's Q. S. 6th ed. 395.

This has always been holden a misdemeanor indictable at common law; 4 Bla. Com. 235; 2 T. R. 733, R. *v.* Lynn; and so was selling the dead body of a person capitally convicted, for dissection, whether there was direct evidence or not that the defendant sold the body for lucre and gain and for dissection; R. *v.* Candick, 1 D. & R. N. P. C. 13; Graham B. If the shroud, coffin or any other chattel accompanying the dead body be taken away, with intent to steal, such taking is a larceny; see 2 and 3 Wm. IV. c. 75; Anatomy Schools.

See Archbold's C. P. 5th Am. ed. 786; R. *v.* Gills, R. & R. 366, n.; Com. *v.* Cooley, 10 Pick. 37. To cast a dead body into a river without the rites of sepulchre is a misdemeanor; Kanavan's case, 1 Greenl. 226. If the body cannot be recognized, it should be stated as that of a person to the jurors unknown; and the same course of pleading can be followed where it is doubtful where the body was taken from; R. & R. 366, n.

(*o*) This is under stat. 1830, c. 57; Rev. Stat. c. 130, s. 19; and with the exception of the part in brackets was before the Supreme Court on error, in Com. *v.* Slack, 19 Pick. 304. The judgment was arrested, Wilde J., saying: "We are of opinion, therefore, that as there is no averment in this indictment, that the defendants removed the dead body with the intent to use or dispose of it for the purpose of dissection, and as we consider such intent as the essence of the crime, the indictment is defective." This being the only error noticed by the court, its correction may bring this form sufficiently within the provisions of the statute. Some doubt, however, seems to have been entertained whether the statute was meant to include any cases except those recurring after sepulchre, and perhaps it would be better to insert a second count with an averment to that effect.

away aforesaid, they the said W. S. and J. K., not being authorized by the board of health or overseers of the poor or the selectmen of said town of W. (and the said W. S. and J. K. then and there, to wit, at the time of removing said human body, intending to use and dispose of it for the purpose of dissection,) against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Disinterring dead body in New Hampshire.(*p*)

That S. L., of Chelsea, in the said County of Orange, on the night of the twenty-fifth of October, in the year of our Lord one thousand eight hundred and twenty-six, with force and arms, at Washington in the said County of Orange, the public burying ground, near the west meeting-house in said Washington, unlawfully did enter, and the dead body of one B. P. C., then lately before laid in a coffin and interred in the same burying ground, did then and there unlawfully dig up, disinter, remove from the said coffin, disturb and carry away, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*p*) State *v.* Little, 1 Verm. R. 331.

This indictment is not drawn with great caution. It does not attempt to charge the defendant in the words of the statute. Nor was that necessary, if other words equivalent were inserted. It is objected to the indictment that it neither adopts the words of the statute, nor those that are equivalent. The indictment instead of saying "the remains of any dead person," says "the dead body of Benjamin P. Calfe, then lately before laid in a coffin and interred in the same burying ground." What are the remains of a dead person? the dead body is the answer. This is well understood in common parlance No-thing else does remain, after the spirit has fled, but the dead body. In speaking of a person who is living, if we say that his body was hurt, wounded, &c., it is well understood in its appropriate sense. It means the body of a person, not of his horse or his ox.

The objections that it does not appear that Benjamin P. Calfe was a person—that he ever lived and died, &c.—are rather too nice and technical to be sanctioned. All the statutes against crimes use the expression "if any person shall do such an act;" "if any person shall break the peace;" "if any person shall counterfeit the coins," &c. No indictment upon these statutes, was ever seen alleging that the defendant was a person. The charge is that A. B. did such an act. This is sufficient.

So of some other circumstances noticed as objections. They seemed answered by reading the indictment as every person would understand it. "That the defendant at Washington in said county, with force and arms, the public burying ground near, &c., in said Washington, unlawfully did enter, and the dead body of one Benjamin P. Calfe, then lately before laid in a coffin, and interred in the same burying ground, did then and there unlawfully dig up, disinter, remove from the said coffin, disturb and carry away." All these expressions combined leave but little of that uncertainty supposed by the objections.

But it is urged that there is no averment that the dead body remained interred at the time it was dug up by the defendant. That it only appears argumentatively. This would have been plausible, if there were no allegation of interment. That the defendant dug up the body would strongly imply that it was in a state capable of being dug up; that is, that it was interred. Yet this would be inference only. But when the indictment not only alleges that the defendant dug up, disturbed, disinterred and removed the body of Benjamin P. Calfe, but also alleges that the same dead body had then lately been laid in a coffin and interred in the same burying ground, it seems too much to call upon the court to presume, that, notwithstanding all these allegations, the body might have been disinterred in the meantime and not then capable of being dug up by the defendant.

It is hardly supposable that the defendant could have ever suffered at the trial, or been jeopardized, by the admission of any testimony but what applied to the indictment, according to its most natural signification, and was intended by the grand jury who presented the same. If proof had been offered of the disinterring of any other but a human body or any other of the body of a man or boy of the name of Benjamin P. Calfe, it would have been excluded, as not supporting the indictment.

Same in Indiana.(*q*)

That A. B. on, &c., at, &c., did then and there remove the dead body and corpse of one P. W. from interment in a public burying ground, in which she had been then and there interred, without having obtained the consent therefor of the said P. in her lifetime, nor of her near relations since her death, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Selling the body of a capital convict for dissection, dissection being no part of the sentence.(*r*)

That on, &c., one E. L. was publicly executed, at the parish of St. Mary, Newington, in the County of Surrey; that on the day and year aforesaid, in the parish and county aforesaid, one G. C. of, &c., undertaker, was retained and employed by W. W., the keeper of the gaol in and for the said county, to bury the body of the said person so executed, for certain reward to be therefor paid to the said G. C., by and on behalf of the said county, and in pursuance of the said retainer and employment, the body of the said person so executed as aforesaid, was then and there delivered to the said G. C. for the purpose of being so by him buried as aforesaid, and it then and there became the duty of the said G. C. to bury the same accordingly; but that the said G. C. being an evil disposed person, and of a most wicked and depraved disposition, and having no regard to his said duty, nor to religion, decency, morality or the laws of this realm, did not, nor would bury the said body so delivered to him as aforesaid, but on the contrary thereof, on, &c., at, &c., aforesaid, unlawfully and wickedly, and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same for the purpose of being dissected, cut to pieces, mangled and destroyed, to the great scandal and disgrace of religion, decency and morality, in contempt of our said lord the king and his laws, to the evil example of all other persons in like cases offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Preventing the interment of a dead body by an arrest.(*s*)

That A. B. and C. D. on, &c., with force and arms at, &c., in, &c., a certain dead body, to wit, the body of M. B. then and there being, unlawfully and wickedly did arrest,(*t*) take and carry away, and cause and procure to be arrested, taken and carried away, with an unlawful and wicked intention to prevent the interment and burial

(*q*) Sustained in State *v.* M'Clure, 4 Blackf. 328.

(*r*) R. *v.* Cundick, D. & R. N. P. C. 13; 16 Eng. Com. Law 413. The defendant was convicted and sentence passed.

(*s*) Dickinson's Q. S. p. 393, 6th ed.

(*t*) A vulgar notion at one time prevailed, that it was lawful to arrest the corpse of a person deceased, for a civil debt due from the party in his lifetime. But now it is clearly ascertained that no such practice is lawful; indeed, to prevent the body from being interred, is an offence against decency, and as such indictable under the class of misdemeanors; Jones *v.* Ashburnham, 4 East R. 465; Young's case, 2 T. R. 734; 2 Bla. Com. 472, 8th ed.; 1 Burns' Ecc. Law by Tyrnwhitt 258, 259.

of the said dead body of the said M. B., which ought to have been done and performed according to the rites and ceremonies of the church of that part of this realm called England, against, &c. (*Conclude as in book* 1, *chap.* 3).

Selling lottery tickets. General frame of indictment.

That A. B., late, &c., on, &c., at, &c., unlawfully, &c., did sell(*u*) to one C. D.(*v*) a certain lottery ticket,(*w*) (*where only lotteries of a certain class are prohibited, particularise the class*),(*x*) contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*As to joinder of conspiracy counts, see ante, pp.* 333, 363).

(*u*) Where the statute includes within the offence to offer to sell, &c., the averment "did sell and offer to sale," can hardly be treated as duplicity; Wh. C. L. 81; *ante*, p. 130; *post*, p. 484.

(*v*) The more judicious course is to individuate the offence by naming the vendee, or averring the sale to be to a person unknown; Com. *v.* Thurlow, 24 Pick. 374; State *v.* Walker, 3 Harringt. 547; Com. *v.* Eaton, 15 Pick. 273. The weight of authority clearly is that one or the other allegation must be made; People *v.* Taylor, 3 Denio 99; People *v.* Adams, 17 Wend. 475; State *v.* Munger, 15 Verm. 290; State *v.* Stucky, 2 Blackf. 289; State *v.* Maxwell, 5 *ib.* 230; Butler *v.* State, *ib.* 280.

(*w*) In this note will be considered:

(1). To what cases the term *ticket* applies.

(2). In what cases the ticket should be set forth.

(1). *To what cases the term ticket applies.* The general effect of the term under the statutes usually in force, is considered at large by the Supreme Court of Missouri in a recent case.

"The principal point made in this branch of the case, is, whether the proof of the sale of a quarter ticket will sustain the indictment which charges, that the defendant sold a ticket. The ticket proved to be sold, read—'The holder of this ticket will be entitled to one-fourth of the prize drawn to its number.' This was physically a ticket—not part of a ticket. That its holder was entitled, if among the fortunate, to only one-fourth of the prize drawn by its corresponding number, does not make it less a ticket. It was complete in itself, and so purports to be. It is denominated on its face a ticket, though it appeared that the holder was only entitled to a certain portion of prize drawn to its number. The instruction, therefore, asked of the court on this subject, was properly refused.

"It is also insisted that, as the statutes prohibit the sale of lottery tickets, an indictment will not lie for selling a single ticket. To sustain this objection, the decisions in England on the statute of 14 Geo. II. c. 6, which makes it felony without benefit of clergy, to steal any cow, ox, heifer, &c., are cited. It was held, under that statute, that where the indictment charged the defendant with stealing a cow, and the evidence proved it to be a heifer, the variance was fatal, because the use of both words in the statute, proved that the legislature did not consider them synonymous. Several adjunctions of a similar character have been made in England; and the courts of that country, *in favorem vitæ*, have commenced some very nice distinctions. Admitting that our courts would be willing to adopt such refinements in case of misdemeanors, it is not perceived that this case falls within the class of cases to which we have alluded. Had the penalties of the British statute been directed against stealing of cows or heifers, &c., and had it been adjudged that, under such a law, the stealing of one cow or one heifer, was not an offence within its meaning, the precedent would have been apposite;" Freleigh *v.* The State, 8 Mo. 612.

(2). *In what cases the ticket should be set forth.* Where only lotteries of certain classes are prohibited, it would seem necessary to show, by setting forth at least the purport of the ticket, that it comes within the prohibited class; State *v.* Schribener, 2 Gill & J. 246; Com. *v.* Gillespie, 7 S. & R. 469; but where all lotteries are illegal, the averment in the words of the act that a ticket was sold, together with the name of the vendee, would seem enough; Cohen *v.* Virginia, 6 Wheat. 265; Freleigh *v.* State, 8 Mo. 606; People *v.* Taylor, 3 Denio 99; State *v.* Follet, 6 N. Hamp. 53; Com. *v.* Clapp, 5 Pick. 41; Davis' Prec. 162. In Pennsylvania, under the act of March 16, 1847, the setting forth the ticket is expressly dispensed with. But under any circumstances, however, the averment that "a more particular description of which said lottery is to the jurors aforesaid unknown," will relieve the pleader from the necessity of any further recital.

(*x*) Thus at one time in Pennsylvania, certain lotteries were regularly licensed, in which

Same where ticket is lost or destroyed, or in defendant's possession.

That A. B., late, &c., unlawfully did sell to one C. D., a certain lottery ticket, which said ticket the said jurors cannot here set forth, by reason that it is in the possession of the said A. B., who, though notified so to do, to wit, on, &c., at, &c., has refused and neglected to produce it for the inspection of the said jurors,(*xx*) (*or it seems it is enough to say*, "a more particular description of which is to the said jurors unknown"),(*y*) contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Selling ticket in New Hampshire.(*yy*)

That J. F., of, &c., on, &c., at, &c., unlawfully did sell to one F. E., a part of a ticket, that is to say, one-quarter part of a ticket, at and for the price of fifty cents, in a certain lottery not authorized by the legislature of said state, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in Massachusetts.(*z*)

That E. W. D., of, &c., on, &c., at, &c., did unlawfully have in his possession with intent to offer for sale and to sell, and aid and assist

case it was necessary to aver the ticket to have been "in a lottery unauthorized," &c., Com. *v.* Gillespie, 7 S. & R. 469; and now in New York, in indictments for promoting lotteries, it is necessary, as the precedents will show, to aver the lottery to be one set on foot *for the purpose of disposing of property;* People *v.* Payne, 3 Denio 88.

(*xx*) *Ante*, p. 132. (*y*) In People *v.* Taylor, 3 Denio 91, this allegation was held good.

(*yy*) This count was sustained in State *v.* Follet, 6 N. Hamp. 53.

(*z*) This indictment was sustained in the Supreme Court of Massachusetts, in Com. *v.* Dana, 2 Mete. 329.

The objection to the first and several other counts in the indictment, said the court, "is, that although it alleges, that the defendant at Boston, &c., unlawfully had lottery tickets in his possession with intent to sell the same, it does not allege an intent to sell the same within this commonwealth; and the question is, whether such an averment is necessary.

"It is obvious, as this indictment follows the words of the statute, that the offence intended to be charged in the indictment, is the same offence which is punishable by the statute. We are aware that it is not always sufficient to charge an offence in the words of a statute; because a statute must often use general terms and comprehensive descriptions; whereas an indictment requires certainty in charging the offence so specifically as to give the party notice of what he is to meet, and enable him to traverse the facts averred. But when the statute itself is sufficiently specific, a charge of the offence in the words of the statute is sufficient, in point of certainty. Here the indictment charges an unlawful possession of lottery tickets, with the averment of an intent to sell generally, including of course, as well this commonwealth, as all other places. It is, in this respect, general and unlimited.

"Where the possession of an article is made punishable because so held with a guilty intent, if the act intended is *malum in se*, it is no answer to the charge, that it was intended thus to be committed out of the commonwealth; it is within the words of the statute and the mischief intended to be prevented; Com. *v.* Cone, 2 Mass. 132.

"Perhaps a different rule should prevail, where the act intended to be done is not criminal in itself, but only made so by the statute. If, therefore, it should appear in the trial of an indictment founded on this statute, that the lottery tickets were in the possession of a person passing through this state, and held only for the purpose of carrying them into another state for sale, it is very questionable whether such proof would support the indictment. It certainly would not, if the construction, which the defendant puts upon the statute, is a true one. He maintains, that by a reasonable construction, the statute intends to punish the mere possession of lottery tickets, when there is an intent to sell them 'in this commonwealth,' though not so expressed. If this is correct, then the same construction must be put upon the same words in the indictment; and it would be the duty of a judge, on the trial of such indictment, to instruct a jury, that if such an intent were not

in selling, negotiating and disposing of five hundred certain lottery tickets and five hundred shares, to wit, halves and quarter tickets, being tickets for halves and quarters of prizes drawn to their respective numbers, all of said tickets and shares being in a certain lottery not authorized by law in this commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools, in State of Rhode Island; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That E. W. D., of, &c., on, &c., at, &c., did unlawfully have in his possession with intent to sell it, a certain other lottery ticket in a certain lottery not authorized by law in said commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in Rhode Island, which share of a lottery ticket is of the purport and effect following, that is to say, (*setting forth ticket*), against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That E. W. D., of, &c., on, &c., at, &c., did unlawfully invite and entice and attempt to invite and entice sundry persons whose names to the said jurors as yet are unknown, to purchase and receive certain lottery tickets and certain shares, to wit, halves and quarter tickets, being tickets for halves and quarters of prizes drawn to their respective numbers, all of said tickets and shares being in a certain lottery not authorized by law in this commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in State of Rhode Island; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That E. W. D., of, &c., on, &c., at, &c., did unlawfully have in his possession with intent to sell it, a certain other lottery ticket in a certain lottery not authorized by law in said commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in Rhode Island, which share of a lottery ticket is of the purport and effect following, that is to say, (*setting forth ticket*), against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That E. W. D., of, &c., on, &c., at, &c., did unlawfully advertise lottery tickets for sale, and shares in lottery tickets for sale, and did set up and exhibit representations of a lottery and of the drawing thereof, indicating thereby where a lottery ticket or a share thereof

proved to their satisfaction, they must acquit the defendant. It appears to the court, therefore, that the question is rather, whether the evidence is sufficient to maintain the indictment, than whether the indictment is sufficiently certain. If the case was as above supposed, that the only intent proved was an intent to carry the tickets into another state and sell them there, the course would be, to request the court to instruct the jury that such proof was not sufficient to support the indictment; and should the court decline giving such instruction, or instruct them otherwise, then to take the exception. But here no question is made of the sufficiency of the evidence to support the finding of an intent to sell in this commonwealth. The question is, whether it was necessary to aver it in the indictment. Had the statute expressed such qualification of the possession—that is, with an intent to sell within the commonwealth—it must have been so averred in the indictment, because it would have been a necessary ingredient in the description of the offence. As it is not so expressed in the statute, this rule does not apply; and the court are of opinion that the intent to sell generally, being averred in the indictment, in the words of the statute, it is sufficient, although it should be held, on trial, that proof of an intent to sell in another state only would not bring the case within the statute so as to warrant a conviction.

"There being several counts in the indictment, to which there is no other exception than the above, it becomes unnecessary to consider the other alleged causes for arresting the judgment."

and certain lottery tickets and certain shares, to wit, halves and quarter tickets, may be purchased and obtained, all of said tickets and shares being in a certain lottery not authorized by law in this commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in State of Rhode Island; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

That E. W. D., of, &c., on, &c., at, &c., did unlawfully have in his possession with intent to sell it, a certain other lottery ticket in a certain lottery not authorized by law in said commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in Rhode Island, which share of a lottery ticket is of the purport and effect following, that is to say, (*setting forth ticket*), against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Advertising lottery ticket in same, under stat. 1825, *c.* 184.(*a*)

That W. W. C., of, &c., on, &c., at, &c., did unlawfully advertise and cause to be advertised in a certain newspaper by him published, and called the Evening Gazette, lottery tickets and part of lottery tickets, for sale in lotteries not authorized by the laws of said commonwealth, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Selling lottery tickets in same, under stat. 1825, *c.* 1841, *s.* 1.(*b*)

That B. E., of, &c., on, &c., at, &c., did unlawfully offer for sale, and did unlawfully sell to one J. G., one-half of a lottery ticket in a lottery not authorized by the laws of this commonwealth, called the Connecticut Lottery, for the erection of a bridge at Enfield Falls, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Selling ticket in New York.(*c*)

That, &c., at, &c., on, &c., did unlawfully vend and sell to one W.

(*a*) This indictment was sustained on motion in arrest of judgment, it being held unnecessary to allege the tickets were advertised as being for sale within this commonwealth, or to specify the tickets. The publisher of the paper, it was said, was responsible, although he had no concern in the sale of the tickets.

(*b*) Com. *v.* Eaton, 15 Pick. 273.

This indictment was resisted on ground of duplicity, it being alleged that to "sell" and "to offer for sale," were two distinct offences. The court, however, adjudged an offence to be a stage within another, and sustained the indictment on demurrer. This principle is consistent with that established in the analogous averments of "counterfeiting and causing to be counterfeited," and of "keeping a gaming house and causing others to game therein;" Wh. C. L. 98. Where the offences are of a distinct nature, neither of them capable of being resolved into the other, it is error to join them in the same count. Where they are several in their nature, and yet of such a character that one of them, when complete, necessarily implies the other, there is no such repugnancy as make their joinder improper. In fact under such circumstances it is less embarrassment to the defendant to be thus charged, than to have each stage of the offence split from the context, and set in a distinct count.

It will be observed that in this form the offence is distinguished by the description of the lottery in which the ticket was sold, as well as of the vendee. Some such ear-marks are necessary for the protection of the accused, for if the defendant be merely charged with selling a lottery ticket, there is nothing on the record to show him what to plead.

(*c*) This count was sustained, it being held unnecessary to aver that the lottery for the selling of a ticket in which the party was indicted, was not expressly authorized by law;

H. F. a certain ticket, purporting to be in the Delaware Lottery, &c., (*describing ticket at large*,) in contempt of the people of the State of New York, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form for same.

That A. B., &c., on, &c., at, &c., unlawfully did vend and sell to one a certain ticket, purporting to be in the lottery, numbered called class number series, with certain combination numbers thereon, to wit, combination numbers which said ticket purported to entitle the holder thereof to one of such prize as might be drawn to its number, if demanded within after the drawing, subject to a deduction of fifteen per cent., payable after the drawing, which said lottery on the face of the said ticket purported that the drawing thereof would take place at and was dated in contempt of the people of the State of New York, and against, &c., and against, &c., (*Conclude as in book* 1, *chap.* 3).

That A. B., &c., at, &c., did unlawfully offer to vend, sell, barter, furnish or supply, and did vend and sell or cause and procure to be vended and sold to one a ticket or part or share of a ticket, or a paper or instrument purporting to be a ticket or to be a share or interest in a ticket of a certain lottery, device or game of chance, not expressly authorized by law, which said ticket, share of a ticket, paper or instrument, was and is to the purport following, that is to say, in contempt of the people of the State of New York, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Promoting lottery in same, being the form in common use.

That A. B., &c., on, &c., at, &c., the said being unauthorized by special laws for that purpose, unlawfully did promote a certain lottery, called which lottery was set on foot for the purpose of disposing of money, by exposing to sale tickets and parts of tickets in the said lottery, and by selling to one at the ward, city and county aforesaid, a certain ticket in the said lottery, called the of a ticket with the combination numbers thereon, which said ticket was and is numbered the whole price or value for which said lottery was made being to the jurors aforesaid unknown, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Carrying on lottery whose description is unknown to jurors.(cc)

That A. B., &c., on, &c., at, &c., being unauthorized, &c., (*as in last form*), did publicly carry on a certain lottery (a more particular description of which said lottery is to the jurors aforesaid unknown), for the purpose of exposing certain money, &c, in contempt, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

People *v.* Sturdevant, 23 Wend. 418. The counts immediately succeeding are more to be depended upon than the present.

(cc) This count was sustained, though with much reluctance, by the Supreme Court of New York in People *v.* Taylor, 3 Denio 91.

Selling lottery policy in Pennsylvania, under act of March 16, 1847.(*d*)

That A. B., &c., on, &c., at, &c., unlawfully did sell to a certain person whose name is to this inquest unknown, (*or to one A. B.*), a certain lottery policy, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Selling ticket in same, under same.

That the said A. B. afterwards, on, &c., did unlawfully sell (and expose for sale; *see ante*, *p.* 481, n. *w*), to one C. D., (*or as in the last count*), a lottery ticket, to be drawn in a lottery in the state of, (*naming the state or country*), contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same under repealed act of March 1, 1833. *First count, sale of ticket, ticket being set forth.*(*e*)

That N. S., late of, &c., on, &c., at, &c., unlawfully did sell and expose to sale and cause to be sold and exposed to sale, a lottery ticket in a lottery not authorized by the laws of this commonwealth, which said lottery ticket was in the words and figures following, that is to say, (*setting forth the ticket*), contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Conspiracy to sell a lottery ticket, &c., the defendant being singly charged with a conspiracy with others unknown.

That the said N. S. afterwards, to wit, on the same day and year aforesaid, at the city aforesaid and within the jurisdiction of this court, together with divers other evil disposed persons to the jurors aforesaid as yet unknown, did unlawfully and wickedly conspire, combine, confederate and agree together, unlawfully and wickedly contriving and intending to acquire unjust and illegal lucre to themselves, to sell and expose to sale and cause and procure to be sold and exposed to sale, a lottery ticket and tickets in a lottery not authorized by the laws of this commonwealth, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in Virginia.(*f*)

That he, J. P., since, &c., to wit, on, &c., at the city aforesaid, unlawfully did sell and cause to be sold one certain lottery ticket in a certain lottery to be drawn in this commonwealth, to wit, in a lottery called A. and F. Turnpike Lottery, and then and there advertised to be drawn at the said lottery not being a lottery authorized

(*d*) Under this act indictments merely averring a sale, but not stating to whom or mentioning the ticket, were held insufficient on demurrer by Kelley J. in the Philadelphia Quarter Sessions, June, 1847. See *ante*, p. 481, n. *v*.

(*e*) Com. *v.* Sylvester, 6 Pa. L. J. 383. In this case it was held that not only might the statutory misdemeanor and the common law conspiracy be joined, but that on a verdict of guilty on both counts, the court would impose a separate sentence on each.

See also Com. *v.* Gillespie, 7 S. & R. 469; Com. *v.* Canfield, Sup. Ct. March, 1827, No. 30; Com. *v.* Conine, *ib.* No. 20. As to joinder of conspiracy, see pp. 333, 363.

(*f*) This count was supported in Phalen *v.* Com., 1 Robinson 713, 714.

to be drawn by any contract made with this commonwealth prior to the 25th day of February, 1834, or by any contract made since in pursuance of any law of this commonwealth passed prior to the said 25th of February, 1834, the drawing of which lottery was not to extend by virtue of said last mentioned contract beyond the 1st day of January, 1840, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER IV.

RIOT, AFFRAY, TUMULTUOUS CONDUCT, RESCUE, PRISON BREACH, &c.; RESISTANCE TO AND ASSAULTS ON OFFICERS OF JUSTICE.

General frame of indictment for riot.

That A. B.,(*a*) late of, &c., C. D., late of, &c., E. F., late of, &c., with divers evil disposed persons, to the number of ten or more, to the jurors aforesaid as yet unknown, on, &c., with force and arms at, &c., did unlawfully, riotously, routously and tumultuously assemble and meet together(*b*) to disturb the peace of the said commonwealth, and being so then and there assembled and gathered together,(*c*) did then and there make great noise, riot, tumult and disturbance, and then and there unlawfully, riotously, routously and tumultuously remained and continued together, making such noises, tumults and disturbances for a long space of time, to wit, &c., to the great terror(*d*) and disturbance not only of the good subjects of the said commonwealth there inhabiting and residing, but of all the other citizens of the said commonwealth there passing and repassing in and along the public streets and queen's common highways there, in contempt, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*It is usual to add a count for assault and battery, on which the defendant may be acquitted if convicted of riot.*(*e*)

(*a*) On an indictment for a riot against three or more, if a verdict acquit *all but two*, and find them guilty, the finding is repugnant and void unless the indictment charge them with having made such a riot, *together with divers other persons unknown;* for otherwise it appears that the defendants are found guilty of an offence whereof it is impossible that they should be guilty: for there can be no riot where there are no more than two persons; R. *v.* Sudbury and others, 1 Ld. Raym. 484; Wh. C. L. 110, 530. And let it be observed, that though women are amenable to the law as rioters, infants of either sex under the years of discretion are not; Hawk. b. 1, c. 65, s. 14. But where six were indicted for a riot, and two of them died before trial, two were acquitted and two only found guilty, yet judgment was given upon this verdict, for, by Ld. Mansfield, they must have been found guilty with one or both of those who had not been tried, or it could not have been a riot; R. *v.* Scott, 3 Burr. R. 1262.

(*b*) An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with an intent to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor making a motion towards the execution of it; Hawk. b. 1, c. 65. See R. *v.* Birt, 5 C. & P. 154, and the charge of Tindal C. J., at Stafford Special Commission, in 1842, C. & M. 661.

"But," Hawkins adds, "this seems altogether much too narrow a definition. For any meeting whatever of great number of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the queen's subjects, seems properly to be an unlawful assembly; as where great numbers complaining of a common grievance (*e. g.* the enclosure of land in which they all claim a right of common, Hawk. b. 1, c. 65, s. 8), meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests: for no one can foresee what may be the event of such an assembly; Hawk. b. 1, c. 65, s. 9; 4 Bla. Com. 142. It has been lately laid down, that the meeting must be under such circumstances as would give firm and rational men reasonable ground to fear breach of the peace. Alderson B., in Reg. *v.* Vincent, 9 C. & P. 91."

An assembly of a man's friends for the defence of his person against those who threaten to beat him, if he go to such a market, or the like, is unlawful; for he who is in fear of such insults ought to demand surety of the peace, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. See the admirable view given of this branch of the law, in the charge of Judge King in the Kensington riot cases, 4 Pa. L. J. 33. An assembly of a man's friends *in his own house*, for the defence of the possession thereof against those who threaten to make an unlawful entry thereinto, or for the defence of his person against those who threaten to beat him therein, is allowed by law; for a man's house is looked upon as his castle; Hawk. b. 1, c. 65, s. 10; 11 Mod. 116. But the like liberty is not allowed by the law to a man in defence of other property (*e. g.* his close); R. *v.* The Bishop of Bangor, 1 Russ. C. & M. 255; Dickinson's Q. S. *tit. Forcible Entry*.

If a number of persons, being met together at a fair or market, or any other lawful or innocent occasion, happen on a sudden quarrel to break the peace, it seems agreed that they are not guilty of a riot, but of sudden affray only, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it; Hawk. b. 1, c. 65, s. 3; State *v.* Snow, 18 Maine 346; State *v.* Cole, 2 M'Cord 117. If the object of the assembly be lawful, it in general requires stronger evidence of the terror of the means to induce a jury to return a verdict of guilty, than if the object were unlawful; and it has even been holden that if a number of persons assemble for the purpose of abating a public nuisance, and appear with spades, iron crows, and the proper tools for that purpose, and abate it accordingly, without doing more, it is no riot, Dalt. c. 137; unless threatening language or other misbehaviour in apparent disturbance of the peace be at the same time used; *ib.* Yet it is said, that if persons innocently assembled together do afterwards, upon a dispute happening to arise among them, form themselves into parties with promises of mutual assistance, and then make an affray, they are guilty of a riot: because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design; *ib.*; Wh. C. L. 524, *et seq.* If a person, seeing others actually engaged in a riot, do join himself unto them and assist them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence to contend that he came innocently into the company, but appears to have joined himself unto them with an intention to second them in the execution of their unlawful enterprise; and it would be endless as well as superfluous to examine whether every particular person engaged in a riot were, in truth, one of the first assembly or actually had a previous knowledge of the design of its movers; Hawk. b. 1, c 65, s. 3.

It has been holden that the enterprise ought to be accompanied with some offer of violence either to the person of a man or to his possessions, as by beating him or forcing him to quit the possession of his lands or goods, or the like; and from hence it seems to follow that persons riding together on the road with unusual weapons, or otherwise assembling together in such a manner as is apt to raise a terror in the people, without any offer of violence to any one in respect either of his person or possessions, are not properly guilty of a riot, but only of an unlawful assembly; *ib.* s. 4; Wh. C. L. 524. Thus where a band of men, consisting of eight or ten persons, disguised, paraded at night through the streets of a town, armed with guns or pistols or both, and marched backward and forward through the streets, shooting guns and blowing horns, to the terror and alarm of inhabitants, it was held that the perpetrators were guilty of a riot, and a motion for a new trial was refused; State *v.* Brazil *et al.*, Rice R. 257. However, it seems to be clearly agreed

Affray at common law.(*f*)

That J. S., &c., and J. W., &c., on, &c., with force and arms at, &c., being unlawfully assembled together and arrayed in a warlike manner, then and there in a certain public street and highway there situate, unlawfully and to the great terror and disturbance of divers liege subjects of our said lady the queen then and there being, did make an affray; in contempt of our said lady the queen and her laws, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Unlawful assembly and assault.(*g*)

That J. D. et al., together with divers other evil disposed persons

that in every riot there must be some circumstance either of actual violence or force, or at least of an apparent tendency thereto, as is naturally apt to strike a terror into the people, as the show of arms, threatening speeches or turbulent gestures, *ib.* s. 4: for every such offence must be laid to the terror of the people; *ib.*; R. *v.* Hughes, 4 C. & P. 373. "And from hence," adds Hawkins, "it clearly follows that assemblies at wakes or other festival times, or meetings for exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous. And from the same ground also it seems to follow that it is possible for three persons or more to assemble together with an intent to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a competent number of persons assemble together in order to carry off a piece of timber to which one of the company has a pretended right, and afterwards to carry it away without any threatening words or other circumstances of terror." He adds, that by parity of reasoning, the assembling together in a peaceful manner to do a thing contrary to a statute (*e. g.* to celebrate mass), and afterwards peaceably performing the thing intended, cannot be a riot; Hawk. b. I, c. 65, s. 5.

Whether the proclamation from the riot act be read or not, the common law misdemeanor of riot remains; and magistrates, constables and even private persons may disperse the offenders, and by force if it cannot be otherwise accomplished; R. *v.* Fursy, 6 C. & P. 81. It is sufficient to allege that the defendants assembled "with force and arms," and being so assembled committed acts of violence, without repeating the wards "force and arms;" Com. *v.* Runnels, 10 Mass. 518. Where the indictment charged in substance "that the defendants unlawfully, riotously and routously assembled together to disturb the peace of the state, and being so assembled did make great noise, riot, tumult and disturbance for a long space of time, to the great terror and disturbance of the people," &c., it was held conformable to the precedents in such cases, and sufficient; State *v.* Brazil *et al.*, Rice R. 257. An indictment charging that the defendants, "with force and arms, at the house of one S. R., situate, &c., did then and there wickedly, maliciously and mischievously, and to the terror and dismay of the said S. R., fire several guns," is good. No technical words are necessary, but it should appear that such force and violence were used as amount to a breach of the peace. All that the law requires in indictments of this kind is, that the facts shall be so stated as to show a breach of the peace, and not merely a civil trespass; State *v.* Langford, 3 Hawks 381.

(*c*) It is said that an unlawful purpose of assembly must be shown; but this seems doubtful, as a riot may occur though the original object of the meeting was lawful. See R. *v.* Gulston, 2 Ld. Raym. 1210.

(*d*) These words are essential to sustain a charge of *riot;* but if the indictment omit them, and riotous acts, as cutting down fences, &c., are proved, it will still support a conviction of an unlawful "assembly;" R. *v.* Cox, 4 C. & P. 538; Parke B. "So, if after assembling for what if executed would make the parties rioters, they separate without carrying their purpose into effect;" R. *v.* Birt, 5 C. & P. 154; Patteson J.

(*e*) Shause *v.* Com., 5 Barr 83; R. *v.* Higgins, 2 East R. 5.

(*f*) Archbold's C. P. 5th Am. ed. 708.

(*g*) Com. *v.* Dupuy, 6 Pa. L. J. 223. The defendants were shown to have entered the Weccaco church in Philadelphia county, for the purpose of preventing a particular minister from officiating, and to have when there created considerable disturbance. A verdict of guilty was rendered under instructions from Kennedy J.; the indictment being held to cover the offence.

to the number of three and more (to the jurors aforesaid yet unknown), on, &c., with force and arms, &c., at, &c., did unlawfully, riotously and routously assemble and gather together to disturb the peace of the said commonwealth; and so being then and there assembled and gathered together, in and upon one S. W., in the peace of God and the said commonwealth then and there being, unlawfully, riotously and routously did make an assault, and him the said S. W. then and there unlawfully, riotously and routously did beat, wound and ill-treat, so that his life was greatly despaired of, and other wrongs to the said S. W. then and there unlawfully, riotously and routously did, to the great damage of the said S. W., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Riot and hauling away a wagon.(*h*)

That R. S., late of, &c., together with four others persons, to the inquest aforesaid unknown, on, &c., at, &c., with force and arms, &c., riotously, routously and unlawfully to disturb the peace of this commonwealth, did assemble themselves together, and so being assembled and met together, a certain wagon of the value of thirty pounds, of the goods and chattels of S. B. then and there being found, then and there with force and arms, &c., riotously, routously and unlawfully did take and haul away, to the great damage of the said S. B., to the terror of the good citizens of this commonwealth, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Riot, in breaking the windows of a man's house.(*i*)

That J. M. and P. C., with certain other wicked and ill-disposed persons, to the number of twenty and upwards, to the inquest aforesaid unknown, on, &c., at, &c., with force and arms, &c., to wit, with stones, sticks, staves and clubs as rioters, routers and disturbers of the peace of the commonwealth, riotously, routously, tumultuously and unlawfully did assemble and gather themselves together, and so being assembled and gathered together, the day and year aforesaid, at the county aforesaid, the doors and windows of the mansion house of J. L., in the same county standing and being, with clubs, sticks, staves and stones then and there riotously, routously and unlawfully did break, pull down, spoil and destroy, and the same mansion house then and there riotously, routously and unlawfully did enter and the said J. L. did beat, wound and ill-treat, and other harms then and there did to the said J. L., to the great damage of the said J. L., to the evil example, &c., to the great terror and disturbance of all the good citizens of the commonwealth, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Riot and pulling down a dwelling house in the possession of prosecutor.(*j*)

That W. S., J. S., H. S. and D. L., late of the County of Pike afore-

(*h*) Drawn in 1780 by Mr. Bradford. (*i*) *Ib.*
(*j*) Com. *v.* Shause, Supreme Court Pa., March T. 1847, No. 1. This indictment was

said, together with divers other persons to the number of ten or more, to the jurors aforesaid as yet unknown, being rioters, routers and disturbers of the peace of the commonwealth, on, &c., with force and arms, that is to say, with sticks, staves, clubs and other hurtful weapons, at, &c., did unlawfully, riotously, routously and tumultuously assemble and meet together, to the great terror of the peaceable people and inhabitants of this commonwealth, and to disturb the peace of the said commonwealth, and being so assembled and met together, one building and dwelling house in the possession of J. W. of the County of Pike aforesaid, did then and there riotously, routously and unlawfully pull down, break down, destroy and other wrongs to the said J. W. did then and there, to the great damage to the said J. W., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add second count, giving riot and assault on prosecutor*).

Riot and false imprisonment.(*k*)

That G. S., et al., on, &c., at, &c., with force and arms, &c., themselves as rioters and disturbers of the peace of our lord the now king, riotously, routously and tumultuously, with an intent the peace of our said lord the now king to disturb and interrupt, did assemble and gather together, and so then and there being assembled and gathered together, then and there with force and arms, &c., riotously, routously and tumultuously in and upon a certain H. B., in the peace of God and our said lord the now king then and there being, an assault did make and him the said H. B. then and there without any lawful warrant or authority did imprison and restrain of his liberty for the space of two hours, and then and there did compel and oblige him the said H. to pay the sum of two shillings current money of this province, and to give and deliver a certain red cow, being the proper cow of him the said H. B., unto the said G. S. to obtain his discharge and regain his liberty from the imprisonment aforesaid, to the evil example, &c., in contempt, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Disturbing the peace, &c., on land occupied by the United States for an arsenal.

That C. S., et al., all of Springfield in said district of Massachusetts, on the day of June, &c., at said Springfield, on land belonging to the said United States, to wit, on land occupied for an army or arsenal and for purposes connected therewith, out of the jurisdiction of any particular state of the said United States and within the jurisdiction of the said United States, together with divers other persons whose names are to the jurors aforesaid as yet unknown, to the number of four, being evil disposed and disorderly persons, with force and arms

considered in 5 Barr 83; where it was held, that under an indictment charging four with riot and riotous assault and battery, *one* may be convicted of an assault and battery, and the others acquitted generally.

(*k*) This indictment was framed in 1759 by Benjamin Chew, the then attorney-general of Pennsylvania, and stood the test of a conviction.

did then and there unlawfully, riotously and routously assemble and gather themselves together to disturb the peace of the said United States, and being so assembled did then and there unlawfully, riotously and routously, with force and arms, cut down and destroy and carry away a certain fence, the property of the said United States, and a certain small wooden building the property of the said United States, and other wrongs then and there did, to the terror of the people there residing, being and passing; in evil example, &c., and against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Disturbance of elections in Massachusetts.(*l*)

That the inhabitants of W., on, &c., at, &c., aforesaid, were duly assembled in town meeting, for the choice of town officers for the political year then next ensuing; that a moderator was duly chosen, who called on the electors present to give in their votes for a selectman for the said political year then next ensuing; and that T. F. H., of in the county of on the day and year before mentioned, when the said moderator was presiding at the meeting, and was receiving the votes for a selectman, with force and arms, intending as much as in him lay to prevent the choice of said selectman according to the will of the said electors, and to interrupt the freedom of election, unlawfully and disorderly did openly declare that the old selectman should not be chosen, and attempted repeatedly to take from the box, which contained the votes of the electors, the votes of the electors; (and so the jurors say, that the said J. F. H., on the day and year aforesaid, and at in the county aforesaid, in the public town meeting aforesaid, did behave himself disorderly and indecently, to the disturbance of the peaceable and quiet citizens then and there assembled for the purpose aforesaid, in violation of the rights of private suffrage), against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Interrupting a judge of the election in Pennsylvania.

That B. G., &c., on, &c., at, &c., designing and intending the due execution of the laws of this commonwealth to obstruct and prevent, with force and arms, &c., did threaten and use violence to the person of one J. B., he the said J. B. then and there being one of the judges of the election in the City of Philadelphia, at a general election held in and for the said city, on, &c., duly chosen, appointed and sworn by virtue of an act of the general assembly of this commonwealth, entitled an act, &c., and in the due execution of his said office then and there also being, and then and there with threats and opprobrious language did interrupt the said J. B. in the execution of his office, and then and there did say to the said J. B., he the said J. B. still being in the due execution of his said office, "you (the said J. B. meaning) damned infernal rascal, I will see you for this another time,"

(*l*) The part in brackets of this count was held in Com. *v.* Hoxey, 16 Mass. 385, to comprehend an offence at common law, though the averments taken altogether were pronounced insufficient to sustain a sentence under the act of 1785, c. 75, s. 6.

thereby meaning and intending to prevent and debar the said J. B. from proceeding in the execution of his said office, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Disturbing a religious meeting, under the Virginia statute.(*m*)

That W. D., late of the County of Lewis, yeoman, on the sixth day of October, on, &c., with force and arms at, &c., during religious worship, did on purpose, maliciously and contemptuously disquiet and disturb a certain congregation of Methodists, being then and there lawfully assembled for the purpose of religious worship, in contempt of public worship, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Disturbing a congregation worshipping in a church, at common law.(*n*)

That J. D., &c., on, &c., being Sunday, with force and arms at, &c., in the Ebenezer Baptist Church there, during the celebration of divine service, unlawfully, unjustly and irreverently did disturb and hinder one J. V., then being the minister officiating in the said church and then being in the discharge of his sacred functions and in the performance of divine service, in contempt of the laws of this state, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Disturbing same in a dwelling house.(*o*)

That on, &c., at, &c., a number of the citizens of said county were peacefully assembled at the house of J. W. in said county, for reli-

(*m*) See Com. *v.* Daniels, 2 Va. Cases 402, where the form in the text was upheld.

"This indictment," say the court, "sets forth the place where, the time when, as well as the denomination of religious persons to whom the disturbance was offered. It also charges the defendant with the offence in the very words of the statute. But it is urged, that as the time at which it is offered may be proved to have been different from that alleged, the want of an averment as to the means by which the disturbance was effected, renders the indictment too uncertain to be supported. We do not doubt that it is a correct mode of drawing an indictment, to charge the means by which the disturbance was caused, where those means can be ascertained, but when we find that an indictment similar to this, founded on an English statute, bearing a great resemblance to ours, has been acted on in the Court of King's Bench, and a judgment thereon rendered against sundry persons for the penalty prescribed by that statute, we are of opinion that the question is sufficiently settled.

"It may further be remarked, that there seems to be but little difference in point of *certainty* between the simple averment of a disturbance and disquieting in the words of the act, and the averment that the defendant did 'make divers great cries, noises and disturbances, to disturb and disquiet, and did then and there disturb and disquiet,' &c., or this averment, 'that they did disquiet and disturb the congregation by then and there *talking, laughing, cursing and swearing with a loud voice*,' both of which are to be found in approved precedents as copied by Chitty.

"On the whole matter, we are of opinion that it should be certified, 'that it is not necessary in an indictment for disturbing a religious congregation, to set out the means by which the disturbance or disquieting was offered.'"

(*n*) People *v.* Degey, 2 Wheel. C. C. 135.

(*o*) State *v.* Swink, 4 Dev. & Bat. 368.

"This case," said Ruffin C. J., "is fully within the principle of Jasper's case, 4 Dev. R. 323, which is that a congregation of people collected together for the purpose of divine

gious worship, and for the purpose of offering prayers to Almighty God, and the said persons being then and there so assembled together for the purpose aforesaid, and actually engaged in divine worship, P. R. S. and J. E. S., &c., well knowing the purpose of the said meeting, with force and arms did then and there enter into said house, and by loud and abusive language then and there, with profane oaths and violent actions did disturb, wantonly and intentionally, the worship of the Almighty, and did disturb and molest the citizens then and there assembled for divine worship, to the great contempt of religion, to the common nuisance of the citizens of the state then and there being, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Dressing in a woman's clothes and disturbing a congregation at worship.(*p*)

That S. S., &c., being an injurious, profane and irreligious man, on, &c., at, &c., did dress and disguise himself in woman's apparel, and being so as aforesaid dressed and disguised, then and there did go to the Lutheran Church, called Augustus Church, in the same township and county, with an intention then and there to interrupt and disturb divers of his majesty's liege subjects then and there assembled and gathered together to worship God, and then and there wickedly, profanely and irreligiously did molest, vex, interrupt and disturb a certain Henry A. Muhlenberg, rector of the said church, then and there preaching to divers of his majesty's liege subjects in the same church, he the said Henry A. Muhlenberg, then and there being lawfully charged and qualified to preach in the same church by reason of his care and function, and other harms to him the said Henry A. Muhlenberg then and there did, to the great displeasure of Almighty God, in contempt of his worship and religion and of the laws of the land, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Going armed, &c., to the terror of the people, at common law.(*q*)

That R. S. H., &c., on, &c., with force and arms at, &c., did arm himself with pistols, guns, knives and other dangerous and unusual

service and engaged in the worship of Almighty God, are protected by the laws and constitution of this state from wanton interruption or disturbance. To entitle them to that protection, it is not requisite that they should be assembled in a church, chapel or meeting house; as in this state, houses set apart by religious societies permanently for worship are generally and indifferently called. That would be the rule, if the indictment were framed upon a statute protecting churches, or people worshipping in churches. But under the enlarged sense of the constitution, 'a place of worship' is constituted by the congregating of numerous worshippers thereat; for it is the right of conscience, the worship of the Supreme Being by his creatures that is protected, and not merely the edifice. Our opinion therefore is, that although the assembly was at a private house—as, we think, must be intended upon this indictment—the defendants were guilty of a gross misdemeanor in molesting those persons there engaged in offering their common prayers or united in other acts of worship to God."

(*p*) This indictment was framed in 1759 by Benjamin Chew, the then attorney-general of the province.

(*q*) State *v.* Huntley, 3 Iredell 418.

Gaston J. said: "The argument is, that the offence of riding or going about armed

weapons, and being so armed did go forth and exhibit himself openly, both in the day time and in the night, to the good citizens of Anson

with unusual and dangerous weapons, to the terror of the people, was *created* by the statute of Northampton, 2d Ed. III. c. 3; and that, whether this statute was or was not formerly in force in this state, it certainly has not been since the first of January, 1838, at which day it is declared in the Rev. Stats. (c. 1, s. 2), that the statutes of England and Great Britain shall cease to be of force and effect here. We have been accustomed to believe that the statute referred to did not *create* this offence, but provided only special penalties and modes of proceeding for its more effectual suppression; and of the correctness of this belief we can see no reason to doubt. All the elementary writers who give us any information on the subject, concur in the representation; nor is there to be found in them, as far as we are aware of, a *dictum* or intimation to the contrary. Blackstone states, that 'the offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land; and is *particularly* prohibited by the statute of Northampton, 2 Ed. III. c. 3, upon pain of forfeiture of the arms and imprisonment during the king's pleasure;' 4 Bla. Com. 149. Hawkins, treating of offences against the public peace, under the head of 'Affrays,' pointedly remarks, 'but granting that no *bare words* in judgment of law carry in them *so much terror as to amount to an affray*, yet it seems certain that in some cases there may be an affray where there is no actual violence, as where a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people, *which is said to have been always an offence at common law*, and *strictly* prohibited by many statutes;' Hawk. P. C. b. 1, c. 28, s. 1. Burns and Tomlyns inform us, that this term 'affray,' is derived from the French word '*effrayer*,' to affright, and that *anciently it meant no more*, 'as where persons appeared with armour or weapons not usually worn, to the terror of others.' Burns' Verbo, 'Affray.' It was declared by the Chief Justice in Sir John Knight's case, that the statute of Northamption was made in affirmance of the common law; 3 Mod. Rep. 117. And this is manifestly the doctrine of Coke, as will be found on comparing his observations on the word 'affray,' which he defines (3 Inst. 158) 'a public offence to the terror of the king's subjects, and so called because it affrighteth and maketh men afraid, and is inquirable in a *leet* as a common nuisance,' with his reference immediately thereafter to this statute and his subsequent comments on it (3 Inst. 160), where he cites a record of the 29th year of Ed. I. showing what had been considered the law *then*. Indeed if those acts be deemed by the common law, crimes and misdemeanors which are in violation of the public rights and of the duties owing to the community in its social capacity, it is difficult to imagine any which more unequivocally deserve to be so considered than the acts charged upon this defendant. They attack directly that public order and sense of security which it is one of the first objects of the common law, and ought to be of the law of all regulated societies, to preserve inviolate; and they lead almost necessarily to actual violence. Nor can it for a moment be supposed that such acts are less mischievous here, or less the proper subjects of legal reprehension, than they were in the country of our ancestors. The bill of rights in this state secures to every man indeed the right to 'bear arms for the defence of the state.' While it secures him a *right* of which he cannot be deprived, it holds forth the *duty* in execution of which that right is to be exercised. If he employ those arms which he ought to wield for the safety and protection of his country, to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege with which he has been invested.

"It was objected below, and the objection has been also urged here, that the court erred in admitting evidence of the declarations of the defendant, set forth in the case, because those or some of them at least, were acknowledgments of a different offence from that charged. But these declarations were clearly proper, because they accompanied, explained and characterized the very acts charged. They were not received at all as *admissions* either of the offence under trial or any other offence. They were constituent parts of that offence.

"It has been remarked that a double-barrelled gun, or any other gun, cannot in this country come under the description of 'unusual weapons,' for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an 'unusual weapon' wherewith to be armed and clad. No man amongst us carries it about with him as one of his every day accoutrements—as a part of his dress—and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving state, as an appendage of manly equipment. But although a gun is an 'unusual weapon,' it is to be remembered that the carrying of a gun, *per se*, constitutes no offence. For any lawful purpose, either of business or

aforesaid, and in the said highway and before the citizens aforesaid, did openly and publicly declare a purpose and intent, one J. H. R. and other good citizens of the state then and there being in the peace of God and the state, to beat, wound, kill and murder, which said purpose and intent the said R. S. H. so openly armed and exposed and declaring, then and there had and entertained, by which said arming, exposure, exhibition and declarations of the said R. S. H. divers good citizens of the state were terrified and the peace of the state endangered, to the evil example, &c., to the terror of the people, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Carrying a dangerous weapon, under Indiana Rev. Stat.(*r*)

That on, &c., at, &c., and on divers other days and times, &c., A. B. did then and there unlawfully carry concealed in his pocket, a certain dangerous weapon, viz. a certain pistol, he not being a traveller, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Maliciously firing guns into the house of an aged woman and killing a dog belonging to the house.(*s*)

That R. T. and J. L., late of, &c., on, &c., with force and arms at the house of one S. R. an aged woman, situate in the county aforesaid, did then and there wickedly, mischievously and maliciously, and to the terror and dismay of the said S. R., fire several guns, and then and there did shoot and kill a dog belonging to said house, without any legal authority, against, &c. (*Conclude as in book* 1, *chap.* 3).

Breach of peace, tumultuous conduct, &c., in Vermont.(*t*)

That H. B., &c., on, &c., and on divers other days and times be-

amusement, the citizen is at perfect liberty to carry his gun. It is the wicked purpose and the mischievous result, which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm a peaceful people."

(*r*) State *v.* Duzan, 6 Blackf. 31.

"We think this indictment is good. The objection that the pistol is not stated to have been loaded is insufficient. The statute says, 'that every person, &c., who shall wear or carry any dirk, pistol, sword in cane, or other dangerous weapon concealed, shall,' &c.; Rev. Stats. 1838, p. 217. The statute does not require that the pistol should be loaded."

(*s*) Sustained in State *v.* Langford, 3 Hawks 381. See for similar precedents, *ante*, p. 216, *et seq.*

(*t*) This count was sustained in State *v.* Benedict, 11 Verm. 237.

Redfield J.: "Whatever was once thought upon this subject, it is now well settled, that mere threats in words not written, is not an indictable offence at common law. It is said in many of the books that it was formerly indictable. This might have been and probably was the case at the time the statute in this state in relation to the subject was passed. It is there said, 'if any person shall in any manner disturb or break the peace, by tumultuous and offensive carriage, by threatening, quarrelling, challenging, assaulting, beating or striking any other person,' he shall be liable, on conviction, to pay such fine as 'the court, taking into consideration the situation of the party smiting or being smitten, the instrument and danger of the assault, the time, place and provocation, according to the nature of the offence, shall adjudge.'

"There is another reason why here more than at common law, mere threats should be considered an offence punishable by indictment. At common law the person threatened can swear the peace against the offender and obtain redress in that way, by obtaining

tween that date and the time of this presentment, with force and arms at, &c., did greatly disturb and break the peace by tumultuous and offensive carriage and by threatening, quarrelling and challenging, and by lying in wait for one S. B., and by threatening to kill the said S. B., to the great disquiet, terror and alarm of the said S. B. and other good citizens of this state, and other wrongs then and there did, to the evil example, &c., contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Refusing to aid a constable in quelling a riot.(*u*)

That heretofore, to wit, on, &c., at, &c., divers disorderly persons to the number of twenty and more, to the jurors aforesaid as yet unknown, then and there did unlawfully, riotously and routously assemble and gather together to disturb the peace of our lady the queen, and being then and there so unlawfully, riotously and routously assembled and gathered together, did commit divers outrages, to the great terror of all the liege subjects of our said lady the queen, as well inhabiting and residing as passing and repassing there, and against the peace of our said lady the queen, her crown and dignity; and the jurors aforesaid do further present, that one D. H. then and there being a constable of and for the county aforesaid, and in the due execution of his said office then and there did endeavour to prevent and restrain the said persons so assembled and committing such outrages as aforesaid, from continuing to make the said riot and breach of the peace, and him the said D. H. being such constable as aforesaid, and so acting according to the duty of his said office, the said persons so unlawfully, riotously and routously assembled and gathered together and disturbing the peace of our said lady the queen, with force and arms did then and there violently, forcibly and unlawfully resist and obstruct in the execution of his duty; and that he the said D. H. being such constable as aforesaid, thereupon, being then and there on the day and in the year aforesaid, in the parish aforesaid in the county aforesaid, did in his proper person apply to one T. B., late, &c., being then and there present, and in her majesty's name did then and there on the day and in the year aforesaid, at, &c., charge and require the said T. B. to aid and assist him the said D. H. in the execution of his office and the preservation of the peace of our said lady the queen, and for securing the said persons so unlawfully, riotously and routously assembled to disturb the queen's peace as aforesaid, still then and there continuing to resist and obstruct the said D. H. in the due execution of his office, in order to their being dealt with according to law; yet he the said T. B. not regarding his duty in this respect, and then and there well knowing the said D. H. was such constable as aforesaid, and so in the execution of his duty as aforesaid, to wit, on, &c., at, &c., with force and arms, unlawfully,

security against the commission of the offence threatened. This mode of primitive justice has not been much resorted to, if indeed it exists in this state. It is believed the legislature intended the remedy here given to supersede its necessity. The sending of threatening letters is an offence of a different character."

(*u*) R. *v.* Brown, 1 C. & M. 175.—Verdict, guilty.

obstinately and contemptuously did neglect and refuse to aid and assist the said D. H. for the purpose and on the occasion aforesaid, in the manner he the said T. B. was requested, charged and commanded to do as aforesaid, or in any other manner whatever, contrary to his duty in that behalf, in manifest contempt of our said lady the queen and her laws, to the great hinderance of justice, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Refusing to assist a constable in carrying offender to prison.(*v*)

That whereas a certain E. E., late of Philadelphia county aforesaid, spinster, on, &c., at, &c., was duly arrested, on suspicion of having feloniously taken, stolen and carried away eight yards cambric, &c., of the goods and chattels of a certain D. M., and then and there did appear in her proper person before E. T., Esq., one of his majesty's justices of the peace in the said County of Philadelphia to keep, and also divers trespasses, felonies and other misfeasances in the said county perpetrated, to hear, try and determine, assigned, to be examined touching the said felony; and whereas the aforesaid E. T., the day and year aforesaid at the county aforesaid, one of his majesty's justices as aforesaid being, did make his warrant of commitment in writing, with the seal of him the said E. T. sealed, bearing date the day and year aforesaid, to the sheriff or keeper of the common gaol of the County of Philadelphia directed, by which it was commanded the said sheriff or keeper of the common gaol aforesaid, that he should receive into his custody the body of the said E. E., who was charged with the felony aforesaid, and her safely keep, till she should be from thence delivered by due course of law, which said warrant of commitment with the body of her the said E. E., the said E. T. then and there did deliver to a certain P. S., one of the constables of the township of Lower Dublin in the county aforesaid, then and there being by him to be carried to the common gaol of the said county, and there to be safely delivered to the sheriff of the said county or the keeper of the gaol of the said county, in due form of law, and that the aforesaid P. S. then and there did take and receive the said E. E. into his custody, and the said P. S., one of the constables as aforesaid, then and there being, then and there did require and in the name of our said lord the now king, did command a certain J. W., late of the County of Philadelphia, farmer, then and there to aid and assist him the said P. S. to carry and convey the body of the said E. E. to the common gaol of the County of Philadelphia: Nevertheless the said J. W., to aid and assist him the said P. S. to carry and convey the body of the said E. E. to the common gaol of the said County of Philadelphia, contemptuously did refuse and deny, to the manifest contempt of our said lord the now king and his law, to the evil and pernicious example of all others in such case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*v*) This form was prepared in 1760, by Benjamin Chew, the then attorney-general of Pennsylvania.

Assault and rescue.(*w*)

That on, &c., at, &c., J. H., Esq., then and still being one of the justices of this commonwealth, the peace in the said county to keep, assigned, and also to hear and determine divers felonies and misdemeanors in the same county committed, made his warrant in writing under his hand and seal, directed to the high sheriff of the said county, and to any constable therein, commanding him to take and arrest the body of a certain J. R., and him to bring before the said J., or some other justice of the peace, there to answer a certain charge of forcibly opposing one J. F., constable of the said city, in the execution of his duty before that time made, which warrant was delivered to J. W., then one of the constables for the City of Philadelphia in the county aforesaid, to be executed in due form of law, by virtue of which same warrant the aforesaid J. W. afterwards, to wit, on, &c., at, &c., aforesaid, and within the jurisdiction of this court, did take and arrest the body of J. R. in the warrant aforesaid named, and him the said J. R. in his custody, by virtue of the said warrant, then and there had; and that J. F. and J. H., both late of the county aforesaid, yeomen, afterwards, to wit, on, &c., with force and arms, &c., at, &c., in and upon the same J. W. then and there as aforesaid being one of the constables of the same city, in the peace of God and this commonwealth, and in the execution of his said office then and there being, with force and arms an assault did make, and him the said J. R., out of the custody of the said J., and against the will of the said T. W., then and there with force and arms unlawfully did rescue and put at large, to go where he would, and that the said J. F. and J. C. the said J. R., out of the custody of the said J. W. and against the will of the said J. W., then and there with force and arms did rescue and put at large, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against two for a rescue, one of them being in custody of an officer of the marshal's court, upon process, &c.(*x*)

That on, &c., our said lord the king, by his writ issued out of the court of our said lord the king of his palace of Westminster, under the seal of the said court, bearing date the same day and year aforesaid, directed to the bearers of the verges of the household of our said lord the king, officers and ministers of the court of our said lord the king of his palace of Westminster and every of them, did command

(*w*) Drawn in 1786, by Mr. Bradford.

(*Rescue by third persons*). Reseue is where a third person procures or assists the escape of a prisoner; and this is at the least criminal, in the same degree with the act of a party breaking prison. In case of treason, a stranger rescuing a traitor is himself guilty of treason; Hawk. b. 2, c. 21, s. 7; in case of felony, he is guilty of felony, if the principal be convicted; and in all cases he is guilty of a high misdemeanor at common law, for which he may be prosecuted, whatever may be the fate of the party whom he aided; Hawk. b. 2, c. 21, s. 6. At common law, unsuccessful attempts to procure the escape of a felon, were not felonies; R. *v.* Tilley, 2 Leach 671; R. *v.* Stanly, R. & R. C. C. 432; though where the attempt is in any degree successful, it becomes indictable; People *v.* Tompkins, 9 Johns. 70. See as to forms for same, Index, titles, "Escape," "Attempts to Commit Offences," &c.

(*x*) Stark. C. P. 463.

them and every of them, that they should take or one of them should take, by their bodies, R. A. and W. C., if they should be found within the jurisdiction of the court aforesaid, and them safely keep, so that they might have, or one of them might have, their bodies before the judges of the court aforesaid, at the next court of the palace of our said lord the king of Westminster aforesaid, on, &c., then next following, to be holden at S. in the Count of Surrey, to answer T. W. of a plea of trespass upon the case, to the damage of the said T. W. of pounds, which said writ afterwards, and before the delivery thereof, &c., which same writ so endorsed, afterwards, and before the return of the same, to wit, on, &c., at, &c., and within the jurisdiction of that court, was delivered to one G. N., then one of the bearers of the verges of our said lord the king, officers and ministers of the court of our said lord the king, to be executed in due form of law; by virtue of which said writ, the said G. N. afterwards, and before the return thereof, to wit, on, &c., at, &c., and within the jurisdiction of that court, did take and arrest the body of the said R. A. in the writ aforesaid named, and him the said R. A. in his custody, by virtue of the said writ, then and there had; and that the said R. A., late of the parish aforesaid in the county aforesaid, yeoman, and C. D., late of the same, blacksmith, afterwards, to wit, on, &c., with force and arms at, &c., in the county and within the jurisdiction aforesaid, in and upon the said G. N. then and there as aforesaid being one of the bearers of the verges of the household of our said lord the king, officers and ministers of the court aforesaid, and having the said R. A. in custody for the cause aforesaid, and in the due execution of his said office, then and there also being, did make an assault, and him the said G. N. then and there did beat, wound and ill-treat; and that the said C. D. him the said R. A., out of the custody of the said G. N., and against the will of the said G. N., then and there with force and arms unlawfully did rescue and put at large to go whithersoever he would; and that the said R. A., himself out of the custody of the said G. N., and against the will of the said G. N., then and there with force and arms unlawfully did rescue and escape and go at large whithersoever he would, to the great hinderance and obstruction of justice, in contempt of our said lord the king and his laws, to the great damage of the said G. N., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add a count for a common assault*).

Assault and rescuing goods seized as a distress for rent after a fraudulent removal.(*y*)

That on, &c., and continually afterwards until, &c., one M. E. did

(*y*) Dickinson's Q. S. 6th ed. 370; see Stark. C. P. 389. By 8 Hen. c. 14, it is enacted, that in any case any lessee of any messuages, tenements, &c., on demise whereof any rents shall be reserved or made payable, shall fraudulently and clandestinely convey and carry off from such demised premises, his goods and chattels, with intent to prevent the landlord or lessor from distraining the same for arrears of the rent, the lessor or landlord may take and seize such goods and chattels wherever they may be found, as a distress, and sell them in the same way as if they had been regularly distrained on the premises; and by 2 Geo. II. c. 19, s. 1, the time is enlarged to thirty days.

hold of one J. W., a certain room or apartment with the appurtenances, being part and parcel of a certain messuage or dwelling house of him the said J. W., situate, &c., by virtue of a certain demise thereof made by and from the said J. W. to the said M. E. at and under the weekly rent of fifteen shillings, reserved and made payable by the said demise to the said J. W. on the said, &c., and that on the said, &c., the said sum of fifteen shillings was due in arrear and unpaid for the rent aforesaid, by virtue of the said devise to him the said J. W. And the jurors, &c., do further present, that the said M. E. on, &c., at, &c., aforesaid, did fraudulently and clandestinely convey and carry off from the said demised premises, his goods and chattels, that is to say, one pewter dish, &c., (*here set out the goods*), of the value of the said sum of fifteen shillings, with intent to prevent the said J. W., the lessor aforesaid, from distraining the same for the said rent so reserved, in arrear due and unpaid as aforesaid; whereupon the said J. W. afterwards, and within the space of five days next ensuing the said conveying and carrying off the said goods, to wit, on, &c., at, &c., aforesaid, did find the said goods and chattels, and the same goods and chattels so found, did then and there in due form of law seize as a distress for the said rent so due and in arrear as aforesaid, and being also then unpaid, and the said goods and chattels in his custody and possession, for the cause aforesaid, then and there had; and that the said M. E., late of, &c., aforesaid, and S. his wife, afterwards, to wit, on, &c., last aforesaid, at, &c., aforesaid, in and upon the said J. W. in the peace of God and our said lady the queen then and there being, did make an assault, and the said goods and chattels (so as aforesaid, for the cause aforesaid, taken and seized), out of the possession, and against the will of the said J. W. unlawfully and injuriously did take, rescue and carry away (the said sum of fifteen shillings so due for rent as aforesaid, or any part thereof, not being then paid or satisfied to the said J. W.), against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add a count for a common assault*).

Assault on an officer of justice, and taking from him goods which had been seized by him on execution.(z)

That on, &c., one J. D. then being one of the deputies of the sheriff of said County of Suffolk, by virtue of a certain writ of attachment to him directed, purchased out of the clerk's office of the Court of Common Pleas for the County of Suffolk, in due form of law attached certain goods and chattels, and placed the same in the care, keeping and custody of one T. J. S., and the said T. then being lawfully in possession of the goods and chattels aforesaid, under the authority and deputation of the said J. D. in his capacity of deputy of the said sheriff, and while the said T. was so in possession, they the said D. D. B., A. K. and H. H. F., at said Boston, on, &c., with force and arms in and upon said T. made an assault, and him the said T. then

(z) See Com. v. Kennard, 8 Pick. 133, in which case the indictment in the text was used. The defendant met it by a special plea, which will be found hereafter in Book VI.

and there beat, bruised and evil-treated, and with force and a strong hand deprived the said T. of the care, custody and possession of the goods and chattels aforesaid, and other wrongs and injuries to said T. then and there with like force did, against, &c. (*Conclude as in book* 1, *chap.* 3).

Rescuing goods distrained for rent of a house.(*a*)

That on, &c., one M. D., in due form of law did take and distrain one oak table of the value of ten shillings, and one feather bed of the value of thirty shillings, and one clock of the value of two pounds, of the goods and chattels of one W. H., labourer, then being in a certain dwelling house of the said M. D. situate in, &c., aforesaid, which same distress was taken by him the said M. D. for the sum of five pounds, being then due for rent, for one whole year, in arrear from the said W. H., to him the said M. D. for the house aforesaid; and that the said M. D., the said goods and chattels then and there had and lawfully detained in his custody for the cause aforesaid. And the jurors, &c., do further present, that N. W., late of, &c., afterwards, to wit, on, &c., with force and arms at, &c., aforesaid, the said goods and chattels so as aforesaid by the said M. D. taken and distrained, and in the custody of him the said M. D. then and there lawfully being, from and out of the custody and against the will of him the said M. D., then and there unlawfully and injuriously did rescue, take and carry away (the said sum of five pounds for the rent in arrear as aforesaid being due, nor any part thereof being then paid), against, &c. (*Conclude as in book* 1, *chap.* 3).

Riot and rescue of fugitive slaves from their masters.(*b*)

That on, &c., at, &c., two persons named H. N. and A. B., held to service or labour in the State of Maryland, under the laws thereof, the said H. and A. being the property of one J. H. K. of the said State of Maryland, and the said H. and A. having escaped into the said State of Pennsylvania, were then and there, to wit, on, &c., at, &c., arrested by the said J. H. K., the owner of the said H. and A., (*or if the case be so, by one G., the authorized agent of the said H. the owner*), as fugitives from service or labour from the said State of Maryland. And the said H. and A. were then and there, to wit, on, &c., aforesaid, at, &c., lawfully in the custody and under the control of the said J. H. K., to whom their service or labour was due. And the jurors aforesaid do further present, that J. C., &c., et al.,

(*a*) Dickinson's Q. S. 6th ed. 370.

The civil remedy by 2 Wm. & Mary, sess. 1, c. 5, s. 4, whereby treble damages and costs are recoverable for pound breach or rescue of goods distrained, is the usual remedy resorted to, but nevertheless, an indictment will lie at all events, if breach of the peace occurs.

(*b*) This count was sustained in Com. v. Clellans, tried before Judge Hepburn in Carlisle, 1848, and under which the defendants were sentenced, after the indictment having been closely canvassed by eminent counsel. Subsequently the sentence was reversed by the Supreme Court on the ground that the punishment was not regular, no exception being taken to the correctness of the indictment.

(*here insert the names and additions of all persons known to be guilty of the offence*), together with divers, to wit, thirty other persons to the jurors aforesaid as yet unknown, being rioters, routers and disturbers of the peace, on, &c., at, &c., with force and arms, to wit, with clubs, staves and other hurtful weapons, did unlawfully, riotously, routously and tumultuously assemble and meet together, to disturb the peace of the said commonwealth, and then and there unlawfully, riotously, routously and tumultuously to seize, carry away and rescue the said H. and A., fugitives from service or labour as aforesaid, from and out of the custody and from under the control of the said J. H. K.; and then and there also unlawfully, riotously, routously and tumultuously to aid the said H. and A., fugitives from service or labour as aforesaid, to escape from the said J. H. K. And the said J. C., &c., together with the said other persons to the jurors aforesaid as yet unknown, on, &c., at, &c., being so then and there assembled and met together as aforesaid, with force and arms as aforesaid, unlawfully, riotously, routously and tumultuously did seize, carry away and rescue the said fugitives from service or labour, to wit, the said H. and A., from and out of the custody and from under the control of the said J. H. K., and did thereby then and there unlawfully, riotously, routously and tumultuously cause and procure the said H. and A. to escape from and out of the custody and from under the control of the said J. H. K., to the great damage of the said J. H. K., in contempt, &c., to the great terror and disturbance not only of the peaceable people and inhabitants of the said commonwealth there passing and repassing, residing and being, but of all others, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Prison breach.(*c*)

That on, &c., at the district aforesaid, R. P., Esq., Judge of the District Court of the said United States issued his warrant under his hand and seal to W. N., Esq., marshal of the said district directed, and the said warrant to the said marshal then and there delivered, wherein and whereby the said marshal was directed that he take the body of J. E., late of Northampton County in the same district, yeoman, and bring him before the said R. P., to find sufficient sureties for his the said J. E.'s personal appearance at the Circuit Court of the said United States for the middle circuit and district aforesaid, at the then next stated session thereof, to be holden at Philadelphia, on, &c., to answer a charge of being concerned in an unlawful combination and conspiracy to impede the operation of a law of the said United States, entitled an act to lay and collect a direct tax within the United States, and to such other matters as should in behalf of the said United States be then and there objected against him, and further to be dealt with according to law. Which said W. N., the marshal aforesaid, afterwards, that is to say, on the seventh day of March, in the year aforesaid, at the district aforesaid, by virtue of the said warrant, did

(*c*) U. S. *v.* Eyerman; U. S. Circuit Court for Pennsylvania, 1799. The bill was drawn by Mr. Rawle, then district attorney, and was sustained after a verdict of guilty.

arrest and take him the said J. E., and him the said J. E. in his custody by virtue of the said warrant then and there had. And the grand inquest aforesaid, upon their respective oaths and affirmations, do further present, that the said J. E., on, &c., at the district aforesaid, so being in the lawful custody of him the said W. N., Esq., marshal aforesaid, with force and arms and against the will of the said W. N., prison did break, and out of the said custody of the said W. N., the said marshal, did liberate himself and go at large, in contempt of the said United States and the laws thereof and the administration of justice therein, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Assault on a constable, &c.

That A. B., on, &c., in and upon one E. F. (then being one of the constables of the said parish of C., in the said County of D.,(*d*) in the peace of God and the said, &c., and in the due execution of his said office, then and there also being), did make an assault; and him the said E. F. then and there did beat, wound and ill-treat, so that his life was greatly despaired of, and other wrongs, &c.

(*Add a count for a common assault*).

Another form for same.(*e*)

That R. W., late of, &c., on, &c., with force and arms at, &c., an assault did make upon J. K. of, &c., then and ever since a constable of said town, &c., legally authorized and duly qualified to discharge and perform the duties of said office, and being then and there in the due and legal execution of the same, and him the said J. K. did then and there beat, abuse and ill-treat, and in the due and lawful execution of said office did then and there unlawfully and knowingly obstruct, hinder, resist and abuse, by assaulting, beating, threatening, pushing and refusing to submit to the lawful authority of him the said K., so as aforesaid then and there in the lawful execution of his said office, against, &c., of evil example, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Averring arrest of defendant by said constable, &c., and proceedings before a justice of the peace, upon which defendant was committed in default of bail, charging resistance by defendant to the officer when detaining him in custody.

That on, &c., the said R. W., together with J. B., C. L. B. and H. H., at, &c., were by J. K. of the said town of New Haven, then and ever since a constable of said town of New Haven, legally authorized and duly qualified to execute and perform the duties of said office, at said town of New Haven and within the precincts of the said K.,

(*d*) See State *v.* Downer, 8 Verm. 424.

This is a sufficient allegation that he was a constable, Stark. C. P. 178, 179, 187, 188; and the allegation would be satisfied by evidence that he acted as such; Gordon's case, Leach 581; 4 T. R. 366; 5 T. R. 607; 3 T. R. 632.

(*e*) This indictment was prepared by Mr. Kimberly, state's-attorney in New Haven in 1837, and was sustained by the court, on motion for arrest of judgment. See for other forms for same, *post*, p. 506–7–9.

constable as aforesaid, lawfully arrested and brought before T. B., Esq., then and ever since a justice of the peace for New Haven county, duly qualified and sworn, residing in said town of New Haven, at his office in said town of New Haven, by virtue of a warrant then in the hands of said K., issued by the said T. B., Esq., as such justice, on the complaint of J. C. H., Esq., of said town of New Haven, then and there a grand juror of said town, charging them the said R. W., J. B., C. L. B. and H. H. with the crime of theft, to wit, at New Haven aforesaid, which warrant was directed to the sheriff of New Haven county or his deputy or either of the constables of the town of New Haven in said county, commanding them to arrest the bodies of the said R. W., J. B., C. L. B. and H. H. and them forthwith have before the said T. B., Esq., a justice of the peace for said county, or some other justice of the peace for said county in said town of New Haven, to answer to the charges alleged against them in the complaint aforesaid of the said J. C. H., grand juror as aforesaid, and be dealt with therein as the law directs; and the said R. W., J. B., C. L. B. and H. H. were then and there by the said J. K. as constable as aforesaid, and in the due execution of his said office, by virtue of said warrant detained and held in custody before said Justice B., to wit, at New Haven aforesaid, whilst holding a Justice Court for the examination and trial upon the charge aforesaid, and the said T. B., Esq., so holding a Justice Court as aforesaid for the purposes aforesaid, having inquired into the allegations contained in said complaint, and finding it necessary to adjourn said trial to a future time, did thereupon consider and order that they the said R. W., J. B., C. L. B. and H. H. should become bound each of them with surety in a recognizance in the sum of seventy-five dollars each to the treasurer of the County of New Haven, that they should respectively appear before him the said Justice B. on the, &c., to which time said trial was by said justice adjourned, then and there to answer to said complaint, and in default thereof to be committed to the New Haven county gaol; and the said W., B., B. and H. having neglected and refused to become bound and while so in the custody of the said K. as constable as aforesaid, and while the said K. was so in the execution of his said office as constable as aforesaid, endeavouring to hold and detain them and preparing to commit them to the keeper of the gaol in said county in compliance with the order of said court, so as aforesaid holden by the said T. B., Esq., justice of the peace for New Haven county as aforesaid, the said R. W. did then and there with force and arms at the town of New Haven aforesaid, well knowing all the facts aforesaid, wilfully and knowingly resist, hinder, obstruct and abuse the said K., so a constable of the town of New Haven as aforesaid, and so in the execution of his said office as aforesaid, by threatening, assaulting, striking and pushing him the said K., and refusing to submit to his lawful authority, against, &c. (*Conclude as in book* 1, *chap.* 3).

Resistance to a constable employed in the arrest of a fugitive charged with larceny.(*f*)

That H. G. T., F. S., W. W., H. H. S. and R. W., &c., together with divers others to the number of fifty, evil disposed persons, whose names are to this inquest as yet unknown, on, &c., at, &c., with force and arms, did unlawfully, riotously and routously assemble together to disturb the peace, and being so assembled, in and upon one J. S., then and there being one of the constables of the City of Boston, in the due and lawful discharge of the duties of his office as constable of said city, being in the service of a legal precept to him directed, and having then and there lawfully one G. L. otherwise called A. M. in his custody as a prisoner to be examined on a charge of larceny by the Police Court of said city, according to a certain lawful precept to him directed and issued by said Police Court under its seal, upon a complaint made and sworn to according to law, said Police Court then and there having lawful jurisdiction in the premises, and said S. then and there being in the peace of the commonwealth, an assault did make unlawfully, riotously and routously, and him the said S. did then and there unlawfully, riotously and violently beat, wound and ill-treat, and resist, hinder and obstruct him in the discharge of the duties of his office of constable, and then and there unlawfully, riotously and routously did attempt to rescue said L. from the custody of said S., and did then and there unlawfully, riotously and routously throw a dangerous missile called a brick-bat at and towards said S., which missile hit and dangerously wounded one A. G. then and there being one of the watchmen of said City of Boston, who then and there was acting as an assistant of said S., constable as aforesaid; and other wrongs and injuries unlawfully, riotously and routously did and committed, &c.

Resistance to a peace officer in the performance of his duties; form used in Boston.

That A. B., &c., on, &c., at, &c., with force and arms, in and upon one then and there in the peace of said commonwealth being, an assault did make, he the said also then and there being a peace officer, called and then and there also being in the due and lawful discharge of his duties as such officer. And so the jurors aforesaid, on their oath aforesaid, do say and present, that the said at Boston aforesaid, on the said day of said with force and arms assaulted the said as such officer, and hindered, resisted and obstructed him in the discharge of his lawful duties, in manner and form aforesaid, against, &c. (*Conclude as in book* 1, *chap.* 3).

(*f*) For what purpose the special matter in this case is so elaborately set out, does not appear, though it was conceded by the attorney-general that it need not have contained more than the mere allegation of a riotous assault on an officer while in execution of a legal warrant; Com. v. Tracy, 5 Mete. 536. It was held by the court that the averment as to the warrant, &c., was supported by evidence that the officer was in the service of a legal precept, and had the defendant in his custody as a prisoner, to be examined on a charge of larceny in another state, and of being a fugitive from justice.

Resistance to the marshal of the United States in the service of a writ of arrest.(g)

That heretofore, to wit, on, &c., a certain judicial writ of arrest, directed to the marshal of the said District of Pennsylvania, was duly awarded and issued by and out of the District Court of the United States in and for the said District of Pennsylvania, in a certain cause, civil and maritime, between G. O., A. W., A. R. and D. C., libellants, and E. S. and E. W., surviving executrives of D. R., Esq., deceased, respondents, which said judicial writ of arrest was duly delivered to J. S., Esq., an officer of the said United States, to wit, marshal of the said District of Pennsylvania, at Philadelphia in the district aforesaid, on the said in the year aforesaid, and was of the purport and effect following, that is to say:

"United States,
District of Pennsylvania, } *sct.*:

[SEAL.] "Richard Peters, Judge of the District Court of the United States in and for the District of Pennsylvania, to the Marshal of the same district, Greeting:

"Whereas heretofore, to wit, on, &c., it was adjudged, ordered and decreed in a certain cause, civil and maritime, then depending in this court between G. O., A. W., A. R. and D. C., libellants, and E. S. and E. W., surviving executrives of D. R., Esq., deceased, respondents, that the certificates in the libel in the said court filed, mentioned, should be transferred and delivered, and the interest moneys paid over by the said respondents to the said libellants, in execution of the judgment and decree of the Court of Appeals, as stated in the proceedings in the said cause, with costs; provided however, that the bond of indemnity should be cancelled or delivered to the said respondents on their compliance with the said decree:

"Therefore, you are hereby commanded, in the name and by the authority of the United States, that you forthwith attach and arrest the bodies of the said respondents, E. S. and E. W., and them so attached and arrested, to keep and detain under safe and secure arrest until they shall in all things comply with and perform the final sentence or decree pronounced in this cause on the said .

"Given under my hand and the seal of the District Court, at Philadelphia, this and in the year of the independence of the said United States.

"R. P."

"S. D. C., Clerk Dist. Court."

And the grand inquest aforesaid do further present, that the said judicial writ of arrest being duly awarded, issued and delivered as aforesaid, afterwards, to wit, on, &c., at, &c., in the said district, the said J. S. then and there being an officer of the said United States, to wit,

(g) This indictment, which was incident to a serious collision between the authorities of the United States and of the State of Pennsylvania, was met by a plea which will be examined under the chapter *Pleas*, to which the attention of the reader is directed. The indictment was sustained by the court. The bill bears the name of Mr. A. J. Dallas.

marshal of the district aforesaid, attempted to serve and execute the said writ of arrest in manner and form as he was therein commanded; and that M. B., late of the said district, esquire, J. A., late of the said district, yeoman, W. C., late of the said district, yeoman, C. W., late of the said district, yeoman, S. W., late of the said district, yeoman, A. O., late of the said district, yeoman, D. P., late of the said district, yeoman, C. H., late of the said district, yeoman, and J. K., late of the said district, yeoman, with divers other persons to the said grand inquest unknown, being then and there well and truly informed of the premises, then and there with force and arms did knowingly, wilfully and unlawfully obstruct, resist and oppose the said J. S., then and there being an officer of the said United States as aforesaid, to wit, marshal of the said district, in attempting as aforesaid then and there to serve and execute the said judicial writ of arrest in manner and form as he was therein commanded, to the great damage of the said J. S., to the great hinderance and obstruction of justice, to the evil example, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add second count for assault on same*).

Refusal to aid a constable in the service of a capias ad respondendum issued by a justice of the peace.(*h*)

That D. P., then and there being one of the justices of the peace in and for the County of Bucks, duly commissioned, qualified and empowered to perform the duties of that office, and being so commissioned, qualified and empowered, did, on, &c., at, &c., then and there make his certain writ in writing under his hand and seal, directed to the constable of the borough of Newhope, or to the next constable of the said county most convenient to the defendant, in the county aforesaid; by which said writ the constable aforesaid was commanded to take J. H., of Solesbury township in the said county, and bring him before the subscriber, a justice of the peace of said county, forthwith on the service thereof, to answer L. S. in a plea of debt not exceeding one hundred dollars, and that should be his warrant; which said writ was afterwards, to wit, on, &c., delivered to one S. H. P., town constable of the borough of Newhope in the said county, duly elected, appointed and qualified to perform the duties of that office, to be by him executed in due form of law, and that the said S. H. P. so being town constable as aforesaid, afterwards, to wit, on, &c., by virtue of the said writ, did then and there, at the county aforesaid and within the jurisdiction of this court, take and arrest the said J. H., and him the said J. H. the said S. H. P. in his custody, by virtue of the said writ then and there had, and that the said J. H. did then and there, at the county aforesaid, on the day and year last aforesaid, with force and arms, violently, forcibly and unlawfully resist and obstruct the said S. H. P. in the due execution of his said office, and attempt to escape

(*h*) Comfort *v.* Com., 5 Wh. 437. There was a refusal to arrest judgment on this indictment in the Quarter Sessions of Bucks county, and an affirmance of the judgment in the Supreme Court.

from his lawful custody and go at large, contrary to the will of the said S. H. P., and that he, the said S. H. P., being such town constable as aforesaid, thereupon did then and there, on the day and year last aforesaid, at the county aforesaid, and within the jurisdiction of this court, in his proper person apply to J. C., E. C., J. K., T. K. and W. K. Jr., all late of the township of Solesbury, in the said county, yeomen, and they the said J. O., E. C., J. K., T. K. and W. K. Jr., all being then and there present, and in the name of the Commonwealth of Pennsylvania did then and there, on the day and year last aforesaid, at the county aforesaid, charge and require them, the said J. C., E. C., J. K., T. K. and W. K. Jr., to aid and assist him in the preservation of the peace of the said commonwealth, and for the securing the said J. H., and for preventing the said J. H. from effecting his escape from and out of the lawful custody of him the said S. H. P.; he the said S. H. P. being then and there such town constable as aforesaid, in the due execution of his said office, in conveying the said J. H. before the said justice of the peace, to be dealt with according to law. Yet the said J. C., E. C., J. K., T. K. and W. K. Jr., all being then and there duly informed that the said S. H. P. was such town constable as aforesaid, and well knowing the same, and that he the said S. H. P. was in the due execution of his said office, and not regarding their duty in that respect, to wit, on the day and year last aforesaid, to wit, at the county aforesaid, and within the jurisdiction of the court, with force and arms, unlawfully, obstinately and contemptuously did neglect and refuse to aid and assist him, the said S. H. P., for the purpose and on the occasion aforesaid, in the manner they, the said J. C., E. C., J. K., T. K. and W. K. Jr., were charged and required to do as aforesaid, or in any other manner whatever, contrary to their duty in that behalf; whereby the said J. H. did then and there, to wit, on the day and year last aforesaid, at the county aforesaid, and within the jurisdiction of this court, effect his escape from and out of the lawful custody of him the said S. H. P., and against the will of the said S. H. P., he the said S. H. P. being then and there such town constable as aforesaid, and in the due execution of his said office, and did go at large in manifest contempt of our said commonwealth and her laws; to the great hinderance of justice, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Assault with intention to obstruct the apprehension of a party charged with an offence.(*i*)

That A. B., late of, &c., on, &c., with force and arms at, &c., in and upon one C. D., a subject of our said lady the queen then and there being, wilfully and unlawfully did make an assault, and him the said

(*i*) Dickinson's Q. S. 6th ed. 323. The following count, which formed the fourth in R. *v.* Fraser, 1 Mood. C. C. 419, will (though for cutting and wounding), be useful for framing indictments for common assaults, with intent to obstruct arrest:

"In and upon said J. C., in the peace of God and our said lady the queen then and there being, unlawfully, &c., did make an assault, and then and there unlawfully, &c., did cut and wound said J. C. in and upon the head and face of said J. C., with intent to resist and

C. D. did then and there beat, wound and ill-treat, with intent in so doing wilfully and unlawfully to obstruct, resist and prevent the lawful apprehension and detention of him the said A. B. for a certain offence, to wit, for, &c., (*here state the offence with which the defendant was charged*), for which said offence he the said A. B. was then and there liable by law to be apprehended, imprisoned and detained, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

And the jurors, &c., that the said A. B. heretofore, to wit, on, &c., aforesaid, with force and arms at, &c., aforesaid, in and upon the said C. D. wilfully and unlawfully did make an assault, and him the said C. D. did then and there beat, wound and ill-treat, with intent in so doing wilfully and unlawfully to obstruct, resist and prevent the lawful apprehension and detention of him the said A. B. for a certain offence, before then committed, to wit, at, &c., aforesaid, for the committing of which said last mentioned offence he the said A. B. was then and there liable by law to be apprehended, imprisoned and detained, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add a count for a common assault*).

Assault on a deputy-gaoler in the execution of his office.(*j*)

That A. B., late of the castle of Lancaster, in the County of Lancaster, labourer, on with force and arms, at the castle of Lancaster, at Lancaster aforesaid in the said county, in and upon one J. C., then and there being deputy-keeper of his majesty's gaol of the castle of Lancaster, and having the custody of divers persons confined in the said gaol, and then and there being in the due execution of his said duty and office of deputy-keeper as aforesaid, did make an assault, and him the said J. C. did beat, bruise, wound and ill-treat, so that his life then and there was greatly despaired of, and other wrongs to the said J. C. then and there did, to the great damage of the said J. C., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add a count for a common assault*).

Resisting a sheriff in execution of his office. First count, assault on sheriff at common law.(*k*)

That W. P. H., on, &c., at, &c., with force and arms, in and upon one A. S., in the peace of God and of this state then and there being, and then being sheriff of said County of Addison and in the due execution of his said office, then and there did make an assault, and him the said A. S., so being in the due execution of his said office aforesaid,

prevent the lawful apprehension and detainer of him the said M. F., for a certain offence by him committed, for which he the said M. F. was then and there liable by law to be apprehended and detained, that is to say, for then and there wilfully and maliciously committing damages and injury upon certain plants and roots then and there growing in a certain garden of and belonging to H. I., there situate, against the statute, &c., and against the peace, &c."

(*j*) Stark. C. P. 430.

(*k*) State *v.* Hooker, 17 Verm. 231. This, with a count for a common assault and battery, was considered by the Supreme Court as well pleaded.

then and there did hinder and impede, and then and there did beat, wound and ill-treat, and other wrongs to the said A. S. then and there did, to the great damage of the said A. S., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. The same under statute, specially setting out the execution which the sheriff was serving, &c.

That the said W. P. H., at, &c., aforesaid, on, &c., with force and arms, wilfully and knowingly did impede and hinder a civil officer, under the authority of this state in the execution of his office, to wit, A. S., sheriff of the County of Addison aforesaid, in the peace of God and this state then and there being, in then and there serving and attempting to serve and execute a legal writ of execution, to wit, a pluries writ of execution, regularly issued on a judgment rendered by the Honourable County Court in and for said County of Addison, at a term of said court begun and holden at Middlebury, in and for said County of Addison, on, &c.., said execution dated, &c., and signed by S. S., clerk of said court, and directed to any sheriff or constable in the state, and made returnable in sixty days from the date thereof, whereby, after reciting that H. G. of said Middlebury, by the consideration of the County Court begun and holden at Middlebury, in and for said County of Addison, on, &c., recovered judgment against the said W. P. H. and one C. H. in an action of trespass (the cause of which action it was adjudged by said court arose from the wilful and malicious act of the defendants), in the sum of three hundred and forty-one dollars and fifty-six cents damages, and for the sum of thirty-two dollars and seventy cents costs of suit, whereof execution remains to be done for the sum of three hundred and seven dollars and seventy cents, said officer as often before commanded, is therefore by virtue of said writ of execution, by the authority of the State of Vermont, commanded to cause to be levied of the goods, chattels or estate of the said W. P. H. and C. H., said sum of three hundred and seven dollars and seventy cents, with twenty-five cents more for said writ of execution and fifty cents for two others, and for want of the goods and chattels of said W. P. and C., shown or to be found by said officer within his precinct, commanding him to take the bodies of said W. P. H. and C. H., and them commit to the keeper of the common gaol of Middlebury, in said county, within said prison, which said writ of execution so duly issued as aforesaid, in full life, and in no way satisfied, paid or discharged, was on, &c., delivered to said A. S., sheriff as aforesaid, to serve and return, and afterwards, to wit, on, &c., at Middlebury aforesaid, the said A. S., then being sheriff as aforesaid, for want of the goods, chattels or lands of the said W. P. and C., shown him or to be found within his precinct whereon to levy said writ of execution, attempted to serve and execute said writ of execution as he was therein commanded, by arresting the body of said W. P. H.; and the said W. P. H. then and there unlawfully and wickedly intending to impede and hinder the said A. S. in the execution of his said office, and well knowing that said A. S. was sheriff of the County of Addison as aforesaid, and that said A. S. then and there had said writ of execution so duly issued and in full force as aforesaid to serve and execute,

and was then and there attempting to serve and execute said writ of execution, did with force and arms then and there impede and hinder the said A. S., sheriff as aforesaid, in attempting to serve and execute said writ of execution, in the execution of his said office, by beating and bruising the said A. S. with a large and heavy bludgeon on his head, shoulders and arms, to the great damage of the said A. S., to the great hinderance and obstruction of justice, and contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Assault on police officer of the City of Boston.(*l*)

That, &c., on, &c., at, &c., with force and arms, in and upon one G. L. an assault did make, said L. then and there being a police officer of the City of Boston, and then and there being in the lawful discharge of his duty as such police officer, and him then and there did beat, wound, bruise and evil treat, and did then and there obstruct, hinder and oppose said G. L. in discharge of his duty as said police officer, and which he the said G. L. was then and there attempting lawfully to perform, against, &c. (*Conclude as in book* 1, *chap.* 3).

Assaulting a person specially deputized by a justice of the peace to serve a warrant.(*m*)

That S. F., of in the county of yeoman, on, &c., with force and arms at, &c., in and upon the body of one P. W. did make an assault, he the said P. W. being then and there duly and lawfully appointed to serve and execute a certain warrant, legally issued against the said S. F., and the said P. W. being then and there in the due and lawful execution of the said warrant, and that he the said S. F., him the said P. W. did then and there beat, abuse and ill-treat; and in the due and lawful exercise of his said office, did then and there unlawfully and knowingly obstruct, hinder and oppose, and other wrongs then and there did and committed; to the great damage of the said P. W., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*l*) Com. *v.* Hastings, 9 Mete. 259.

(*m*) In this form there is no averment that the prosecutor was an officer, and in the case for which it was drawn, the fact was that he was not. It appeared that he was specially deputized by a justice to arrest the defendant for breach of the peace. There was nothing introduced in the evidence to show that the deputation was made through necessity, or that no regularly constituted officer was at the time accessible; and the court held that under such circumstances there being no valid appointment, the warrant was no protection to the prosecutor. Whether or not such deputation would have been good if it had appeared that there was no officer at hand to have served the warrant, was doubted; Com. *v.* Foster, 1 Mass. 489. Wherever the prosecutor is a regular constable, it is better specially to aver the fact; though if the official aggravation be badly pleaded, the whole of it may be rejected as surplusage, and a verdict sustained on the mere assault. A sheriff's deputy, however, will be protected in the execution of his office, whether he be formally appointed by writing or not; Com. *v.* Field, 13 Mass. 321.

Assaulting peace or revenue officers in the execution of their duties.(*n*)

That A. B., &c., on, &c., at, &c., in and upon one J. N., then and there being a peace officer, to wit, a constable, (*any peace officer or revenue officer, or any person acting in aid of such officer*), and then and there being in the due execution of his duty as such constable, did make an assault, and him the said J. N. so being in the execution of his duty as aforesaid, then and there did beat, wound and ill-treat, and other wrongs to the said J. N. then and there did; to the great damage of the said J. N., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add a count for a common assault*).

Resisting an officer of the customs in the discharge of his duty.(*o*)

That S. L., &c., on, &c., at, &c., did forcibly resist, prevent and impede a certain J. J. R. in the execution of his duty as an officer of the customs for the district aforesaid; he the said J. J. R. being then and there an inspector of said district, and as such duly appointed and authorized to seize all goods, wares and merchandise imported into said district contrary to law. And the said J. J. R. being then and there in the peace of the United States, and having then and there in the due execution of his office as aforesaid the charge and possession of certain goods, wares and merchandise on board of a certain vessel, to wit, the brig Star, as having been imported into the United States and into the district aforesaid contrary to law; he the said S. L. did then and there forcibly take and carry away from said vessel and from the possession and custody of the said J. J. R., the said goods, wares and merchandise, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That the said S. L., afterwards, to wit, on, &c., did forcibly resist, prevent and impede a certain J. J. R., an officer of the customs for the District of Philadelphia, in the United States of America, he the said J. J. R. being then and there an inspector of said district, and as such duly appointed and authorized to take charge and possession of all goods, wares and merchandise imported into said district, in the execution of his duty as an inspector as aforesaid, contrary &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Masquerade under the Pennsylvania act of February 18, 1805.(*p*)

That A. B., &c., "late of the said on the day of in the year of our Lord one thousand eight hundred and at the aforesaid, and within the jurisdiction of this court, did set on

(*n*) Archbold's C. P. 5th Am. ed. 545.

This is under the English statute, which affixes a specific penalty on "any assault upon any revenue or peace officer in the due execution of his duty, or upon any person acting in aid of such officer."

(*o*) Under this indictment the defendant was convicted in Philadelphia, in 1842.

(*p*) This is the form prescribed by the act making the offence, and as the words are imperative, any variance will be fatal.

foot, promote and encourage a masquerade within the aforesaid, to the common nuisance of all good citizens of this commonwealth," contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER V.

COMPOUNDING FELONY.

At common law for compounding a felony.(*a*)

That one A. B., late of, &c., on, &c., with force and arms at, &c., one silver spoon of the value of five shillings of the goods and chattels of one C. D. then and there being found, feloniously did steal, take and carry away, against, &c. (*Conclude as in book* 1, *chap.* 3).

And that the said C. D., late of, &c., well knowing the premises, but unlawfully and unjustly contriving and intending to prevent the due course of law in this behalf, and to procure the said A. B. to escape with impunity, afterwards, to wit, on, &c., at, &c., unlawfully and unjustly, and for the sake of wicked lucre, did compound the said felony with the said A. B., and did then and there exact, receive and have of the said A. B., five pounds in moneys numbered for and as a reward for compounding for the said felony, and for desisting from all prosecution of the said A. B. for the felony aforesaid, and that the said C. D. on, &c., at, &c., did thereupon desist, and from that time hitherto, hath desisted from all prosecution of the said A. B. for the

(*a*) Dickinson's Q. S. 6th ed. 346.

(*Offence at common law*). The agreeing to receive money in consideration of compounding a charge of felony is a high misdemeanor, subjecting the party who commits it to imprisonment and fine; 1 Hale 546, 619; 2 Hale 400. Formerly it was thought to constitute the offender an accessory to the original crime; but this construction has not prevailed in modern times; 4 Bla. Com. 134. The offence is consummated by a person receiving a note from a party charged with larceny as a consideration for not prosecuting the suit; Com. *v.* Pease, 16 Mass. 91. It is also a misdemeanor to receive money for compounding a prosecution for misdemeanor, or a criminal information, without leave of the court in which the proceeding is depending; Collins *v.* Blantern, 2 Wils. 341, 349; Edgecomb *v.* Ross, 5 East 298, 302; but that permission is sometimes granted in cases of personal injury; see remarks of Gibson C. J., in Brittain *v.* Doylestown Bank, 5 W. & S. 99. The compounding penal actions without leave of the court, was made punishable by the statute 18 Eliz. c. 5, ss. 3 and 4, see R. *v.* Stone, 4 C. & P. 379; R. *v.* Crisp, 1 B. & Al. 282; R. *v.* Gotley, R. & R. 84; Reg. *v.* Best, 9 C. & P. 368, with the forfeiture of £10, half to the party grieved and half to the crown, with exposure in the pillory (now abolished). But 18 Eliz. c. 5, does not apply to informations for offences cognizable only before magistrates; and, therefore, an indictment for compounding such an offence was holden bad in arrest of judgment; R. *v.* Crisp, 1 B. & Al. 282. See generally as to compromise of misdemeanors, 6 Pa. L. J. 359.

felony aforesaid, to the great hinderance of public justice, and against, &c.(*b*) (*Conclude as in book* 1, *chap.* 3).

Compounding misdemeanor. (*Stat.* 18 *Eliz.*) *First count.*(*c*)

That the defendant disregarding the statute (18 Eliz. c. 5, s. 4), upon colour and pretence that one W. P. had committed a certain offence against a certain penal law, in this, that the said W. P. had, before that time, sold by retail and delivered a quantity, less than two gallons, of certain spirits and distilled spirituous liquors, to wit, one quartern of gin to one E. H., without being duly licensed, against the form of the statute, &c., unlawfully and for wicked gain's sake, and without the order and consent of the queen's courts at Westminster, did make composition with the said W. P., and take from him three sovereigns, three half-sovereigns, and ten shillings, twelve pennies, and twenty-four half-pennies, as a reward for forbearing to prosecute for the said supposed offence against the statute, and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*b*) See 4 Went. 327.

(*c*) R. *v.* Best, 9 C. & P. 368.

The second count was like the first, except that it stated the selling of the spirits to be in a certain house in the occupation of William Peverill, he not having a retailing license.

In this case A. threatened B. that he would inform against him for selling spirits without a license, unless B. would give him a sum of money. B. had not in fact sold any spirits, but he gave A. the money to prevent an information; and it was held that A. was indictable under the stat. 18 Eliz. c. 5, s. 4, although B. had not committed any offence, and although no information was ever preferred nor any process sued out.

By stat. 18 Eliz. c. 5, s. 4, it is enacted "that if any person or persons (except the clerks of the court only for making out process otherwise than is above appointed), shall offend in suing out of process, making of composition, or other misdemeanor contrary to the true intent and meaning of this statute, or shall by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward or promise of reward, for himself, or to the use of any other, without order or consent of some of her majesty's courts at Westminster, that then he or they so offending being thereof lawfully convicted, shall stand on the pillory, be disabled to sue in any action popular or penal, and forfeit £10; and justices of oyer and terminer, justices of assize on their circuits and the quarter sessions, are empowered to hear and determine offences against this act."

By the stat. 56 Geo. III. c. 138, the punishment of the pillory was abolished as to this offence, and fine and imprisonment substituted for it.

Two other cases appear under this statute in the English books. In one, R. *v.* Southerton, 6 East 126, it was held that a threatening to put in motion a prosecution for penalties for the purpose of obtaining money to stay the prosecution, is not an indictable offence at common law, although it be alleged that the money was obtained; but Ld. Ellenborough intimates an opinion that the charge might have been supported if the indictment had been framed on the stat. Eliz. c. 5.

In the other, R. *v.* Gotley, R. & R. C. C. 84, the prisoner was convicted of having compounded an offence aginst the highway act. Some of the counts stated, that the party from whom the money was taken, had committed the offence; and the others stated, that the prisoner compounded, and took money by and upon colour and pretence of a certain matter of offence pretended to have been committed. It was proved, that the person from whom the prisoner took the money, had incurred a penalty of five pounds under the highway act, and that the prisoner had received money from him to compound it, but that no process had been sued out, and no information laid before any magistrate. Le Blanc J. respited the judgment, upon a doubt whether the offence was within the stat. Eliz. c. 5, inasmuch as no action or proceeding was depending, in which the order or consent of any court in Westminster Hall for a composition could be obtained; but the judges held the conviction right; and that the statute 18 Eliz. c. 5, applies to all cases of taking a penalty incurred or pretended to be incurred, without leave of a court at Westminster, or judgment or conviction.

CHAPTER VI.

MISCONDUCT IN OFFICE; INCLUDING EXTORTION, NEGLECT OF DUTY, ESCAPE, AND CRUELTY TO SEAMEN, CHILDREN AND PAUPERS.

Against a magistrate, for committing in a case where he had no jurisdiction.(a)

That on, &c., at, &c., one T. C., then being one of the constables of the said parish, brought one J. N. before J. S., Esq., then and yet being one of the justices of our said lady the queen, assigned to keep the peace of our said lady the queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county; and the said J. N. then and there was charged before the said J. S. with having committed a certain supposed misdemeanor, in having vilified the character and hurt the trade of one A. C. of the parish aforesaid, miller; and the said J. N. was then and there examined before the said J. S. as such justice as aforesaid, touching the said supposed offence so to him charged as aforesaid. And the jurors aforesaid upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid in the county aforesaid, esquire, being such justice as aforesaid, wickedly and maliciously contriving and intending to oppress, injure and aggrieve the said J. N. in this behalf and to put him to great charge and expense, and to cause him to undergo and suffer great pain, torture and anguish of body and mind, afterwards, to wit, on the day and year aforesaid, at, &c., did order and direct that the said J. N. should find sureties for his personal appearance at the next general quarter sessions of the peace of our said lady the queen, to be holden in and for the said County of M., to answer the said charge; and, because the said J. N. did not and could not conveniently find such sureties as aforesaid, he the said J. S., being such justice as aforesaid, wickedly and maliciously contriving and intending as aforesaid, wrongfully, unjustly and maliciously, and contrary to the laws of this realm, then and there (by virtue and colour of a certain warrant under his hand and seal as such justice as aforesaid), did commit the said J. N. a prisoner to a certain prison called the house of correction, situate at the parish aforesaid in the county aforesaid, to be there safely kept until he the said J. N. should find such sureties as aforesaid, and until he should be fully examined according to the premises; and then and there ordered, directed and commanded the then keeper of the said prison to keep the said J. N. under close confinement in the said prison, and to deny him the use of pen, ink and paper, and to allow no letter to be delivered to or from the said J. N., and also to allow no person to see or speak to him the said J. N. And the

(a) Arch. C. P. 5th Am. ed. 689.

jurors aforesaid upon their oath aforesaid, do further present, that the said J. S. by virtue and under colour of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, and from thence for a long space of time, to wit, for the space of ten days then next following, at the parish aforesaid in the county aforesaid, wrongfully, unjustly and maliciously, and contrary to the laws of this realm, did cause and procure the said J. N. to be closely confined and imprisoned in the said prison, and to be denied the use of pen, ink and paper, and to be restrained from all communication with his relations and friends, to wit, at the parish aforesaid in the county aforesaid; whereby the said J. N. during all that time underwent and suffered great pain, torture and anguish of body and mind, and was deprived of his liberty and prevented from finding such sureties as aforesaid, and was put to great charge and expense in and about obtaining his discharge and release from the said commitment and imprisonment; to the great scandal of the administration of justice in this kingdom, in contempt of our lady the queen and her laws, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a magistrate for neglect of duty at a riot. First count, for neglecting to read the riot act.(*b*)

That on, &c., at, &c., divers wicked, seditious and evil disposed persons to the number of fifty and more, whose names are at present

(*b*) R. *v.* Kennett, Esq., 5 C. & P. 282. This information was filed in the 20 Geo. III. by Mr. Wallace, then attorney-general. There was a verdict of guilty before Lord Mansfield, but no sentence was passed, the defendant dying shortly after trial.

The second and third counts were nearly similar, except that they omitted such part of the charges in the first count as related to demolishing houses and furniture.

The fourth count stated a riot to have occurred in the defendant's presence, and that he disregarding his duty, did not make the proclamation, but refused and neglected and omitted so to do.

The fifth count stated the riot, and that the defendant was a justice of the peace and present at it, and then went on—"And that the said B. K., being such justice of the peace as aforesaid, and disregarding the duty of his said office, did not apprehend or restrain the said persons so unlawfully, riotously and tumultuously assembled as last aforesaid, or any of them, or endeavour so to do, or use any means or endeavours whatsoever to suppress and put an end to the said unlawful, riotous and tumultuous assembly, or execute or endeavour to execute any of the powers and authorities by the laws of this realm vested in the said B. K. as such justice of the peace as last aforesaid, in that behalf; but the said B. K. then and there unlawfully, wilfully and contemptuously refused, neglected and omitted to apprehend or restrain the said rioters, or any of them, or endeavour so to do, or to use any means or endeavours whatsoever to suppress and put an end to the said unlawful, riotous and tumultuous assembly, or execute or endeavour to execute any of the powers and authorities by the laws of this realm vested in him the said B. K. as justice of the peace aforesaid, in that behalf; and then and there unlawfully permitted and suffered the said persons so unlawfully, riotously and tumultuously assembled, to be and continue there so unlawfully, riotously and tumultuously assembled, for a long space of time, to wit, for the space of four hours, contrary to the duty of his said office of justice of the peace as aforesaid, in contempt," &c.

The sixth count was nearly similar to the fifth count, except that it stated the riot in rather more general terms.

Lord Mansfield charged the jury generally, that "A magistrate may assemble all the king's subjects to quell a riot, and may call in the soldiers, who are subjects and may act as such; but this should be done with great caution; and that at the time of the riot, he might repel force by force before the reading of the proclamation from the riot act. If," he declared, "on a riot taking place, the magistrate neither reads the proclamation from the riot act, nor restrains nor apprehends the rioters, nor gives any order to fire on them,

unknown to the said attorney-general, with force and arms unlawfully, riotously and tumultuously assembled themselves together, to the disturbance of the public peace, tranquillity, order and government of this realm, and to injure and destroy the properties of divers quiet and peaceable subjects of our said lord the king; and being so assembled did then and there unlawfully, riotously, tumultuously and with force, feloniously and against the form of the statute in such case made and provided, begin to demolish and pull down the dwelling house of M. C. there situate and being, and did also then and there unlawfully, riotously and tumultuously injure and destroy the household furniture and effects of divers quiet and peaceable subjects of our said lord the king, whose names are at present unknown to the said attorney-general, and commit and perpetrate other outrages and enormities; and the said attorney-general of our said lord the king for our said lord the king, giveth the court here to understand and be informed that B. K., late of London aforesaid, esquire, at the time of the said unlawful, riotous and tumultuous assembly, to wit, on, &c., and before and afterwards, was mayor of the City of London aforesaid, and also one of the keepers of the peace and justices of our said lord the king, assigned to keep the peace and also to hear and determine divers felonies, trespasses and other misdemeanors committed within the said City of London, that is to say, at, &c.; and that the said B. K., being such mayor and justice of the peace as aforesaid, well knew of and was personally present at the time and place of the said unlawful, riotous and tumultuous assembly, and whilst the said persons so unlawfully, riotously and tumultuously assembled were committing and perpetrating the aforesaid felony, injuries, outrages and enormities, to wit, on, &c., at, &c.; and it was then and there the duty of the said B. K. as such mayor and justice of the peace as aforesaid, for the dispersing of the persons so unlawfully, riotously and tumultuously assembled as aforesaid, and the suppressing and putting an end to the said unlawful, riotous and tumultuous assembly, to have then and there made or caused to be made proclamation in the manner prescribed and directed in and by an act of parliament, made in the parliament of the lord George the First, late king of Great Britain, &c., at a session thereof holden at Westminster in the County of Middlesex, in the first year of his reign, entitled "an act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters." And the said attorney-general of our said lord the king for our said lord the king, giveth the court here further to understand and be informed, that the said B. K., being such mayor and justice of the peace as aforesaid, and well knowing of the said unlawful and tumultuous assembly, and being so present as aforesaid, but disregarding his duty as such mayor and justice of the peace as aforesaid and the directions contained in the said act of parliament for the suppressing of tumults and riots, did not at any time during the said unlawful, riotous and

nor makes any use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if rather than apprehend the rioters his sole care was for himself, this is also neglect."

tumultuous assembly, make or cause to be made proclamation in the manner prescribed and directed by the said act of parliament, but then and there, to wit, on, &c., at, &c., wilfully, obstinately and contemptuously neglected, refused and omitted to make or cause to be made proclamation in the manner prescribed and directed by the said act of parliament, and thereby then and there unlawfully permitted and suffered the said persons so unlawfully, riotously and tumultuously assembled as aforesaid, to be and continue there unlawfully, riotously and tumultuously assembled as aforesaid, for divers, to wit, four hours, doing, committing and perpetrating the said felony, injuries, outrages and enormities, contrary to the duty of him the said B. K. as such mayor and justice of the peace as aforesaid, in contempt, &c. (*Conclude as in book* 1, *chap.* 3).

Against a justice of the peace, for proceeding to the duties of his office in a state of intoxication.(*c*)

That A. B., &c., on, &c., at, &c., did take his seat as a justice of the peace in the County of Loudon, the ninth of August, one thousand eight hundred and three, on the bench of the said county court, and act as a justice and member of the court then and there sitting, in giving his vote upon a judicial question and examination at the time depending in the said court, and in signing the minutes of its proceedings as presiding justice thereof, while he the said A. B. was in a state of intoxication from the drinking of spirituous liquors, which rendered him incompetent to the discharge of his duty with decency, decorum and discretion, and disqualified him from a fair and full exercise of his understanding in matters and things, at the time and place last mentioned judicially before him, to the great disgrace of the administration of public justice, and to the evil example of persons in authority; whereby the said A. B. was guilty of misbehaviour in his office of justice of the peace in and for the said County of Loudon, against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a justice of the peace, for issuing a warrant without oath, using falsely the name of a third party as prosecutor.(*d*)

That A. B., on, &c., at, &c., out of malice and evil disposition towards a certain J. H., a surveyor of the highway, and with a wicked and malicious intent to disquiet, defraud and oppress the said J. H., and falsely, wickedly and maliciously to cause the said J. H. to be put to costs and expenses, unjustly, wickedly, maliciously and unlawfully wrote, signed and issued under his own hand, as such justice of the peace, a certain warrant or summons, to a constable directed, commanding him to summon the said J. H. to appear before him, the

(*c*) Com. *v.* Alexander, 1 Va. Cases 156.

(*d*) Wallace *v.* Com., 2 Va. Cases 130.

To this indictment the defendant pleaded not guilty, and the jury convicted him and assessed his fine to one hundred dollars. The Superior Court thereupon entered a judgment against him, that he be removed from his office of justice of the peace, and that he be incapable of exercising the duties of the same, and also a judgment for the fine. An application for a writ of error was afterwards refused by the general court.

said A. B., to answer to a certain complaint and information of a certain J. W., made against him the said J. H., for not keeping a road, (*describing it*), in repair, and upon that warrant or summons caused the said J. H. to appear before him the said A. B., as such justice of the peace, to answer the complaint aforesaid, and upon a hearing therein did not acquit the said J. H. of the complaint aforesaid, but unlawfully, corruptly and wickedly adjudged the said J. H. to pay the costs of the same; whereas, in truth and in fact, the said J. W. never did make to the said A. B., nor to any other justice of the peace, the complaint or information aforesaid against the said J. H., nor did the said J. W. nor any other person direct the said prosecution, but the said A. B. falsely and wickedly used the name of the said J. W. without his knowledge, and against his directions, in contempt of his the said A. B.'s oath and duty, as a justice of the peace, to the evil example, &c. (*Conclude as in book* 1, *chap.* 3).

Against a justice of the peace in Pennsylvania, for refusal to deliver transcript to party demanding it.(*e*)

That W. B., &c., being a justice of the peace in and for the district numbered six, composed of the townships of B. and S. in the said County of B., duly commissioned and sworn to do the duties of the said office with fidelity and according to law, a certain suit was commenced and instituted before him as such, of which suit and of the cause of action thereof he lawfully had jurisdiction and cognizance, wherein a certain J. B. was plaintiff, and a certain F. C. was defendant, and in which suit the said W. B., as a justice of the peace, entered judgment, and that on, &c., at, &c., and within the jurisdiction of this court, with force and arms, &c., he the said W. B., as a justice of the peace, did unlawfully refuse to make out a copy of his proceedings at large in the said suit, and deliver the said copy duly certified by him to the said F. C., the defendant in the suit; he the said F. C., having then and there required and demanded the same of the said W. B. as a justice; and he the said F. C. then and there did tender unto him the said W. B. as a justice of the peace, eighteen and three-quarter cents, the just and legal fee of him the said W. B., for his services in that behalf aforesaid; to the great hinderance and obstruction of public justice, against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a justice of the peace in Massachusetts, for extortion generally.(*f*)

That A. B., &c., on, &c., then being one of the justices of the peace in and for the county of duly and legally appointed and qualified to perform the duties of that office, not regarding the duties of

(*e*) Bailey *v.* Com., 5 R. 59. This indictment is under the Pennsylvania act of 20th March, 1810, s. 23, and was sustained by the Supreme Court as sufficiently descriptive of the offence created by that section.

(*f*) Davis' Prec. 119. This indictment is founded on Massachusetts statute 1795, c. 41, s. 6, and may, says Mr. Davis, be adopted *mutatis mutandis*, for extortions by all other officers and persons mentioned in the statute.

said office, but contriving and intending one C. D. to injure and oppress, on the said day of in the year aforesaid, at in the county aforesaid, by colour of his said office, did wilfully, corruptly and extorsively demand, take and receive of him the said C. D. a greater fee than is allowed and provided by law for the trial of a certain issue, then and there in due form of law joined and pending before him the said A. B., as a justice of the peace for the said county of between the aforesaid C. D. and one E. F., in a certain civil action commenced and entered by the said C. D. against the said E. F., before him the said A. B., justice of the peace as aforesaid, at a justice's court duly appointed, and then and there held by him the said A. B., to wit, the sum of for the trial of the said issue, which sum is more than the fee allowed and provided by law for the service aforesaid; contrary to the duty of him the said A. B. in his office aforesaid, against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a justice of the peace for extorting fees for discharging a recognizance, and for not returning the same to the court for which it was taken.(*g*)

That N. J., of, &c., on, &c., and continually afterwards, until the day of the taking of this inquisition, was, and yet is one of the justices of the peace within and for the said county of, &c., duly and legally appointed and authorized to discharge the duties of that office. Nevertheless the said N. J., not regarding the duties of his said office, but perverting the trust reposed in him, and contriving and intending the citizens of this commonwealth, for the private gain of him the said N. J. to oppress and impoverish, and the due execution of justice, as much as in him lay, to hinder, obstruct and destroy, on the day of and between that day and the day of the finding of this bill, at aforesaid in the county aforesaid, under colour of his said office of justice of the peace for the said county of a certain sum of money, to wit, the sum of for not returning a certain recognizance before him, within the time aforesaid, taken for the appearance of one G. J. at a certain term of the, (*here describe the court to which the recognizance was made returnable*), to be holden next after the taking of the recognizance aforesaid from the said G. J., unlawfully, unjustly and extorsively did exact, receive and have; and although the said next court of, (*here describe the court*), for the county aforesaid, after the taking of the recognizance aforesaid, and to which the said recognizance ought to have been returned, was held at in the county aforesaid, on the Tuesday of in the year aforesaid, in the due course of law, the said N. J. the said recognizance, to the court aforesaid, as of right, and according to his duty and the laws of said commonwealth he ought to have done, did not return, but *suppressed* the same, against the duties of his said office, to the great hinderance of justice, against, &c. (*Conclude as in book* 1, *chap.* 3).

(*g*) Davis' Prec. 122; 1 Trem. P. 119. This indictment would be more correct if it contained an allegation of the particular nature and condition of the recognizance, and also that the magistrate was authorized to take it.

Against a constable for extorting money of a person apprehended by him upon a warrant, to let him go at large.(*h*)

That A. B., of &c., on at in the county aforesaid, then and there being one of the constables of the town of in the county aforesaid, did take and arrest one C. D. by virtue of a warrant duly made and issued, which he the said A. B. then and there had, directed, &c., (*here insert the warrant*); and that the said A. B., him the said C. D. then and there had in his custody by virtue of the said warrant, and that the said A. B. afterwards, to wit, on at in the county aforesaid, unlawfully, corruptly and extorsively, for the sake of gain and contrary to the duty of his said office, did extort, receive and take of and from the said C. D. the sum of for discharging the said C. D. out of the custody of him the said A. B., constable as aforesaid, without conveying the said C. D. before any justice of the peace in and for said county, or before any other lawful authority, to answer to the charges, matters and things whereof he stood accused and charged as aforesaid; against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a constable for neglecting to execute a warrant in a civil case.

That whereas, A. K. and D. F., Esqrs., two of the justices of the peace of the said County of P., duly elected and commissioned, did on, &c., at, &c., and within the jurisdiction of this court, issue their warrant, under their hands and seals, to any constable of the said county directed, setting forth that A. T., Esq., one of the sub-lieutenants of the said county, having before them the said justices obtained judgment in due and regular form of law, against T. F., for the sum of twenty-five pounds ten shillings, lawful money of Pennsylvania, by him the said A. T. expended in procuring a substitute to serve in the militia, in the first class of the fifth battalion of the county aforesaid, in the place of him the said T. F. with costs; that the said constable was thereby required and enjoined to levy the said sum of twenty-five pounds ten shillings and costs, with the costs thereby accruing, by distress and sale of the goods and chattels, lands and tenements of the said T. F. as the law directed, returning the overplus, if any, to the owner. And the inquest aforesaid, do say, that the said warrant was on, &c., delivered and offered and tendered to be delivered to J. Z., then and there being constable of the township of W., one of the townships of the said County of P., to be by him executed. And the inquest aforesaid, do further say, that the said J. Z., then and there being constable of the said township of W., on, &c., and ever since, until, &c., at, &c., and within the jurisdiction of this court, did neglect to execute the said warrant, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*h*) Davis' Prec. 121; see 2 Chit. 295, 296; Cro. C. C. 327, 6th ed.; 2 Stark. 585; and for other precedents for extortion in 2 Chit. 296, 297; Cro. C. C. 327; 1 Trem. P. C. 111, 115; 2 Chit. 300, against a collector for extorting money by colour of his office.

Against a constable for neglecting to execute a justice's warrant for the apprehension of a person.(*i*)

That heretofore, to wit, on, &c., at, &c., W. N., Esq., then and still being one of the justices assigned, &c., did make a certain warrant in writing, under his hand and seal, bearing date on, &c., directed to the constable of the parish of G. in the County of D., thereby in her majesty's name charging and commanding the said constable that, &c., (*here set forth the warrant*); which said warrant, afterwards, to wit, on, &c., at, &c., aforesaid, was duly endorsed for execution by and in the name of X. Y., Esq., then being mayor and one of her majesty's justices of the peace in and for the borough of D. in the said County of D., and which said warrant so endorsed, afterwards, to wit, on, &c., at, &c., was delivered to T. O., late of, &c., then and still being constable of the said parish of G. in the county aforesaid, in due form of law to be executed; and the said T. O. was then and there required to execute the same by bringing the body of the said E. R. before the said W. N., at the time and place and for the purpose in the said warrant mentioned. And the jurors, &c., that although the said T. O. could and might and ought to have executed the said warrant accordingly, the said T. O. so being constable of the said township of G. in the County of D. aforesaid, not regarding the duty of his said office, did not, nor would, execute the said warrant as aforesaid, or otherwise howsoever, but unlawfully, wilfully, obstinately and contemptuously neglected and refused so to do, and therein failed and made default; to the great hinderance of public justice, in contempt, &c., to the evil, &c., and against, &c.(*j*) (*Conclude as in book* 1, *chap.* 3).

Against a constable for extorting and obtaining money under colour of discharging a bench warrant.(*k*)

That A. B., late of, &c., on, &c., then being one of the constables of the said parish, at, &c., did take and arrest one C. D. by colour of a certain warrant called a bench warrant, which he the said A. B. then and there alleged that he had in his possession; and that the said A. B., afterwards, and while the said C. D. so remained in his custody as aforesaid, on, &c., at, &c., unlawfully, corruptly, deceitfully and extorsively and by colour of his said office, did extort, receive and take of and from the said C. D. the sum of two guineas,(*l*) as and for a fee

(*i*) Dickinson's Q. S. 6th ed. 435.

(*j*) The 33 Geo. III. c. 55, gives summary jurisdiction to justices to punish parish officers for neglect of duty, but that remedy does not supersede the ancient one by indictment; Dickinson's Q. S. 6th ed. 435.

(*k*) Dickinson's Q. S. 6th ed. 433.

(*l*) An information against the ferryman over the Menai, laid the ferry to be ancient from time out of mind, and "that 1*d.* was the usual rate of passage for man and horse, 7*d.* for 20 cattle, 2*d.* for 20 sheep, &c., and that defendant being the common ferryman between, &c., and day of exhibiting information, injuste oppressive et deceptive cepit et extorsit de diversis ligeis et sudditis domini regis ignotis to the attorney-general, passing that way, diversas denariorum summas excedent antiquam rotam et pretium pro passagio et transportatione suis et averiorum suorum, viz. pro passagio *cujuslibet* personæ cum equo suo, 2*d.*, et pro *quibuslibet* 20 *catallis*, 2*s.* et sic secund arm ratam praedictam pro majori

due to him the said A. B. as such constable as aforesaid, for the obtaining and discharging of the said warrant, as he the said A. B. then and there alleged; whereas, in truth and in fact, no fee whatever was then due from the said C. D. to the said A. B., as such constable in that behalf; in breach of the duty of his said office of constable, and against, &c.(*m*) (*Conclude as in book* 1, *chap.* 3).

Against constables for neglecting to attend the sessions.(*n*)

That J. H. and A. Y., &c., on, &c., then and long before were constables of the township of Blockley in the said county, and that T. A. of the same county, yeoman, on the day and year aforesaid, at the county aforesaid, was a constable of the township of B. in the said county; and that S. W., &c., on, &c., and long before was a constable of the township of L. D. in the said county, and that R. W., &c., on, &c., and long before was a constable of the township of the manor of M. in the said county, and that B. V., &c., on, &c., and long before was a constable of the township of O. in the said county. And the inquest aforesaid, upon their oaths and affirmations aforesaid, do present, that the said J. H., A. Y., T. A., S. W., R. W. and B. V., so being constables as aforesaid, the duty of their office not regarding, unlawfully and contemptuously, on, &c., at, &c., did absent themselves and each of them did absent himself from the General Quarter Sessions of the Peace and Gaol Delivery, holden at P., in the said county, on the day and year aforesaid, for the county aforesaid, and then and there did neglect to make a return to the said sessions of all and such persons as were retailers of spirituous liquors by measure less than one quart within their respective townships, to the great hinderance of public justice, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a high constable for not obeying an order of sessions.(*o*)

That at the General Quarter Sessions of the Peace, holden for the County of B., at, &c., in and for the county aforesaid, on, &c., before A. B., C. D., E. F. and G. H., Esqrs., and others their fellows, justices of our said lady the queen, assigned, &c., it was ordered by the said court there, (*here set out the order of sessions in the past tense*), as by the said order, reference thereto being had, will more fully and at large appear, which said order was afterwards, to wit,

vel minori numero averiorum." Judgment arrested for accumulating several offences under a general charge; each extortion from every particular person being a separate offence which should have been laid singly, so as to enable the court to proportion the fine to each offence; R. *v.* Roberts, Carth. 226; Shower 189, S. C. Relied on in R. *v.* Foster, Ld. Raym. 475, and in R. *v.* Rowand. Dickinson's Q. S. 6th ed. 433.

(*m*) If any fee may be taken, the legal amount must be stated, or the indictment will be bad; Reg. *v.* Levy, in Q. B. 8 June, 1839; Blake's case, 3 Leon. 268. If the extortion is in levying an execution, the amount of extortion must be laid and shown. Dickinson's Q. S. 6th ed. 433.

(*n*) Drawn by Mr. Bradford in 1785.

(*o*) Dickinson's Q. S. 6th ed. 441.

on, &c., at, &c., personally served(*p*) on the said C. D., one of the high constables in the said order named, and the said C. D. then and there had notice of the said order, and was then and there requested to obey the same as therein mentioned; nevertheless, the said C. D., late of, &c., then being one of the high constables in the said order mentioned, unlawfully and contemptuously, upon being so served with the said order as aforesaid, did neglect and refuse to, (*here state what the order required the defendant to do*), as by the said order he the said C. D. was required to do, nor hath he the said C. D., at any time since complied with or obeyed the said order, although often requested so to do; in contempt of the said justices, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a toll collector for extorting toll from a person who had compounded.(*q*)

That C. B., &c., by colour of being collector and receiver of the moneys and tolls at a certain turnpike or toll-bar gate, situate in, &c., aforesaid, on, &c., with force and arms at, &c., aforesaid, unlawfully, extorsively and deceitfully, and of his own wrong, extorted, asked, demanded and received of one A. X., husbandman, the sum of one shilling and sixpence, for a cart and two horses, that is to say, sixpence for a cart and sixpence for each of two horses, then and there drawing the said cart belonging to him the said A. Z., for permitting the same to pass through the said turnpike or toll-bar gate, under colour and pretence that the said A. Z. had neglected to take out and obtain from him the said C. B. such a ticket or certificate of composition and exemption from toll, as is permitted by a certain act of parliament, passed in the thirty-sixth year of the reign of his late majesty king George the Third, entitled, (*here insert the title of the act*); whereas, in truth and in fact, he the said A. Z. had taken and obtained from the said C. B., and was then in possession of such ticket or certificate of composition and exemption as aforesaid, signed with the name of the said C. B., and dated, (*here set out the date to show that it was within the terms of the act*), as in the said mentioned act specified; against, &c. (*Conclude as in book* 1, *chap.* 3).

(*p*) This is necessary, and the want of this allegation will not be supplied by the allegation that the defendant was requested to comply with the terms of the order; R. *v.* Kingstone, 6 East R. 52; R. *v.* Moorhouse, Cald. 554; Dickinson's Q. S. 6th ed. 441; Arch. C. P. 5th Am. ed. 691; see for forms of a similar nature, Cro. Cir. Com. 327; R. *v.* Meredith, R. & R. 46; R. *v.* Booth, *ib.* 47; R. *v.* White, Cald. 183; R. *v.* Robinson, 2 Burr. 799; R. *v.* Balme, Cowp. 650; R. *v.* Fearnly, 1 T. R. 316; R. *v.* Davis, Say 163.

(*q*) Dickinson's Q. S. 6th ed. 433.

Two observations particularly apply to this precedent:

1st. That statute 3 Ed. I. c. 26, was only in affirmance of the common law, and therefore all *public* officers, properly so called, whether mentioned in that statute or not, seem to be subject to indictments for extortion; Dalt. c. 41; 1 Russ. C. & M. 144.

2d. That the question of exempt, or not exempt, from toll of a turnpike gate, cannot be tried on an indictment of a bar-keeper for extortion, the general right to take not having been denied, nor the ground of exemption notified; R. *v.* Hamlyn, 4 Campb. 379; Dickinson's Q. S. 6th ed. 433.

Against an innkeeper for not receiving a guest, he having room in his inn at the time.(r)

That before and at the time herein next mentioned, T. I., late of, &c., labourer, was an innkeeper and did keep a common inn for the accommodation of travellers, that is to say, a certain common inn called the Bell Inn, together with certain stables for horses attached to the said inn, and which said inn and stables are situate in the parish and county aforesaid, †† and that whilst the said T. I. was such innkeeper, and so kept the said inn and stables as aforesaid, to wit, on, &c., at, &c., one S. P. W., then and there being a traveller, came to a certain outer door of the said inn, such outer door then and there being a usual door of entrance into the said inn for travellers and other persons, and then and there required the said T. I. to suffer and permit him the said S. P. W. to enter, and to stay and to lodge at the said inn for and during the night of the same day, and to suffer and permit a certain horse upon which the said S. P. W. then and there rode, to enter and stay and lodge in the said stables for and during the time aforesaid; † and that the said S. P. W. was then and there ready and willing, and then and there offered the said T. I. to pay him a reasonable sum of money for such lodging for himself the said S. P. W. and his horse; †* and that neither was the said inn nor were the said stables at the time of such application by the said S. P. W. as aforesaid, fully occupied, but there was then and there sufficient room in the said inn for the accommodation and entertainment of the said S. P. W. therein; and there was then and there sufficient room in the said stable for the accommodation and entertainment of the said horse for and during the time aforesaid; * but that the said T. I. not regarding his duty as such innkeeper, did not nor would at the said time when he was so requested as aforesaid, suffer or permit the said S. P. W. to enter to stay or lodge at the said inn as aforesaid during the time aforesaid, nor did nor would the said T. I. at the said time when he was so requested as aforesaid, suffer or permit the said horse of the said S. P. W. upon which the said S. P. W. rode as aforesaid, to enter or lodge in the said stables for or during the time aforesaid; but so to do, the said T. I. then and there without sufficient

(r) Dickinson's Q. S. 6th ed. 438.

This was the form used in R. *v.* Juens, 7 C. & P. 213. The defendant was convicted and fined twenty shillings. The marginal note is thus: "An indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time; (and it is not necessary for the guest to tender the price of his entertainment if his rejection is not on that ground; doubted by Ld. Abinger C. B., Fell *v.* Knight, 8 M. & W. 276), and it is no defence for the innkeeper that the guest was travelling on a Sunday and at an hour of the night after the innkeeper's family had gone to bed, nor that the guest refused to tell his name and abode, as the innkeeper has no right to insist upon knowing those particulars; but if the guest come to the inn drunk or behaves in an indecent or improper manner, the innkeeper is not bound to receive him." Hawk. b. 1, c. 78, s. 2, is full on this point, and adds, "Also it is said, that a person keeping a common inn may be compelled by the constable of the town to receive and entertain as his guest such a person as above, being a traveller. A traveller is entitled to reasonable accommodation, but cannot select a particular room or insist on sitting up all night in a bed-room when a sitting room is offered; an innkeeper must admit all persons who apply peaceably to be admitted as guests;" Hawthorn *v.* Hammond, C. & K. 404; see Sunbalf *v.* Alford, 3 M. & W. 248.

cause wholly neglected and refused; to the great damage of the said S. P. W., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That whilst the said T. I. was such innkeeper and so kept the said inn and stables as aforesaid, to wit, on, &c., at, &c., the said S. P. W. then being a traveller, came to a certain outer door, &c., (*as in the first count, omitting the words between* † *and* †*).

Third count. Similar to the second, except that it also omitted the allegation between †* *and* *, *and all mention of the horse.*

Fourth count. Same as first to ††, *and then proceed*:

And that whilst the said T. I was such inkeeper and so kept the said inn as aforesaid, to wit, on, &c., at, &c., the said S. P. W. then and there being a traveller, came to the said inn, and then and there required the said T. I. to suffer and permit him the said S. P. W. to enter and to stay and to lodge at the said inn for and during a reasonable time for the rest and refreshment of him the said S. P. W. in the said inn, and that the said T. I. not regarding his duty as such innkeeper, did not nor would at the said time when he was so requested as last aforesaid, suffer or permit the said S. P. W. to enter or stay or lodge at the said inn as last aforesaid; but so to do, the said T. I. then and there without any sufficient cause wholly neglected and refused; to the great damage, &c.(*s*) (*Conclude as in book* 1, *chap.* 3).

Against an innkeeper refusing to entertain foot travellers.(*t*)

That A. B., late of the county aforesaid, then and there being a licensed innkeeper and keeping a house of public entertainment, on, &c., at, &c., with force and arms, &c., unlawfully and without reasonable cause did refuse to entertain and accommodate a certain person to the grand inquest aforesaid unknown, the said person then and there being a traveller on foot and applying for such entertainment and accommodation, to the great damage of the person so travelling on foot as aforesaid, to the public injury, and against, &c. (*Conclude as in book* 1, *chap.* 3).

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said A. B., late of the county aforesaid, *then and there being a licensed innkeeper*(*v*), and keeping a house of public entertainment for the accommodation of the good

(*s*) This precedent may be classed under neglects of duties imposed by common law; Dickinson's Q. S. 6th ed. 439.

(*t*) The above indictment, as it appears by a manuscript note of W. H. Dillingham, Esq., of this city, to whose kindness I am indebted for a number of valuable forms contained in the preceding pages, was prepared in the case of the Innkeepers of Chester, and supported by President Wilson, after argument.

In the above case it was decided that the common law principle embraced in the above charge extends in Pennsylvania; that it is not supplied or altered by any act of assembly; that the above indictment is good in form, but that in order to support the indictment a *tender* must be proved, or an offer to pay and *waver* of tender by the landlord; 4 Bla. Com. 167, 168; 1 Hawk. P. C. 225, old ed.

(*v*) The words in italics were not inserted in the indictment against the innkeeper of Chester in the second count, but the court thought the indictment could only be supported

citizens of this commonwealth and strangers thereby passing and repassing, as well travellers on foot as others, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, with force and arms, &c., unlawfully and without reasonable cause, did refuse to furnish and supply the said person to the grand inquest aforesaid unknown, so travelling on foot as aforesaid and applying therefor, with lodging, victuals, drink, entertainment and accommodation, to the great damage of the person so travelling on foot as aforesaid, to the public injury, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against an attorney for buying a note, on New York stat. sess. 41, *c.* 259, *&c.*(*w*)

That J. W., on, &c., at, &c., did buy a certain promissory note of and from one J. B. S., the holder and proprietor of the note, which was made and signed by one W. M., and dated April fourteenth, one thousand eight hundred and twenty-four; by which note W. M. promised to pay one A. V. A. the sum of twenty-five dollars and fifty cents, at the Bank of Lansingburg, in ninety days from the date; that the note was endorsed by said A. V. A., whereby it became and was the property of J. B. S., till the purchase by the defendant for a good and valuable consideration; that said defendant at the time he so purchased, was an attorney and counsellor of the Supreme Court of Judicature of the State of New York, and of the Court of Common Pleas of the County of Rensselaer; and that he did not then and there buy or receive the note in payment for any estate real or personal, or for any services actually rendered, or for any debt antecedently contracted, or for any purpose of remittance, without any intent to violate or evade the act, &c., entitled "an act to prevent abuses in the practice of law, and to regulate costs in certain cases," passed April twenty-first, one thousand eight hundred and eighteen; to the evil, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That said J. W., on, &c., at, &c., did buy of and from one P. B., and become interested in buying of and from P. B., a certain other promissory note, made and signed by W. M., by which W. M. promised to pay to P. B. or bearer the sum of forty-two dollars and sixty cents, said J. W. at the time he so bought and purchased the last mentioned notes, being, and still being an attorney and counsellor of the Supreme Court of Judicature of the people of the State of New York; and the inquest further present, that said J. W. did not then and there buy or receive the same note in payment for any estate

in this state against *licensed innkeepers*, and thence it became necessary to prove their license.

(*w*) This form, as appears by People *v.* Walbridge, 6 Cow. 512, is in substance the same with the indictment sustained in that case. It was there held, that an indictment against an attorney, &c., upon the statute (sess. 41, c. 259, s. 1), for buying a note, need not allege that he bought the note with intent to prosecute, &c, nor that the note has been prosecuted; nor need it show when it became due, its amount, or other circumstances from which an intent to prosecute is to be inferred. The act of buying, it was said, is the offence, unless it come within the proviso of the statute, which it lies with the defendant to show.

real or personal, or for any services actually rendered, or for any debt before that time contracted, or for any purpose of remittance; to the evil, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That said J. W., on, &c., at, &c., knowingly, wilfully and corruptly became and was interested in buying a certain promissory note made by one W. M. for the sum of one hundred and twenty-five dollars and fifty cents, payable to one A. V. A.; and also one other promissory note made by W. M. to one E. G. for the sum of thirty-one dollars and twenty cents; also one other promissory note made by W. M., payable to one C. F., for a sum of money to the jurors unknown; said J. W., at the time of the purchase of each and every of these notes, and at the time he became so interested in the purchase thereof, being, and still being an attorney and counsellor of the Supreme Court of Judicature of the People of the State of New York; and the inquest aforesaid do further present, that he the said J. W. did not then and there become interested in the purchase of either of these notes, by way of payment for any estate real or personal, or for any services rendered before the purchase of these notes respectively, or for any purpose of remittance, without any intent to evade or violate the act, &c., (*as in the first count*).

Against a master for neglecting to provide an apprentice of tender years with sufficient food, clothing, bedding and other necessaries.(*x*)

That one T. F., late of, &c., at, &c., did take and receive one S. Q. into the dwelling house of the said T. F. as an apprentice of the said T. F., to be by him treated, maintained and supported as an apprentice of him the said T. F., and did for a long time have and keep her in the said house as such apprentice as aforesaid, and that afterwards, to wit, on, &c., and on divers other days and times, as well before as after that day, and during the said time he so had and kept her in the said house as such apprentice, the said T. F. with force and arms unlawfully and injuriously, and without the consent of the said S. Q.

(*x*) Dickinson's Q. S. 6th ed. 359.

See R. *v.* Friend, *cor.* Le Blanc J., Exeter Assizes, 1801; R. & R. 20, cited by Lawrence J. in 2 Camph. 651. There were two indictments for ill-usage of two female apprentices of the respective ages of twelve and fourteen. The wife of Friend was indicted with him, and the offences were charged against both prisoners "and each of them;" the indentures of apprenticeship and assignment of them were given in evidence. Each apprentice was to serve during the term, and the master during that term was to "find, provide and allow to the said apprentice meet, competent and sufficient meat, drink, apparel, lodging, washing and other things necessary and fit for an apprentice, that she be not any way a charge" to the party binding her, "and to instruct her in housewifery." The wife was acquitted, and the male prisoner convicted and imprisoned. After two meetings of all the judges, and some difference of opinion, the general opinion was that it was an indictable misdemeanor to refuse or neglect to provide sufficient food, bedding, &c., to any infant of tender years, whether child, apprentice or servant, unable to provide for and take care of itself, whom a man was obliged by duty or contract to provide for, so as thereby to injure its health; but that the indictment was defective in not stating the child to be of tender years and unable to provide for itself. However, as at the trial, objection was taken not so much to the indictment itself, as to the evidence adduced in its support, it was thought right that the prisoner should suffer his whole imprisonment. See R. *v.* Meredith and R. *v.* Booth, R. & R. 47, cruelty by overseers.

and against her will, and maliciously and unlawfully intending to hurt and injure the said S. Q., she the said S. Q. being such apprentice to the said T. F. as aforesaid, and then and there being an infant of tender years, to wit, of the age of years, and under the dominion and control of the said T. F., and unable to provide for herself, did neglect and refuse to find and provide for and to give and administer to her, being so had and kept as such apprentice as aforesaid, sufficient meat, drink, victuals, wearing apparel, bedding and other necessaries proper and requisite for the sustenance, support, maintenance, clothing, covering and resting the body of the said S. Q., by means whereof she became emaciated and nearly starved to death, and the constitution and frame of her body was greatly hurt and impaired, to the great damage, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a mistress, for not providing sufficient food for a servant, keeping her without proper warmth, &c.(*y*)

That one E. R., late of, &c., the wife of S. R., unlawfully and maliciously contriving and intending to hurt and injure one E. W., being a servant to her the said E. R., and an infant of tender years, to wit, of the age of years, under the dominion and control of the said E. R., and unable to provide for herself, heretofore, to wit, on, &c., and on divers other days and times as well before as after that day, with force and arms at, &c., unlawfully, wilfully and maliciously did omit, neglect and refuse to provide for and give and administer to the said E. W. sufficient meat and drink necessary for sustenance, support and nourishment of the body of her the said E. W., and did then and there expose the said E. W. to the cold and inclemency of the weather,(*z*) as well within as without the house wherein the said E. R. then dwelt and kept the said E. W. without sufficient warmth necessary for the health of her the said E. W., to wit, at, &c. (the said E. R. on the several days and times, and during all the time aforesaid, living separately and apart from the said S. R. her husband, to wit, at, &c.),(*a*) contrary to the duty of her the said E. R., as the mis-

(*y*) Dickinson's Q. S. 6th ed. 358.

This is the indictment against Elizabeth Ridley, 2 Campb. 650, but with the addition suggested by Lawrence J. as necessary to sustain it. See 3 Chit. C. L. 1st ed. 861, and R. *v.* Friend, R. & R. C. C. 20. Unless the child be of tender years, unable to provide for itself, and is under the control of the defendant, so as to be unable to take any steps by leaving the service, or remonstrating or complaining to a magistrate, mere nonfeasance respecting it would be a more breach of contract, and not indictable. See R. *v.* Ridley and R. *v.* Friend.

(*z*) As to this part of the charge, see Dickinson's Q. S. 6th ed. 314, 320, 358.

(*a*) Where the offender is a married woman, living with her husband, it is necessary to state (and prove) instead of the matter above placed within brackets, either that the child was imprisoned by her, which is sufficient to show her duty to provide it with food (Reg. *v.* Elizabeth Edwards, 8 C. & P. 611, Patteson J.), or to allege as follows: "the said husband of the said on the several days and times, and during all the times aforesaid having provided the said with sufficient meat, drink and victuals necessary for the maintenance, support and nourishment of the body of the said , and with sufficient firing, covering, bedding and other necessaries proper and requisite for sustaining, supporting, maintaining, clothing and resting the body of the said and covering the same from the cold and inclemency of the weather," S. C.; for her crime is the wilfully neglecting to deliver the food to the child after the husband had provided it (R. *v.* Saun-

tress of the said E. W. in that behalf, by reason of all which premises she the said E. W. afterwards, to wit, on, &c., became and was, and for a long time, to wit, the space of six months then next following, continued to be very weak, sick and ill and greatly consumed and emaciated in her body, to wit, at, &c., aforesaid, to the great damage of the said E. W., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against the captain of a vessel, for bringing into the port a person with an infectious disease, under the Pennsylvania act.(*b*)

That A. E., late of, &c., on, &c., being master and commander of the schooner St. Andrews, did arrive with the said vessel from beyond seas, at the port of P., and then and there had on board of the said vessel a certain W. M., then and there disordered with a certain infectious disease called a putrid fever; and that N. F., then and still being the officer appointed by virtue of the act, entitled a "supplement to the act entitled an act for imposing a duty on persons convicted of heinous crimes, and to prevent poor and impotent persons being imported into this province;" together with J. H., then and still being one of the physicians appointed by virtue of the act of general assembly, entitled "an act to prevent infectious diseases from being brought into this province," afterwards, to wit, on the same day and year aforesaid, and at the county aforesaid, did repair on board the same schooner or vessel, to inspect the same with respect to the health and disease of the people on board the same vessel, and to do and perform the duties to their respective offices belonging; and that he the said A. E., then and there well knowing the same W. M. to be so as aforesaid on board his said schooner or vessel, and to be disordered with the infectious disease aforesaid, then and there knowingly and willingly did conceal the same from the said officer and physician, and then and there did not make a just and true discovery of the sickly and disordered state and condition of the said W. M. to the said officer and physician, but did neglect so to do, to the great damage of the health and lives of the citizens of this state, contrary, &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a captain of a vessel, for not providing wholesome meat for his passengers.(*c*)

That E. C., late of, &c., mariner, on, &c., being master and commander of the brigantine Cunningham, bound from Londonderry, beyond seas, to the port of Philadelphia, and having charge of the same, on, &c., and within the jurisdiction of this court, did import into the river Delaware from the port of Londonderry aforesaid, three hundred and forty passengers and servants, and that he the said R. C., so being master and commander of the same ship, did neglect and omit to pro-

ders, 7 C. & P. 279, Alderson B.) A mother would be liable for the consequences of not suckling her unweaned infant, if she is able to do so; though if she be married, her husband would be bound to provide food for another child. See per Patteson J., Reg. v. Edwards; Dickinson's Q. S. 6th ed. 358, 359.

(*b*) Drawn by Mr. Bradford in 1790. (*c*) *Ib.*

vide and supply the same passengers and servants, during the voyage aforesaid, with good and wholesome meat, drink and other necessaries, and did wholly omit and neglect during the said voyage to provide and supply any vinegar, to wash and cleanse the said vessel, or for the said passengers and servants to use on board, during the said voyage from Londonderry aforesaid, and that the said passengers and servants were not during the voyage aforesaid provided and supplied with good and wholesome meat, drink and other necessaries, nor with any vinegar for the purposes aforesaid, and that the said passengers and servants then and there were a greater number than were well supplied and provided with the meats, drinks, vinegar and necessaries aforesaid, by reason whereof many of the said passengers became sick and in great jeopardy of their lives, to the evil example, &c., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against overseers for cruelty to a pauper.(*d*)

That on, &c., one M. S., a singlewoman, was a poor, weak, impotent and infirm person, wholly unable to maintain herself, and legally settled within the township of B., in the W. R. of the County of Y., and justly entitled by the laws and statutes of this realm to have reasonable and necessary support and relief found and provided for her by the overseers of the poor of the said township, and that J. B., late of B. aforesaid, well knowing the premises, and having the said M. S. under his care, as a poor person of and belonging to the said township, but wilfully and maliciously intending to injure and oppress the said M. S. on the day and year aforesaid, and continually afterwards until the day of the death of the said M. S., which happened on, &c., at B. in the said W. R., his duty in this behalf in nowise regarding, wilfully, maliciously and unjustly neglected and refused to find and provide for the said M. S. reasonable and necessary meat, drink, clothing, bed and bedding, whereby the said M. S. was reduced to a state of extreme weakness and infirmity; and afterwards, on, &c., at, &c., through the want of such reasonable and necessary meat, drink, clothing and bed and bedding, died, to the great damage, injury and oppression of the said M. S., and to the shortening of her life, to the evil example, &c., and against, &c.(*e*) (*Conclude as in book* 1, *chap.* 3).

(*Add count for common assault*).

(*d*) Dickinson's Q. S. 6th ed. 361.

(*e*) This was the indictment in *R. v.* Booth (Dick. Q. S. 361). The prisoner was convicted and imprisoned. However, in 1803, six judges were of opinion, that an overseer is not indictable for the consequences of not relieving a pauper, unless an order of justices for his relief is stated and proved (except in case of urgent necessity where no such order could be had in time): five judges thought the overseer so indictable, as he had taken the pauper under his care without such order; *R. v.* Meredith and Turner, R. & R. 46. In *R. v.* Warren (1820), R. & R. 48 n., an overseer was indicted for neglecting to supply medical aid when required, to a pauper labouring under a dangerous illness; and Holroyd J., held the offence sufficiently charged and proved, though the pauper was not in the workhouse, or before his illness needed parish relief.

Against a juror for not appearing when summoned on a coroner's inquest.(*f*)

That on, &c., at, &c., one A. B. died within the limits of the borough of Reading, in the County of Berks, of a sudden and violent and not natural death, and that the body of the said A. B. then lay dead in the parish of St. G. within the limits of the borough aforesaid, whereof information had been then and there duly given to J. J. B., Esq., who then was the coroner of the borough aforesaid.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that thereupon the said J. J. B., so being such coroner aforesaid, to wit, on the said day of in the year aforesaid, in the parish of St. G. within the limits of the borough aforesaid, duly made his certain warrant in writing under his hand and seal, as such coroner as aforesaid, directed to the constables and wardens of the said borough, whereby the said coroner in her majesty's name charged and commanded them, that on sight thereof they should summon and warn twenty-four able and sufficient men of their constable-wick personally to appear before him on the said day of at o'clock in the at the house known by the sign of the in street, in the said borough, then and there to do and execute all such things as should be given them in charge on behalf of our sovereign lady the queen's majesty, touching the death of the said A. B., and that they should make a return of those whom they should so summon.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that C. D., of the parish of St. G. within the borough aforesaid, on the said day of in the year aforesaid, and long before, was an inhabitant householder of the parish of St. G. aforesaid within the borough aforesaid, and a person able and sufficient to do and execute all such things as might and should be given to him in charge, on behalf of our said lady the queen, touching the death of the said A. B., and that he the said C. D. then and there was duly summoned and warned personally to appear before the said J. J. B., so being such coroner as aforesaid, at the time and place aforesaid, to do and execute all such things as there might be given to him in charge touching the premises aforesaid. Nevertheless the said C. D., wholly neglecting his duty in that behalf, did not nor would personally appear before the said J. J. B., so being such coroner as aforesaid, but so to do, and to do his duty on that behalf, then and there totally did neglect, and wilfully, obstinately and contemptuously did make default, against the form and effect of the said warrant and summons, in contempt, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said C. D., on the said day of in the year aforesaid, and long before, was an inhabitant of and in the parish of St. G. aforesaid within the borough aforesaid, and that he the said C. D. then and there was duly summoned and warned personally to ap-

(*f*) Dickinson's Q. S. 6th ed. 431; see stat. 4 Ed. I., c. 2; R. *v.* Jones, 2 Stra. 1145; R. *v.* Lowe, *ib.* 820; 2 Inst. 225; Fortescue de Laudibus, c. 25.

pear before the said J. J. B., so being such coroner as aforesaid, at (*the particular time and place stated in the warrant*), to do and execute all such things as then and there might be given to him in charge touching the death of the said A. B., then lying dead in the parish of St. G. aforesaid within the borough aforesaid, of a violent death. Nevertheless the said C. D., wholly neglecting his duty in that behalf, did not nor would personally appear before the said J. J. B., so being such coroner as aforesaid, upon the occasion aforesaid; but so to do, and to do his duty in that behalf, then and there totally did neglect, and wilfully, obstinately and contemptuously did make default; in contempt, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For refusing to serve the office of overseer of the poor.(*g*)

That on, &c., at, &c., B. C., Esq., and D. E., Esq., then and yet being two of the justices of our said lady the queen, assigned to keep the peace of our said lady the queen in the said County of M., and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county (one of them then being of the quorum), and both dwelling near the said parish of A. in the County of M. aforesaid, did under their hands and seals nominate and appoint F. G., late of, &c., then being a substantial householder in the said parish of A. in the county aforesaid, to be overseer of the poor of the said parish for the year then ensuing, according to the form of the statute in such case made and provided. And that afterwards, to wit, on, &c., at, &c., he the said F. G. had due notice of the said nomination and appointment, and was duly and legally served therewith; yet he the said F. G., of the parish aforesaid in the county aforesaid, yeoman, on the said day of in the year aforesaid, and continually afterwards until the day of the taking of this inquisition, during all which time he the said F. G. was, and continued, and yet is an inhabitant and householder within the same parish in the county aforesaid, at, &c., unlawfully, obstinately and contemptuously did, and yet doth neglect and refuse to take upon himself the execution of the said office of overseer of the poor of the said parish of A. in the said County of M., to which he was so nominated and appointed as aforesaid, or to intermeddle or act therein; against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For refusing to execute the office of constable.(*h*)

That J. K., &c., of, &c., on, &c., at, &c., and within the jurisdiction of this court, to wit, at a court of General Quarter Sessions Records, held before M. B. and L. L., &c., of the same county, justices assigned to keep the peace (the said J. K. then and there being an inhabitant and resident of said township of P.), was duly constituted and appointed by the said M. B., &c., to be constable of, &c., from, &c., for

(*g*) Dickinson's Q. S. 6th ed. 430. As to what constitutes a householder for the purpose of liability to serve this office, see R. *v.* Poynder, 1 B. & C. 178.

(*h*) Drawn by William Bradford, Esq.

the term of one year then next following, whereof the said J. K., on, &c., at, &c., had notice. Nevertheless the said J. K., his duty in this behalf not regarding, but intending the due execution of justice as much as in him lay, to hinder and retard from, &c., to, &c., at, &c., the office of constable of, &c., on himself to take and execute, wilfully, obstinately and contemptuously, hath altogether refused and denied, to the manifest contempt and hinderance of justice, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For refusing to take the office of chief constable, being duly elected at the quarter sessions.(*i*)

That at the General Quarter Sessions of the Peace holden at, (*caption of the session*), one A. B., of the parish of C., within the hundred of O. in the County of M. aforesaid, yeoman, then and long before being an inhabitant, and residing in the said parish of C. within the hundred and county aforesaid, and an able and proper person to execute the office of chief constable within the said hundred, was then and there, by the justices above named, at the same session, in due manner elected(*j*) to be one of the chief constables of the hundred aforesaid, in the room and instead of one C. D., whereof he the said A. B. afterwards, to wit, on, &c., at, &c., within the hundred and county aforesaid, had notice; and afterwards, to wit, on, &c., at, &c., was summoned before the said justices at, &c., to be sworn into his said office(*k*) of chief constable of the said hundred of (*k*); nevertheless the said A. B. his duty in that behalf not regarding, but contriving and intending wholly to neglect and serve the said office of chief constable, on, &c., and continually afterwards until the day of the taking of this inquisition, at the parish aforesaid within the hundred and county aforesaid, unlawfully, wilfully, obstinately and contemptuously did wholly neglect and refuse to take upon himself and to execute the said office of chief constable, within the said hundred of O. in the county aforesaid; to the great hinderance of public justice, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a gaoler for a voluntary escape.(*l*)

That heretofore, to wit, at the General Quarter Sessions of the

(*i*) Dickinson's Q. S. 6th ed. 429.

(*j*) *Ib.*; see R. *v.* MacArthur, Peake's C. N. P. acc. The special circumstances of the election, and of the notice of it, must be set forth; 2 Hawk. c. 10, s. 46; Bac. Abr. *tit. Constable* (A); *ante*, *tit. Escapes.*

(*k*) The summons should be stated according to fact; see Prig's case, Alayn's R. 78, acted on in Fortesc. Rep. 127. Dickinson's Q. S. 6th ed. 430.

Refusing to accept offices. The refusal to accept office, which parties are liable to serve and to which they are duly appointed, is an indictable offence. Thus a person duly chosen is indictable, for refusing to take on himself the office of constable of a parish which he inhabits; R. *v.* Harper, 5 Mod. 96. Refusing to take the oath of office is *prima facie* evidence of refusal to take on himself the execution of it, and that refusal need not be stated in the indictment; R. *v.* Brain, 3 B. & Ad. 614. Or the office of overseer of the poor; R. *v.* Jones, 2 Str. 1145; or any other ministerial office; but notice of the appointment must first be given him; and the indictment must show the duty he has violated, by setting out the mode in which he was appointed, and how he became liable to serve; R. *v.* Harper, 5 Mod. 96.

(*l*) Arch. C. P. 5th Am. ed. 654.

Peace, holden at (*so continuing the record of the conviction of the party who escaped, stating it however in the past, and not in the present tense; then proceed thus*): as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the said General Quarter Sessions of the Peace above mentioned, he the said J. N. was then and there committed to the care and custody of J. S., he the said J. S. then and still being keeper of the common gaol in and for the said County of Berks, there to be kept and imprisoned in the gaol aforesaid, according to and in pursuance of the judgment and sentence aforesaid; and the said J. S. the said J. N. then and there had in the custody of him, the said J. S., for the cause aforesaid, in the gaol aforesaid.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said J. S., of the parish of L. in the said County of Berks, yeoman, afterwards, and before the expiration of the six calendar months for which the said J. N. was so ordered to be imprisoned as aforesaid, and whilst the said J. N. was so in the custody of the said J. S., as such keeper of the said common gaol as aforesaid, to wit, on, &c., at, &c., feloniously, (*if the offence for which J. N. was convicted was a felony*), unlawfully, voluntarily and contemptuously did permit and suffer the said J. N. to escape and go at large whithersoever he would; whereby the said J. N. did then and there escape out of the said prison and go at large whithersoever he would; in contempt of our said lady the queen and her laws, contrary to the duty of the said J. S., so being keeper of the gaol aforesaid, in manifest hinderance of justice, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same where the party escaping was committed by a judge as a fugitive from justice.(*m*)

That on, &c., A. V. P., being one of the judges of the said commonwealth under the constitution and laws thereof, and one of the

(*m*) This indictment was prosecuted in Philadelphia, at July T. 1847, by Mr. Champneys, the attorney-general of Pennsylvania. The defendant was acquitted.

The second count, which is very elaborate, is as follows:

"And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that T. G. P. being governor of the State of Maryland, heretofore, to wit, on, &c., and according to the constitution and laws of the United States, gave information to his excellency F. R. S., then and now governor of the Commonwealth of Pennsylvania, that a certain I. B., late of, &c., in the said State of Maryland, stood charged upon the affidavit of A. S. with the crime of an assault, with intent to kill him the said A. S.; and the said T. G. P. so being governor of the said State of Maryland, did at the same time and in manner aforesaid, further request that he the said F. R. S., so being governor of this commonwealth, would cause the said I. B. to be apprehended, secured and delivered up to J. Z. as agent on the part of the said State of Maryland, as a fugitive from justice, to be removed for trial in the said State of Maryland, having jurisdiction of his crime aforesaid, agreeably to the constitution of the United States and the provisions of an act of congress, passed the twelfth day of February, seventeen hundred and ninety-three; and further that the said T. G. P., so being governor of the said State of Maryland, on, &c., in and by a certain paper instrument in writing and printing, under the hand of the said T. G. P., so

associate judges of this honourable court, in due form of law did make his warrant of commitment under his hand and the seal of this

being governor as aforesaid, and the great seal of the said State of Maryland, duly attested by W. T. W. then secretary of the said State of Maryland, did authorize and empower the said J. Z. to take and receive the said I. B., a fugitive from justice as aforesaid, and convey him to the State of Maryland, there to be dealt with according to law; and the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that the said F. R. S., so being governor of the said commonwealth, afterwards, to wit, on, &c., issued a certain writ, warrant and mandate, bearing date the day and year last aforesaid, at Harrisburg in this state, under the hand of him the said F. (so being governor aforesaid, and the great seal of this commonwealth, duly attested by J. M., then and now secretary of the said commonwealth, directed to A. V. P., Esq., an Associate Judge of the Court of Common Pleas for the City and County of Philadelphia, or to any other judge or justice of the peace of this commonwealth, reciting therein the information given by the said T. G. P., governor as aforesaid, to him the said F. R. S., governor as aforesaid, and the request of him the said T. G. P., so being governor as aforesaid, as the same are above particularly set forth, in and by which said writ, warrant and mandate, he the said F. R. S., so being governor as aforesaid, did authorize and require him the said A. V. P., so being associate judge as aforesaid, or any other judge or justice of the peace in this commonwealth as aforesaid, to issue a warrant in the form of law, directed to any constable or other proper officer for the apprehending and securing the said I. B., and that when secured, he the said A. V. P., so being associate judge as aforesaid, or any other judge or justice of the peace of this commonwealth, would cause him the said I. B. to be delivered up to the said J. Z., agent as aforesaid, to the intent that he might be removed from this state into the said State of Maryland, having jurisdiction of his crime, the said agent peaceably and lawfully behaving. Which said writ, warrant and mandate, on the day and year last aforesaid, he the said F. R. S. then being governor as aforesaid, sent and transmitted to the said A. V. P., so being associate judge as aforesaid, by whom it was duly received, to wit, on, &c., at, &c.

"And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that afterwards, to wit, on, &c., at, &c., the said A. V. P. so being Associate Judge of the Court of Common Pleas for the city and county aforesaid, in pursuance of the command in the said writ, warrant and mandate of the said F. R. S., governor as aforesaid, issued his warrant for the arrest of the said I. B., bearing date the day and year last aforesaid, at, &c., under the hand and seal of him the said A. V. P., so being associate judge as aforesaid, directed to J. H. B., then and there being one of the officers of the police of Philadelphia, acting under the authority of the mayor of the said city; and the said J. Z. so being agent of the said State of Maryland for the purposes aforesaid; which said warrant is in these words and figures, to wit:

"'City and County of Philadelphia, *ss.*

"'The Commonwealth of Pennsylvania,

"'To J. H. B., or J. Z., Greeting:

"'Whereas his excellency F. R. S., Governor of the Commonwealth, has issued his warrant to me the subscriber, one of the Judges of the Court of Common Pleas of the said county, setting forth that a certain I. B., late of, &c., in the State of Maryland, stands charged upon the affidavit of A. S. with the crime of an assault with intent to kill him, and that said I. B. is a fugitive from justice, and authorizing and requiring me to issue a warrant in due form of law, directed to any constable or other proper officer, to apprehend and secure the said I. B., and when so secured to cause him to be delivered to J. Z., agent from the State of Maryland. These are therefore to command you the said B. and Z., or either of you, to take the said I. B. and bring him forthwith before the subscriber, to answer said charge and to be further dealt with according to law.

"'Witness my hand and seal at, &c., on, &c. A. V. P.'

"By virtue of which said warrant, they the said J. H. B. and J. Z., acting as aforesaid, arrested and secured the said I. B. named in the information of the said Governor of the State of Maryland and the writ, warrant and mandate of the said Governor of Pennsylvania, in the charge aforesaid, and held and detained him the said I. B. in the charge and keeping of the said J. H. B. and J. Z., acting as aforesaid; and the said I. B. being so held and detained, presented his petition over the mark of him the said I. B. to the said A. V. P., so being associate judge as aforesaid, setting forth that the said I. B. was illegally deprived of his liberty, and praying that he the said A. V. P., so being associate judge as aforesaid, would grant him the said I. B. a writ of habeas corpus to relieve the said I. B. from the said detention and restraint. Whereupon the said A. V. P., so being associate judge as aforesaid, on the day and year last aforesaid, at the county aforesaid, allowed the said writ

honourable court, to wit, at, &c., bearing date the day and year aforesaid, which said warrant of commitment was delivered to A. F., then being the keeper and superintendent of the prison for the said City and County of Philadelphia, in and by which said warrant he the said A. V. P., so being judge and justice as aforesaid, certified that on the day and year aforesaid one I. B. was committed to the said prison for a further hearing, to answer the charge of being a fugitive from justice from the State of Maryland, until, &c.; and he the said I. B. to stand committed until judgment be fully complied with, as by the said warrant more fully appears. By virtue of which said war-

of habeas corpus, which said writ of habeas corpus did thereupon issue, to wit, on, &c., at, &c., out of the said Court of Common Pleas, duly signed and sealed with the seal of the said court, directed to J. H. B., commanding him the said J. H. B., that the body of him the said I. B. under his the said J. H. B.'s custody detained, by whatsoever name the said I. B. might be detained, together with the day and cause of his being taken and detained, he the said J. H. B. have before him the said A. V. P., so being an associate judge of the said court, forthwith in the room of the said court in the said city immediately, then and there to do, submit and receive whatsoever he the said A. V. P., so being associate judge as aforesaid, should then and there consider in that behalf. In obedience of the command of which said writ of habeas corpus, he the said J. H. B. did then and there bring immediately the body of the said I. B. before the said judge at the place named as aforesaid, with a return of the cause of the detainer of the said I. B. written and endorsed on the back of the said writ of habeas corpus, over the signature of him the said J. H. B., in the words following, to wit:

"'The within named I. B. is detained by virtue of a requisition of his excellency Governor T. G. P. of Maryland on the Governor of Pennsylvania, who issued his warrant for the arrest of the said I. B. as a fugitive from justice from the State of Maryland, charged with an assault and battery with intent to kill.

"'J. H. B. 2d Lt. of Police.

"'Philadelphia, &c. "'To Judge P.'

"Whereupon the said A. V. P., so being associate judge as aforesaid, on, &c., at, &c., heard and examined the said charges and the complaint of the said I. B., and afterwards, to wit, on, &c., at, &c., committed the said I. B. to the prison for the said City and County of Philadelphia for a further hearing before him the said A. V. P., so being an associate judge as aforesaid, to answer the said charges before him the said A. V. P., so being an associate judge as aforesaid, on, &c., in the Quarter Sessions court-room, and did then and there, to wit, on, &c., make out his warrant of commitment in due form of law, under the hand of him the said A. V. P., so being associate judge as aforesaid, and the seal of the Court of Quarter Sessions of the Peace for the City and County of Philadelphia, of which said court he the said A. V. P. was then and there likewise an associate judge, to wit, at the county aforesaid, bearing date the day and year last aforesaid; which said warrant of commitment was delivered to A. F., then being the keeper and superintendent of the prison for the said City and County of Philadelphia, in and by which said warrant he the said A. V. P., so being judge and justice as aforesaid, certified that on the day and year aforesaid the said I. B. was committed to the said prison for a further hearing to answer the charge of being a fugitive from justice from the State of Maryland, until, &c., to wit, &c., in the room of the said court; and he the said I. to stand committed until judgment be fully complied with as by the said warrant more fully appears. By virtue of which said warrant of commitment, afterwards, to wit, on, &c., aforesaid, at the county aforesaid, A. F. being the keeper and superintendent of the said prison for the said city and county, did receive the said I. B. into his custody in the said prison for the said city and county, situate in the said county, and did also take and receive the said warrant of commitment. And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that the said A. F, late of the said county, yeoman, so being keeper of the said prison for the said city and county, and having the said I. B. in his custody in the said prison on that occasion, afterwards, to wit, on, &c., at the county aforesaid and within the jurisdiction of this court, unlawfully and negligently did permit and suffer the said I. B., so being a prisoner committed to the said prison as aforesaid, to escape and go at large from and out of the custody of him the said A. F. out of the said prison, whersoever he would, whereby the said I. B. did then and there escape out of the said prison, and go at large whithersoever he would, to the great hinderance and obstruction of justice, in contempt, &c., to the evil example, &c., and against, &c.

rant of commitment, afterwards, to wit, on, &c., A. F. then being the keeper and superintendent of the said prison for the said city and county, did receive the said I. B. into his custody in the said prison for the said city and county, situate in the said county, and did also take and receive the said warrant of commitment.

And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that the said A. F., late of, &c., so being keeper of the said prison for the said city and county, and having the said I. B. in his custody in the said prison on that occasion, afterwards, to wit, on, &c., at, &c., and within the jurisdiction of this court, unlawfully, voluntarily and contemptuously did permit and suffer the said I. B., (so being a prisoner committed to the said prison as aforesaid), to escape and go at large from and out of the custody of him the said A. F., out of the said prison, wheresoever he would, whereby the said I. B. did then and there escape out of the said prison and go at large whithersoever he would, to the great hinderance and obstruction of justice, in contempt of the laws of this commonwealth, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a constable for a negligent escape.(*n*)

That on, &c., at, &c., * J. S., then being one of the constables of the said parish, brought one J. N. before A. C., Esq., then and yet being one of the justices of our said lady the queen, assigned to keep the peace for our said lady the queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county; and the said J. N. then and there was charged before the said A. C. by one C. H., spinster, upon the oath of the said C. H. that he the said J. N. had then lately before violently, and against her will feloniously ravished and carnally known her the said C. H.; and the said J. N. was then and there examined before the said A. C., the justice aforesaid, touching the said offence so to him charged as aforesaid; upon which the said A. C., the justice aforesaid, did then and there make a certain warrant under his hand and seal, in due form of law, bearing date the said, &c., directed to the keeper of Newgate or his deputy, commanding him the said keeper or his deputy that he should receive into his custody the said J. N., brought before him and charged upon the oath of the said C. H. with the premises above specified; and the said justice by the said warrant did command the said keeper of Newgate or his deputy to safely keep him the said J. N. there until he by due course of law should be discharged; which said warrant, afterwards, to wit, on, &c., at, &c., was delivered to the said J. S., then being one of the constables of the said parish as aforesaid, and then and there having the said J. N. in his custody for the cause aforesaid; and the said J. S. was then and there commanded by the said A. C. to the justice aforesaid, to convey the said J. N. without delay to the said gaol of Newgate, and to deliver him the said J. N. to the keeper of the said gaol or his deputy, together with the warrant

(*n*) Arch. C. P. 5th Am. ed. 652.

aforesaid. * And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late, &c., baker, afterwards, to wit, on, &c., then being one of the constables of the said parish as aforesaid, and then having the said J. N. in his custody for the cause aforesaid, at, &c., the said J. N. out of the custody of him the said J. S. unlawfully and negligently did permit to escape and go at large whithersoever he would, whereby the said J. N. did then and there escape and go at large whithersoever he would, to the great hinderance of justice, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a prisoner for escape out of custody of constable.(*o*)

(*State the charge before the magistrate, the warrant of commitment and the defendant's being in the custody of J. S., as in the last precedent, to the* *, *and then proceed thus*): And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N., late, &c., labourer, so being in the custody of the said J. S., under and by virtue of the warrant aforesaid, afterwards and whilst he continued in such custody, and before he was delivered by the said J. S. to the said keeper of Newgate or his deputy, to wit, on, &c., at, &c., in the county aforesaid, out of the custody of the said J. S. unlawfully did escape and go at large whithersoever he would, to the great hinderance of justice, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For inflicting cruel and unusual punishment on one of the crew of a vessel, &c.

That A. B., late of, &c., heretofore, to wit, on, &c., with force and arms on the high seas (*or otherwise*), out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the in and upon one then and there being one of the crew of said vessel, did then and there make an assault, and from malice, hatred and revenge, and without any justifiable cause, then and there did inflict upon the said cruel and unusual punishment, he the said (*the offender*), then and there being, (*state whether the master, officer or one of the crew*), of the said American vessel, being a called the to the great damage of the said against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first, substituting*): "did then and there make an assault, and from malice, hatred and revenge and without any justifiable cause, then and there did beat and wound, (*or as the case may be*), the said he the said," &c., *for* "did then and there make an assault, and from malice, hatred and revenge and without any

(*o*) Arch. C. P., 5th Am. ed. 653.

justifiable cause, then and there did inflict upon the said cruel and unusual punishment, he the said," &c.

Third count.

That A. B., late of, &c., heretofore, to wit, on, &c., with force and arms on the high seas, out of the jurisdiction of any particular state of the United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the in and upon one then and there being one of the crew, (*or otherwise*), of the said American vessel, being a called the in and upon one then and there being of the said called the did then and there make an assault, and from malice, hatred and revenge, and without justifiable cause, then and there did beat, wound and imprison, (*or as the case may be*), the said and upon the said then and there being of the said vessel, being a called the then and there did inflict cruel and unusual punishment; he the said then and there being of the said American vessel, being a called the ; to the great damage of the said against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Against same for same, the punishment being beating and wounding, &c.(*p*)

That W. H. G. of, &c., in said district, master mariner, on, &c., on the high seas, within the admiralty and maritime jurisdiction of the said United States, in and on, to and of the "Richard Mitchell," the same then and there being an American ship or vessel, and belonging to certain persons citizens of the said United States, whose names are to the jurors aforesaid as yet unknown, with force and arms an assault did make in and upon one J. P. C.; and him the said C. then and there from malice, hatred and revenge, and without justifiable cause, did beat and wound, he the said C. then and there being one of the crew of said ship or vessel, and he the said G. then and there being the master thereof, against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Specifying the punishment more minutely.

That W. H. G. of, &c., in said district, master mariner, on, &c., on the high seas, within the admiralty and maritime jurisdiction of the said United States, in and on board of the "Richard Mitchell," the same then and there being an American ship or vessel, and belonging to certain persons citizens of the said United States, whose names are to the jurors aforesaid as yet unknown, with force and arms another assault did make in and upon the said J. P. C., and then and there from malice, hatred and revenge and without justifiable cause, did strip and expose naked down to the middle the person of him the said C., and did then and there inflict on the naked back of him the said C.

(*p*) This form was sustained in Massachusetts after a conviction.

seventeen lashes with a certain instrument called "the cats," and then and there after the infliction of said lashes as aforesaid, did pour a quantity of salt brine upon the said naked back of him the said C.; which said stripping and exposing naked the person of him the said C. as aforesaid, and said inflicting of said lashes as aforesaid, and which said pouring of salt brine as aforesaid upon the naked back of said C., were a cruel and unusual punishment, against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Confining a boy in run of a ship, &c.

That A. B. of, &c., in the district of M., master mariner, in on the high seas, within the admiralty and maritime jurisdiction of the United States, and on board of the same then and there being an American ship or vessel of the United States, with force and arms an assault did make in and upon one and him the said then and there from malice, hatred and revenge, and without justifiable cause, did imprison in the run of said ship or vessel, and detain there so imprisoned for a long space of time, to wit, from the said to the day of then next ensuing; he the said then and there being the master of said vessel, and he the said then and there being one of the crew thereof, against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Refusing suitable food.

That A. B. of, &c., in the district of M., master mariner, on and from that day to then next ensuing, on the high seas, within the admiralty and maritime jurisdiction of the United States, in and on board of the the same then and there being an American ship or vessel of the United States, with force and arms did withhold, from malice, hatred and revenge and without justifiable cause, suitable food and nourishment from one he the said then and there being the master of said ship or vessel, and he the said then and there being one of the crew thereof, against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Another form for withholding suitable food, &c.

That W. L. C. of in said district, master mariner, on and from that day until then next following, on the high seas, within the admiralty and maritime jurisdiction of the said United States, and out of the jurisdiction of any particular state thereof, in and on board the ship Farewell, the same then and there being an American ship or vessel belonging to certain persons citizens of the said United States, whose names are to the jurors aforesaid as yet unknown, with force and arms, from malice, hatred and revenge and without justifiable cause, did withhold suitable food and nourishment from G. W. and (eleven others), they the said W. (et al.) then and there being the crew of said ship or vessel, and he the said L. C. then and there being master thereof, against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

For forcing, &c., a seaman ashore in a foreign port.

That A. B., late of, &c., mariner, heretofore, on, &c., at, (*specify definitely the particular name of the place and country where the seaman was left*), did during his being abroad, maliciously and without justifiable cause, force on shore at, (*as before mentioned*), aforesaid, one he the said then and there being a mariner, and belonging to the company of a certain American vessel, being a called the belonging in whole or in part to a certain person or persons whose name or names are to the said jurors unknown, then and still being a citizen or citizens of the said United States of America, of which said vessel he the said was then and there the master and commander, against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same in another form.

That the said A. B., heretofore, to wit, on, &c., at, &c., he the said then and there being the master and commander of a certain American vessel, being a called the belonging in whole or in part to a certain person or persons whose name or names are to the said jurors unknown, then and still being a citizen or citizens of the said United States, did during his being abroad maliciously and without justifiable cause, force on shore at, (*as above mentioned*), aforesaid, one he the said then and there being a mariner of the said vessel, being a called the contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Leaving behind seaman.

(*Like second count, except instead of*): "force on shore at, (*as above mentioned*), aforesaid," *insert* "leave behind at a foreign port (or place), to wit, the said," (*as is mentioned in preceding counts*).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Leaving seaman in foreign port.(*pp*)

That B. C. S., late of, &c., master mariner, on, &c., at a foreign port or place called Valparaiso, in South America, then and there being the master and commander of the "Henry Clay," the same then and there being a ship or vessel of the United States, and belonging in whole or in part to certain persons citizens of the United States, whose names are to the jurors aforesaid as yet unknown, during her being abroad at said foreign port or place called Valparaiso, maliciously and without justifiable cause, did leave behind in said foreign port or place called Valparaiso, one J. S., he the said J. S., then and there being a mariner of said vessel, against, &c. (*Conclude as in book* 1, *chap.* 3).

Refusing to bring home a seaman.

That B. C. S., late, &c., master mariner, on, &c., at a foreign port or place called Valparaiso, in South America, then and there being the master and commander of the "Henry Clay," the same then and

(*pp*) Drawn and sustained in Boston.

there being a ship or vessel of the United States, and belonging in whole or in part to certain persons citizens of the United States, whose names are to the jurors aforesaid as yet unknown, during his being abroad at the said foreign port or place called Valparaiso, maliciously and without justifiable cause did refuse to bring home again from said foreign port or place called Valparaiso, one J. S., he the said J. S. then and there being a mariner of said ship or vessel, B. C. S. carried out with him from the said United States in said ship or vessel, and then and there being in a condition to return, and willing to return when said B. C. S. was ready to proceed on his homeward voyage from said foreign port or place, against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Another form for same.(*q*)

That heretofore, to wit, on, &c., one J. C. T., then being the master of a ship, to wit, the ship Washington, then and there belonging to a citizen and citizens of the United States, during his the said T. being abroad, to wit, at a foreign port, Calcutta, being a port within the dominions of his Britannic majesty and within the jurisdiction of this court, to wit, at the district aforesaid, did maliciously and without justifiable cause force W. S. B., then and there being an officer of the said ship, to wit, chief-mate of the said ship Washington, on shore in the said foreign port of Calcutta, to wit, at the district aforesaid, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

CHAPTER VII.

LIBEL.

General frame of indictment.

That A. B., of, &c., unlawfully and maliciously contriving and intending to vilify and defame one C. D., and to bring him into public scandal and disgrace, and to injure and aggrieve him the said C. D., on, &c., at, &c., unlawfully and maliciously did compose and

(*q*) United States *v.* Taylor, Phil. Oct. Sess. 1837. The defendant was acquitted. The indictment was framed by Mr. John M. Read, then district attorney.

publish(*a*) and cause and procure(*aa*) to be composed and published, a certain false, scandalous, malicious and defamatory libel of and concerning him(*b*), the said C. D., containing therein among other things, the false, malicious, defamatory and libellous words and matters following, that is to say,(*c*) (*here give the libellous matter in the man-*

(*a*) As composing or writing a libel merely, does not seem to be an offence unless the libel be afterwards published, the indictment must charge a publication; R. *v.* Burdett, 4 B. & Al. 95; Wh. C. L. 549. Where, however, a libel is written in the County of L., with intent to publish it, and is afterwards published in the County of M., the defendant may be indicted for a misdemeanor in either county; *ib.*; *by three judges*, Bayley J. *dubitante.*

(*aa*) This joinder is not bad for duplicity; *ante*, pp. 130, 481, 489.

(*b*) It should be stated that the libel was *of and concerning the prosecutor;* 4 M. & S. 164; 7 Mod. 400; 4 B. & A. 314; and if necessary, what were the circumstances of the publication; State *v.* Henderson, 1 Richardson 179. On an indictment for a libel against Jane Cox, which libel described her as the only daughter of the widow Roach, the innuendo in the indictment stated the identity of Mrs. R.'s daughter and of the prosecutrix Mrs. Cox: it was held that it was not necessary to prove that the prosecutrix was the only daughter; State *v.* Perrin, 1 Tr. Con. Rep. 446; 3 Brevard 152. It has been determined that it is a proper question to ask a witness whether, in his opinion, the alleged libellous words referred to the party alleged to be libelled; Com. *v.* Buckingham, Thacher's C. C. 29. In an indictment for a libel against A. S., omitting to allege that the libel was "of and concerning A. S.," it was held that such omission was not supplied by its being alleged in the introductory part, "that the defendant intending to vilify A. S., he having been mayor of, &c., and to cause it to be believed, that as such mayor he had practised corruption and had been guilty of abuse in respect to granting a license to retail beer," &c., and concluding, "to the injury and disgrace of A. S.," &c., although the innuendoes pointed the different parts of the libel to A. S. and J. L. and to the granting the license; 4 M. & S. 164. See also Clement *v.* Fisher, 7 B. & C. 459; State *v.* Nease, 2 Taylor's (N. C.) R. 270. But this statement does not appear necessary where the libel is stated to have been addressed to the plaintiff and written in the second person, "You," &c.; 1 Saund. 242, n. *n*, 3; Cro. J. 231. Whenever an inducement of extrinsic matter is necessary to constitute the matter libellous, it is necessary to aver that the libel was *of and concerning such matter;* 8 East 427; 1 Saund. 242–3, n. 3, 4; when not, see Ld. Raym. 1480; 2 Lev. 62; Cro. Car. 270.

(*c*) The alleged libellous matter must be set out correctly; Wright *v.* Clement, 3 B. & Al. 503; Tabart *v.* Tipper, 1 Campb. 352; Cartwright *v.* Wright, 1 D. & R. 230; State *v.* Stephens, Wright's Ohio R. 73; Com. *v.* Gillespie, 7 S. & R. 469; Com. *v.* Stow, 1 Mass. 54; Com. *v.* Bailey, 1 Mass. 62; State *v.* Farrand, 3 Halst. 333; State *v.* Gustin, 2 South. R. 749; State *v.* Street, Taylor 158; State *v.* Bradley, 1 Hay. 403; State *v.* Coffey, N. C. Term R. 272; U. S. *v.* Hinman, 1 Bald. 292; U. S. *v.* Britton, 2 Mason 462; People *v.* Franklin, 3 Johns. C. 299; Com. *v.* Searle, 2 Binn. 232; State *v.* Carr, 5 N. Hamp. 367; Com. *v.* Bailey, 1 Mass. 62; Com. *v.* Stevens, *ib.* 203; Com. *v.* Parmenter, 5 Pick. 279; State *v.* Molier, 1 Dev. 263; State *v.* Carter, Conf. (N. C.) R. 210; State *v.* Wimberly, 3 M'Cord 190; State *v.* Twitty, 2 Hawks 487; Com. *v.* Sweeny, 10 S. & R. 173; Com. *v.* Kearns, 1 Va. Cases 109; State *v.* Waters, 3 Brev. 507; Const. Ct. R. 169; Sedgwick J., 8 Mass. 110; People *v.* Badgley, 16 Wend. 53; Pendleton *v.* Com., 4 Leigh 694; State *v.* Parker, 1 Chipman's Verm. R. 298; State *v.* Potts, 4 Halst. 26; People *v.* Kingsley, 6 Cow. 522; State *v.* Squires, 1 Tyler's Verm. R. 147; Com. *v.* Holmes, 17 Mass. 336; Com. *v.* Sharpless, 2 S. & R. 91; Bucher *v.* Jarrat, 3 B. & P. 143; Howe *v.* Hall, 14 East 275; see *ante*, p. 130. It is not enough to charge the libel to contain "in substance" the matter following; 3 B. & A. 508; or that it was "to the effect following;" 2 Salk. 417, 600; 11 Mood. 78, 84, 85; Com. *v.* Sweeny, 10 S. & R. 173; State v. Walsh, 2 M'Cord 248. The usual methods of introducing the libellous words, as will appear more fully in the precedents which are to follow, are: "in which said (paper, book or letter as the case may be), was and is contained amongst other things the false, scandalous, defamatory and libellous words and matter following, of and concerning the said A. B." &c.; 2 Stark. on Sland. 383; or did publish, &c., "a certain false, &c., libel according to the tenor following;" or, "containing divers scandalous, &c., matters according to the tenor following, that is to say;" 3 Chit. C. L. 887–8–9; and see the prefatory averments used in cases of forgery, *ante*, p. 130. The leading case on this point is King *v.* Bear, 2 Salk. 417. The indictment was for composing, writing, making and collecting several libels in *uno quorum continetur inter alia juxta tenorem, et ad effectum sequentum*, and the words were then set out. And it

ner stated in the note, and proceed): to the great injury, scandal and disgrace of the said C. D., and against, &c. (*Conclude as in book* 1, *chap.* 3).

was agreed that *ad effectum* would of itself have been bad, since the court must judge of the *words themselves* and not of the construction the prosecutor puts upon them; but that the words *juxta tenorem sequentum* import the very words themselves; 2 Salk. 417. And it was held that the words "*ad effectum*" were loose and useless words; but that the words *juxta tenorem*, being of a more certain or strict signification, the force of the latter was not hurt by the former, according to the maxim "*utile per inutile non vitiatur.*"

In the same case, that of Ford *v.* Bennett, 1 Ld. Raym. 415, was referred to, where, in a special action upon the case against Bennett *et al.*, the plaintiff declared that the defendants at Saltashe procured a false and scandalous libel against the plaintiff, to be written under the form of a petition, and the libel was set forth after the words *continetur ad tenorem et ad effectum sequentum.* Two were found guilty, upon which judgment was entered for the plaintiff, and afterwards upon error brought in the exchequer, the judgment was affirmed, the exception taken to the words *ad effectum* having been overruled without consideration. And Holt C. J. said, that he then thought the judgment to be given with too great precipitation, but he afterwards, upon great consideration, had esteemed it to be very good law. And the King *v.* Fuller, Mich. 4 Wm. & Mary, and the King *v.* Young, *ib.*, were cited as authorities in point; and the whole court were of opinion that, notwithstanding the exception, the indictment was good; but that if it had been only *ad effectum sequentum*, it had been ill, because it had not imported that the words were *the specific words* which were in the libel.

This rule, however, is relaxed in the following cases:

1. Where the libellous matter is in the defendant's possession, and he though notified to do so, refuses to produce it. In such a case it will be enough for the jury to aver the fact of such possession, as an excuse for the non-setting forth of the tenor of the libel, and then, as will be done in a form which will be presently given, to set forth the substance. This course was first suggested in the King's Bench in King *v.* Watson, 2 T. R. 200, where an information was asked against a corporation for a libel, the libellous writing being in the hands of the defendant, and not within the control of the prosecution. The case did not proceed to trial, but it was strongly intimated by Buller J. that if it should, and the defendant refused to deliver the libellous paper, after notice, it would be enough for the prosecution to prove the substances. And it has since been held, in prosecutions for forgery, that if the prosecutor a reasonable time before the commencement of the assizes, gives the prisoner notice to produce the alleged forged writing, he is entitled, on non-production, to give secondary evidence of its contents; R. *v.* Haworth, 4 C. & P. 254; R. *v.* Hunter, *ib.* 128; see *ante*, p. 132. In Massachusetts, Vermont, New York, New Jersey and Virginia, as well as in the United States courts, it has been laid down that in such cases it is proper and necessary for the prosecution to aver specially in the indictment the loss of the instrument in question, or a possession and non-production by the defendant; see Sedgwick J., 8 Mass. 110; People *v.* Badgley, 16 Wend. 53; Pendleton *v.* Com., 4 Leigh 694; U. S. *v.* Britton, 2 Mason 461; State *v.* Parker, 1 Chipman's Verm. R. 298; State *v.* Potts, 4 Halst. 293; Bucher *v.* Jarrat, 3 B. & P. 143; Howe *v.* Hall, 14 East 275. See for a precedent of same *post*, 559.

2. Where the libellous matter is lost or destroyed, when the same cause would undoubtedly be sustained.

3. Where the libel is of so indecent a character as to make it unfit to be spread on the record, in which case it is determined that it is enough for the grand jury to say "that the same would be offensive to the court here, and improper to be placed on the records thereof," in which case the non-setting forth of the libel is held to be sufficiently excused; Com. *v.* Holmes, 17 Mass. 336.

If the libel be in a foreign language, it must be set out in such language *verbatim*, together with a correct translation, as will appear in one of the following forms. See Zenobio *v.* Aztel, 6 T. R. 162; Wormoth *v.* Cramer, 4 Wend. 394.

If parts of the publication be selected they must be set forth thus: "in a certain part of which said there were and are contained certain false, wicked, malicious, scandalous, seditious and libellous matters, of and concerning, &c., according to the tenor and effect following, that is to say;"—and then after setting forth the first extract, introducing the second, preceding it by: "and in a certain other part," &c. See 1 Campb. 350.

Innuendo. Where the matter written is not in itself obviously libellous, it is necessary to render it so by explaining its real meaning by an *innuendo.* Its nature and office is to explain the defendant's meaning by reference to such inducement or matter previously expressed in the proceedings; Shaffer *v.* Kintzer, 1 Binn. R. 537, 542; Bloss *v.*

Libel on an individual generally.

That C. D., late, &c., being a person of an envious, evil and wicked mind, and of a most malicious disposition, and wickedly, maliciously

Tobey, 2 Pick. (2d ed.) 327, n.; Shely *v.* Biggs, 2 Har. & J. 363; Goodrich *v.* Wolcott, 3 Cowp. 236; Van Vetchen *v.* Hopkins, 5 Johns. R. 220; Stow *v.* Converse, 4 Conn. R. 18; where the intent may be mistaken, or where it cannot be collected from the libel itself; Cowp. 629, 683; 5 East 463; or where the words of the writing are general, ironical, or written by way of allusion or inference, so that in order to show its offensive meaning an innuendo is necessary to connect with some facts or associations not expressed in words, but which they necessarily presented to the mind. As an innuendo can explain only in cases where something already appears upon the record to ground the explanation, it cannot of itself change, add to or enlarge the sense of expressions beyond their usual acceptation and meaning. See 2 Salk. 513; Cowp. 684. In an action against a man for saying of another "he has burnt my barn," the plaintiff cannot by way of innuendo say, "meaning my barn full of corn;" Barham's case, 4 Co., 20, *a*; because this is not an explanation derived from anything which preceded it on the record; but from the statement of an extrinsic fact which had not previously been stated. But if in the introductory part of the declaration, it had been averred that the defendant had a barn full of corn, and that, in a discourse about the barn he had spoken the above words of the plaintiff, an innuendo of its being the barn full of corn would have been good; for by coupling the innuendo with the introductory averment, it would have made it complete; R. *v.* Tutchin, 5 St. Tr. 532; Alexander *v.* Angle, 1 C. & J. 143; Arch. C. P. 494; 1 Roll. Abr. 83, pl. 7, 85, pl. 7; 7 B. & C. 459; Clement *v.* Fisher, 1 Man. & Ry. 281; 2 Roll. Rep. 244; Cro. Jac. 126–39; 6 B. & C. 154; Goldstein *v.* Foss, 9 D. & R. 197; 1 Sid. 52; 2 Str. 934; 1 Saund. 242, n. 3. Thus, in an action for the words "*He is a thief*," you cannot explain the defendant's meaning in the use of the word "*he*," by an innuendo "*meaning the said plaintiff*," or the like, unless something appear previously upon the record to ground that explanation; but if you had previously charged the words to have been spoken of and concerning the plaintiff, then such an innuendo would be correct; for, when it is alleged that the defendant said of the plaintiff "*He is a thief*," this is an evident ground for the explanation given by the innuendo, that the plaintiff was referred to by the word "he;" State *v.* Chase, 1 Walker 384; State *v.* Henderson, 1 Richardson 179; R. *v.* Bindett, 4 B. & Al. 95; Bradley *v.* State, 1 Walker 156; State *v.* Neese, N. C. Term R. 270; 2 Salk. 512; Van Vetchen *v.* Hopkins, 5 Johns. 211; Cowp. 684; Mix *v.* Woodward, 12 Conn. 262; Usher *v.* Severance, 20 Maine R. 50; Zenobio *v.* Aztel, 6 T. R. 162; Wh. C. L. 82; Cartwright *v.* Wright, 1 D. & R. 230; Wright *v.* Clements, 3 B. & Al. 503; Walsh *v.* State, 2 M'Cord 285; 1 Campb. 350, per Ld. Ellenborough; Arch. C. P. 494; 3 Brevard 152; State *v.* Perrin, 1 Tr. Con. Rep. 446; 2 Brevard 474; Barham's case, 4 Co. 20, *a*; Com. *v.* Buckingham, Thacher's C. C. 29; Miller *v.* Maxwell, 16 Wend. 9; 2 Hill 472; 12 Johns. 474; R. *v.* Tutchen, 5 St. Tr. 532; Alexander *v.* Angle, 1 C. & J. 143; 1 Roll. Abr. 83, pl. 7, 85, pl. 7; 7 B. & C. 459; 2 Roll. Rep. 244; Cro. Jac. 126–39; Clement *v.* Fisher, 1 Man. & Ry. 281; 1 Sid. 52; 2 Str. 934; 1 Saund. 242, n. 3; Goldstein *v.* Foss, 9 D. & R. 197; 6 B. & C. 154; 2 Roll. Rep. 244; Tomlinson *v.* Brittlebank, 4 B. & Ad. 630; 1 N. & M. 455; Sweetapple *v.* Jesse, 5 B. & Ad. 27; 2 N. & M. 36; Curtis *v.* Curtis, 10 Bing. 447; 4 M. & Scott 37; Storoman *v.* Dutton, 10 Bing. 502; 4 M. & Scott 174; Day *v.* Robinson, 1 Ad. & El. 554; 4 N. & M. 884. Where the plaintiff averred, by way of innuendo, that the defendant in attributing the authorship of a certain article to a "celebrated surgeon of whisky memory," or to a "noted steam-doctor," meant by the appellations the plaintiff, it was held, notwithstanding the innuendo, that the declaration was bad for want of an averment that the plaintiff was generally known by those appellations, or that the defendant was in the habit of applying them to him, or something to that effect; Miller *v.* Maxwell, 16 Wend. 9; see also 2 Hill 472, and 12 Johns. 474. "Its simple object," says Mr. Chitty (C. L. 875), "is to reduce a natural to a legal certainty; it signifies no more than *id est* or *scilicet*, that such a person means a particular person, or such a thing a particular thing, and must have precedent matter to which it refers; 4 Co. 17, *b*. Every thing therefore, as we have already seen, intended to be thus alluded to, must be stated previous to the *innuendo*, which is to apply it to the matter charged as libellous. But whenever the *innuendo* is erroneous in consequence of its going beyond its office, if the libel be clear to a common intent without it, the defective part may be rejected as surplusage, 6 East 95; 8 East 427; Cro. Car. 512; Cowp. 275; 5 East 463; but care should be taken not to insert more *innuendoes* than are absolutely necessary, for the practice of overloading the record with *innuendoes*, to explain facts which need no explanation, is censurable; and Ld. Ellenborough said, "that such practice seemed to pro-

and unlawfully minding, contriving and intending as much as in him lay to injure, oppress, aggrieve and vilify the good name, fame, credit and reputation of A. B., a good, peaceable and worthy subject of our said lord the king, and to bring him into public scandal, hatred, infamy and disgrace (*or*, into public scandal, contempt, ridicule and disgrace, &c., *according to the nature of the libel*), with force and arms on, &c., at, &c., of his great hatred, malice and ill-will towards the said A. B., wickedly, maliciously and unlawfully did compose and write and cause and procure to be composed and written, a certain false, scandalous, malicious and defamatory libel, of and concerning the said A. B., containing the false, scandalous, malicious and defamatory words and matter following, of and concerning the said A. B., that is to say, (*set out a copy, with proper innuendoes to explain the meaning, if they be necessary*), which said scandalous, malicious and defamatory libel, he the said C. D. afterwards, to wit, on, &c., at, &c., wickedly, maliciously and unlawfully did send(*d*) and cause to be sent to one E. F., in the form of a letter, directed to the said E. F., and did thereby then and there unlawfully, wickedly and maliciously publish and cause to be published the said libel, to the great damage, disgrace, scandal and infamy of the said A. B., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said C. D. being such envious, evil, wicked and malicious person, and wickedly, maliciously and unlawfully minding, contriving and intending as aforesaid, afterwards, to wit, on the same day and year aforesaid, with force and arms at, &c., of his great hatred, malice and ill-will towards the said A. B., wickedly, maliciously and unlawfully did write (*or* print), and publish, and cause and procure to be written (*or* printed) and published a certain other false, scandalous, malicious and defamatory libel of and concerning the said A. B., containing the false, scandalous, malicious and defamatory words and matter following, of and concerning the said A. B., that is to say, (*set out the libel, and conclude as before*).

Third count. For publishing generally.

ceed on the supposition that the court had no discernment and the jury no understanding, and an *innuendo* may sometimes be injuriously narrowing and limiting the prosecutor's case in proof;" 3 Campb. 461; 7 Price 544.

In an action on the case against a man for saying of another "he has burnt my barn," the plaintiff cannot by way of innuendo say, "meaning my barn full of corn;" Barham's case, 4 Co. 20, *a*; because this is not an explanation derived from anything which preceded it on the record, but from the statement of an intrinsic fact which had not previously been stated. But if, in the introductory part of the declaration, it had been averred that the defendant had a barn full of corn, and that in a discourse about the barn he had spoken the above words of the plaintiff, an innuendo of its being the barn full of corn would have been good; for by coupling the innuendo with the introductory averment, it would have made it complete; R. *v.* Tutchin, 5 St. Tr. 532; Arch. C. P. 494; Alexander *v.* Angle, 1 C. & J. 143; 1 Roll. Abr. 83, pl. 7, 85, pl. 7; 7 B. & C. 459; Cro. Jac. 126–39; Clement *v.* Fisher, 1 Man. & Ry. 281; 1 Sid. 52; 6 B. & C. 154; 2 Roll. Rep. 244; 2 Str. 934; Goldstein *v.* Foss, 9 D. & R. 197; 1 Saund. 242, n. 3.

(*d*) 2 Stark. on Slander 369.

Where a libel merely reflects on a person in his profession, trade or business, and the publication is confined to that person, it is not sufficient to aver an intention to disparage and injure the party in his profession, trade or business; the indictment ought to allege an intent to provoke and excite the prosecutor to a breach of the peace; R. *v.* Wegener, 1 Stark. C. 543; *supra*, 2 Stark. on Slander 324.

Writing a libellous letter to prosecutor.(e)

That A. B., of, &c., maliciously and unlawfully intending one C. D. to injure, oppress and vilify, and bring into contempt and ridicule, on, &c., at, &c., in said county, unlawfully and maliciously did write and cause to be written a certain false, malicious and defamatory libel of and concerning the said C. D., which said false, malicious and defamatory libel is of the following purport and effect, that is to say, (*here insert the libel, with proper innuendoes*), which said false, malicious and defamatory libel he the said A. B. afterwards, to wit, on, &c., at, &c., aforesaid, in the county aforesaid, maliciously and unlawfully did send and deliver, and cause to be sent and delivered to the said C. D., in the form of a letter, directed to the said C. D., by the name of, (*here insert the superscription to the letter*); to the great injury, damage and scandal of the said C. D., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Publishing a libellous letter, imputing the crime of theft to the prosecutor.(f)

That A. B., of, &c., designing and maliciously intending to injure, vilify and defame the character and credit of one C. D., and to bring him into disgrace and infamy, on, &c., at, &c., in the county aforesaid, a certain false, scandalous and libellous writing against him the said C. D., and of and concerning him the said C. D., falsely and maliciously did frame and make; and in the name of him the said A. B., did then and there write and publish, and cause to be written and published, in form of a letter, directed to him the said C. D., the purport and effect of which said writing is as follows: "To C. D., &c., (*here insert the letter correctly, with proper innuendoes*); and that the said A. B., with intention to injure, abuse and defame the said C. D., and to bring him into contempt, disgrace and infamy, the said false, libellous and malicious writing, so as aforesaid framed, written and made, afterwards, to wit, on, &c., at, &c., to one E. F., and to divers other good citizens of the said commonwealth then and there present, did maliciously and openly deliver and publish, and cause to be openly delivered and published, to the great damage, infamy and scandal of him the said C. D., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Libel on a person who was dead.(g)

That A. B., of, &c., being a person of revengeful and malicious disposition, and maliciously intending to injure, defame, vilify and disgrace the memory, character and reputation of one C. D., then deceased, and to bring the family, relations and descendants of the said C. D. into disgrace, contempt and infamy, and to cause it to be believed that the said C. D., in his lifetime, was a person of a vicious, immoral and depraved mind and disposition, and destitute of filial

(e) Davis' Prec. 161. (f) Davis' Prec. 154; 3 Chit. C. L. 888.
(g) Davis' Prec. 158-9; 3 Chit. 914.

duty and affection, and that the said C. D. led an immoral and profligate life, on, &c., at, &c., in said county, unlawfully and maliciously did print and publish, and did cause and procure to be printed and published, in a certain newspaper called "The World," a certain false, scandalous and malicious libel, of and concerning the said C. D., which said false, scandalous and malicious libel is of the purport and effect following, to wit, (*here set forth the libel, with proper innuendoes,*) to the great scandal and disgrace of the memory, reputation and character of the said C. D., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Posting a man as a scoundrel, &c.(*h*)

That W. C., late of, &c., being a person of an envious and wicked mind and of a malicious disposition, and unlawfully contriving and intending as much as in him lay to injure, oppress, aggrieve and vilify the good name, credit and reputation of one C. H., &c., and to bring him into great contempt, hatred, infamy and disgrace, on, &c., with force and arms at, &c., a certain false, scandalous and libellous writing against the said C. H., falsely, maliciously and scandalously did frame and make, and then and there cause to be written, published and posted up, the purport, substance and effect of which said writing is as follows, to wit, "C. H. (meaning the aforesaid C. H.), is a *lyar*, a *scoundrel*, a *cheat* and a *swindler*—don't pul this down, Nov. 7, 1807;" and that the said W. C., with intention to scandalize the said C. H. and to bring him into contempt, infamy and disgrace, the aforesaid false, scandalous, malicious and libellous writing so as aforesaid written, framed and made, afterwards, to wit, on, &c., aforesaid, at Boston aforesaid, and in one of the public streets of said town, falsely, maliciously and scandalously did publish and post up and cause to be published and posted up, to the great scandal, infamy and damage of the said C. H., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Libel upon an attorney, contained in a letter.(*i*)

That on, &c., at, &c., one A. B. was one of the attorneys of the Supreme Judicial Court of this commonwealth, and had been and was before the composing, writing and publishing of the several false, malicious and defamatory libels hereinafter mentioned, retained and employed by one C. D., in the business and employment of his the said A. B.'s profession of an attorney at law, to write a letter to one E. F., demanding payment of a certain sum of money, to wit, the sum of fifty dollars, then due and owing from the said E. F. to the said C. D., and that the said E. F., of, &c., unlawfully and maliciously contriving and intending to injure, scandalize, vilify and defame the said A. B., and to bring him into public scandal and disgrace, and to injure, prejudice and ruin him in his said business and profession of an attorney at law, on, &c., at, &c., aforesaid, unlaw-

(*h*) Com. v. Clap, 4 Mass. 163. (*i*) Davis' Prec. 156; 3 Chit. C. L. 894.

fully and maliciously did compose and write a certain false, scandalous, malicious and defamatory libel of and concerning the said A. B. in his said business and profession, and of and concerning the demand aforesaid, so as aforesaid made by the said A. B. on the said E. F. as aforesaid, containing therein among other things the false, malicious, defamatory and libellous words and matter following, of and concerning the said A. B., that is to say, (*here insert the libellous matter, with proper innuendoes*), which said false, malicious and defamatory libel he the said E. F., afterwards, to wit, on, &c., at, &c., unlawfully and maliciously did send and cause to be sent to the said C. D., in the form of a letter addressed to the said C. D., and thereby then and there unlawfully and maliciously did publish and cause to be published the aforesaid libel, against, &c. (*Conclude as in book* 1, *chap.* 3).

Publishing an ex parte statement of an examination before a magistrate for an offence with which the defendant was charged.(*j*)

That before the printing and publishing of the defamatory and malicious libel herein afterwards mentioned, to wit, on, &c., one A. B. preferred to and before C. D., Esq., then and still one of the justices of the peace within and for the county of duly and legally authorized, appointed and qualified to discharge and perform the duties of said office, a certain complaint and charge in due form of law, against one E. F., for that he the said E. F. on, &c., at, &c., with force and arms, in and upon the body of her the said A. B. did make an assault, with intent her the said A B. to ravish and carnally know, by force and against her will, against the peace, &c., and the form of the statute, &c. And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H., of, &c., printer, well knowing the premises but devising and intending to traduce and defame the said E. F., and to injure and prejudice him in the minds of the good people of said commonwealth, and to cause it to be believed that he was guilty of the said felonious assault, and thereby to prevent the due administration of justice and to deprive the said E. F. of the benefit of an impartial trial for and concerning the matter of the said charge, on, &c., at, &c., did wilfully and maliciously print and publish and did cause and procure to be printed and published, a certain scandalous, malicious and defamatory libel, of and concerning the said charge and the matter thereof, and of and concerning the said E. F.; which said scandalous and malicious libel is of the following purport and effect, that is to say, (*here insert the publication correctly and with proper innuendoes*), to the great damage, &c., of him the said E. F., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Information for writing and publishing a libel against the king and government.(*k*)

That J. H., late, &c., being a wicked, malicious, seditious and ill-

(*j*) Davis' Prec. 158; 3 Chit. C. L. 911; 2 Campb. Rep. 563.
(*k*) 2 Stark. on Slander 358.

disposed person, and being greatly disaffected to our said lord the king, and to his administration of the government of this kingdom and the dominions thereunto belonging, and wickedly, maliciously and seditiously contriving, devising and intending to stir up and excite discontent and sedition among his majesty's subjects, and to alienate and withdraw the affection, fidelity and allegiance of his majesty's subjects from his said majesty, and to insinuate and cause it to be believed that divers of his said majesty's innocent and deserving subjects had been inhumanly murdered by his said majesty's troops in the province, colony or plantation of the Massachusetts Bay in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his majesty's subjects in the said province, colony or plantation to resist and oppose his said majesty's government, on, &c., with (*l*) force and arms at,(*m*) &c., wickedly, maliciously(*n*) and seditiously did write and publish,(*o*) and cause and procure to be written and published, a certain false,(*p*) wicked, malicious, scandalous and seditious libel,(*q*) of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect(*r*) following:

"King's Arms Tavern, Cornhill, June 7, 1775.

"At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only, inhumanly murdered by the king's (meaning his majesty's)(*s*) troops at Lexington and Concord in the province of Massachusetts (meaning the said province, colony or plantation of the Massachusetts Bay in New England, in America), on the nineteenth of last April; which sum being immediately collected, it was thereupon resolved, that Mr. H. (meaning himself the said J. H.), do pay to-morrow into the hands of Messrs. B. and C. on account of Dr. F., the said sum of one hundred pounds; and that Dr. F. be requested to apply the same to the above mentioned purpose: J. H." (meaning himself the said J. H.); in contempt of our said lord the king, in open violation of the laws of this kingdom, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said J. H., being such person as aforesaid, and again un-

(*l*) This allegation is unnecessary; see 7 T. R. 4; 2 Stark. on Slander 359.

(*m*) As to the venue, see 2 Stark. on Slander 302; *ib.* 359.

(*n*) As to this averment, see 2 Stark. on Slander 303; *ib.* 359; Sty. 392; 1 Vin. Ab. 33.

(*o*) *Supra*, 1 Stark. on Slander 358; Baldwin *v.* Elphinstone, Bla. R. 1037; 2 Stark. on Slander 359.

(*p*) This allegation need not be proved; see 7 T. R. 4; and *supra*, 2 Stark. on Slander 303; *ib.* 359.

(*q*) See 1 Stark. on Slander 358; 2 Stark. on Slander 359.

(*r*) See 1 Stark. on Slander 364; 2 Stark. on Slander 359.

(*s*) As to the nature and use of an innuendo, see 1 Stark. on Slander 418; 2 Stark. on Slander 359.

lawfully, wickedly, maliciously and seditiously devising, contriving and intending as aforesaid, afterwards, to wit, on, &c., with force and arms at, &c., wickedly, maliciously and seditiously printed and published, and caused and procured to be printed and published, in a certain newspaper entitled "The Morning and London Advertiser," a certain other false, wicked, scandalous, malicious and seditious libel, of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following, that is to say, (*setting out the libel and conclude as before*).

Third and Fourth counts. For publishing the same in other newspapers.

Fifth count.

Wickedly, maliciously and seditiously did print and publish, and cause and procure to be printed and published, a certain other false, wicked, malicious, scandalous and seditious libel, of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following, that is to say, (*as before*).

Sixth count. For printing and publishing the former part of the libel.

Seventh count.

That the said J. H. being, &c., and again unlawfully, wickedly, maliciously and seditiously contriving, devising and intending, as aforesaid, afterwards, to wit, on, &c., with force and arms at, &c., wickedly, maliciously and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, scandalous, malicious and seditious libel, of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following: "I (meaning himself the said J. H.) think it proper to give the unknown contributor this notice, that I (again meaning himself the said J. H.) did yesterday pay to Messrs. B. and C. on the account of Dr. F., the sum of fifty pounds, and that I (again meaning himself the said J. H.) will write to Dr. F., requesting him to apply the same to the relief of the widows, orphans and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's (meaning his said majesty's) troops, at or near Lexington and Concord, in the province of Massachusetts (meaning the said province, colony or plantation of the Massachusetts Bay, in New England in America), on the nineteenth of last April: J. H." (again meaning himself the said J. H. (*Conclusion as before*).(*t*)

(*For sedition generally, see post*, "*Treason.*")

Libel on the president of the United States.(*u*)

That T. C., late, &c., being a person of a wicked and turbulent disposition, designing and intending to defame the president of the Unit-

(*t*) The original, see Cowp. 683, contains other counts stating the printing and publishing of the latter libel in different newspapers, and also the publishing of both on different days; 2 Stark. on Slander 361.

(*u*) This was the indictment in the celebrated case in which Dr. Thomas Cooper was convicted in 1800, and which afterwards became the cause of considerable political con-

ed States and to bring him into contempt and disrepute and to excite against him the hatred of the good people of the United States, on, &c., at, &c., and within the jurisdiction of this court, wickedly and maliciously did write, print, utter and publish a false, scandalous and malicious writing against the said president of the United States, of the tenor and effect following, that is to say: Nor do I (himself the said T. C. meaning) see any impropriety in making this request of Mr. Adams (meaning John Adams, Esq., President of the United States) at that time; he (the said president of the United States meaning) had just entered into office; he (meaning the said president of the United States) was hardly in the infancy of political mistake; even those who doubted his capacity (meaning the capacity of the said president of the United States) thought well of his (meaning the said president of the United States) intentions. And also the false, scandalous and malicious words of the tenor and effect following, that is to say: Nor were we (meaning the people of the United States) yet saddled with the expense of a permanent navy, or threatened under his (meaning the said president of the United States) auspices with the existence of a standing army. Our credit (meaning the credit of the United States) was never yet reduced so low as to borrow money at eight per cent. in time of peace, while the unnecessary violence of official expressions might justly have provoked a war.

And also the false, scandalous and malicious words of the tenor and effect following, that is to say: Mr. Adams (meaning the said president of the United States) had not yet projected his (the said president of the United States meaning) embassies to Prussia, Russia and the Sublime Porte, nor had he (the said president of the United States meaning) yet interfered as president of the United States to influence the decisions of a court of justice—a stretch of authority which the monarch of Great Britain would have shrunk from—an interference without precedent, against law and against money. This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British and delivered up with the advice of Mr. Adams (meaning the said president of the United States) to the mock trial of a British court martial, had not yet astonished the republican citizens of this free country (meaning the United States of America)—a case too little known, but of which the people (meaning the people of the said United States) ought to be fully apprized before the election, and they shall be, to the great scandal of the president of the United States, to the evil example of others in the like case offending, against, &c. (*Conclude as in book* 1, *chap.* 3).

Another form for same.(*v*)

That H. C., late, &c., being a malicious and seditious man, of a depraved mind and wicked and diabolical disposition, and also de-

tention. It was prepared by Mr. Rawle, and stood the test of very active scrutiny. Of course since the repeal of the sedition law, the offence is no longer cognizable in the federal courts; but the precedent may be of use in indictments at common law in the states.

(*v*) People v. Croswell, 3 Johns. 337. In consequence of the equal division of the Supreme Court of New York on the great questions involved in this case, no judgment was

ceitfully, wickedly and maliciously devising, contriving and intending T. J., Esq., President of the United States of America, to detract from, scandalize, tradnce, vilify, and to represent him the said T. J. as unworthy the confidence, respect and attachment of the people of the United States, and to alienate and withdraw from the said T. J., Esq., president as aforesaid, the obedience, fidelity and allegiance of the citizens of the State of New York, and also of the said United States; and wickedly and seditiously to distnrb the peace and tranquillity, as well of the people of the State of New York, as of the United States; and also to bring the said T. J., Esq. (as much as in him the said H. C. lay) into great hatred, contempt and disgrace, not only with the people of the State of New York and the said people of the United States, but also with the citizens and subjects of other nations; *and for that purpose the said H. C.* did, on, &c., at, &c., wickedly, maliciously and seditiously print and publish, and cause and procure to be printed and published, a certain scandalous, malicious and seditious libel, in a certain paper *or* (and?) publication entitled "The Wasp;" containing therein, among other things, certain scandalous, malicious, inflammatory and seditious matters, of and concerning the said T. J., Esq., then and yet being president of the United States of America, that is to say, in one part thereof, according to the tenor and effect following, that is to say: He (the said T. J., Esq., meaning) paid C. (meaning one J. T. C.) for calling Washington (meaning G. W., Esq., deceased, late president of the said United States) a traitor, a robber and a perjurer; for calling Adams (meaning J. A., Esq., late president of the said United States) a hoary headed incendiary, and for most grossly slandering the private characters of men whom he (meaning the said T. J.) well knew to be virtuous; to the great scandal and infamy of the said T. J., Esq., President of the said United States, in contempt of the people of the said State of New York, in open violation of the laws of the said state, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Libel upon a senator of the United States.(*w*)

That T. L., of, &c., being a person regardless of the integrity and patriotism, which the citizens of this commonwealth and of the United States, when elected to and entrusted with offices of honour, trust and responsibility, in the administration of the government of this commonwealth and of the United States, ought to possess and sustain, and unlawfully and maliciously devising and intending to traduce, vilify and bring into contempt and detestation one D. W., of, &c., who was, on the day hereafter mentioned, and still is one of the senators in the congress of the United States of America for the State of Massachusetts, duly and constitutionally elected and appointed to that

entered on the indictment; but its correctness as a precedent is established by the fact that it was drawn by Mr. Ambrose Spencer, one of the most acute and accomplished pleaders of the day, and that no technical exception was taken to it by Mr. Hamilton. At the same time, I apprehend the passage in italics is surplusage, and that the "or" in the 16th line from the bottom had better be changed to "and."

(*w*) Davis' Prec. 161.

office, and also unlawfully and maliciously intending to insinuate and cause it to be believed, that the said D. W. and divers other distinguished and patriotic citizens of this commonwealth had been engaged in an atrocious and treasonable plot to dissolve the union of the said United States, then and still constituting the government of the said United States under the present constitution thereof, and further maliciously intending to make it to be believed, that J. Q. A., then the president of the United States, had denounced the said D. W. as a traitor to his country, on, &c., at, &c., unlawfully, deliberately and maliciously did compose, print and publish, and did cause and procure to be composed, printed and published in a certain newspaper called the "Jackson Republican," of and concerning him the said D. W., an unlawful and malicious libel, according to the purport and effect, and in substance as follows, that is to say, (*here insert the libellous publication, with all necessary innuendoes and averments*); to the great injury, scandal and disgrace of the said D. W., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Libel on a judge and jury when in the execution of their duties.(*x*)

That heretofore, to wit, at the sittings at Nisi Prius, holden on, &c., at, &c., before the right honourable Sir Frederic Pollock, chief baron of our said lady the queen, of her Court of Exchequer at Westminster aforesaid, a certain issue duly joined in the said court, between one A. B. and one C. D., in a certain action on promises in which the said A. B. was plaintiff and the said C. D. defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country, in that behalf duly sworn and taken between the parties aforesaid.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that J. S., late, &c., being a wicked and ill-disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalize and vilify the said Sir F. P. and the jurors by whom the said issue was so tried as aforesaid, and to cause it to be believed that, (*here state the effect of the libel*), on, &c., with force and arms at, &c., wickedly and maliciously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious and scandalous libel, of and concerning the administration of justice in this kingdom, and of and concerning the trial of the said issue, and of and concerning the said Sir F. P. and the jurors by whom the said issue was so tried as aforesaid, according to the tenor and effect following, that is to say, (*here set out the libel, together with such innuendoes as may be requisite*), to the great scandal and reproach of the administration of justice in this kingdom, in contempt of our lady the queen and her laws, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*x*) Arch. C. P. 5th Am. ed. 695; see R. *v.* White, 1 Campb. 359; R. *v.* Watson, 2 T. R. 199.

Libel on a sheriff, attributing to him improper motives and conduct, in getting up petitions, &c., for the locating of the seat of justice in a particular county.(*y*)

That A. B., on, &c., at, &c., being a person of an envious and evil and wicked mind, and wickedly, maliciously and unlawfully contriving and intending, as much as in him lay, to injure, oppress and vilify the good name, fame, credit and reputation of a certain T. W., a good citizen of this commonwealth, and sheriff of the County of Cabell, and to bring him into contempt, infamy and disgrace, and to represent him as a corrupt officer, &c., a certain scandalous and libellous writing maliciously and scandalously did write and publish, and then, &c., did cause to be written and published, in the form of a petition addressed to the honourable the speaker and members of the general assembly of this commonwealth, in which said libel are contained divers scandalous, scurrilous and malicious matters, according to the tenor following: "That the said T. W., being desirous of having it (meaning the seat of justice for Cabell county), on his own plantation, where it was first held, has, and now is circulating a petition in this county, addressed to your honourable body for that purpose. Your petitioners beg leave to state, that the said T. W. is actuated only by selfish and interested motives, and is by no means governed by a desire for the promotion of the convenience and welfare of a majority of the people of this county; that the place he proposes is on his own land, and that it is not only rendered almost inaccessible by reason of the hills and mountains surrounding it, but is not near the centre of population or territory, so that it is among the most inconvenient places that could possibly be thought of, and that the said T. W. uses base and dishonourable means to forward his views, for that he being high sheriff of this county, and of course has the collection of the public revenue and taxes, he persuades ignorant and illiterate men to sign his petition, frequently stating that for so doing he will indulge them a time, and not be over-strenuous in his collections; that the people of this county are generally poor, and as there is very little money in circulation among them, an indulgence of this kind is to them a great favour; that the said T. W. does not present his petition at any public collection of the people, when the merits of it might be inquired into and discussed, but procures signers to it, as he rides through the county, in his office of sheriff, in secret and hidden places," to the great scandal and damage of the said T. W., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Libel on a justice of the Police Court in Boston, &c.

That B. W., Esq., on, &c., at, &c., was one of the justices of the Police Court and Justices' Court for the County of Suffolk, and acting as senior justice of the Police Court, and that W. J. S., labourer, on, &c., at, &c., being an evil disposed person, and unjustly and unlaw-

(*y*) Com. *v.* Morris, 1 Va. Cases 176.

fully devising, contriving and intending, as much as in him the said W. J. S. lay, to defame, asperse, scandalize and vilify the character of the said B. W., Esq., and to insinuate and cause it to be believed that the said B. W. had been guilty of gross misconduct in his said office of justice of the Police Court as aforesaid, did unlawfully and maliciously, wickedly and scandalously, compose, write, print and publish, and did cause and procure to be composed, written, printed and published, in a certain public newspaper, entitled the New England Galaxy, a certain false, wicked, mischievous and scandalous libel [of and concerning said B. W., and of and concerning his official conduct in said office of justice of the Police Court, and of and concerning the administration of the public justice of said Police Court, whilst he said B. W. was presiding and sitting therein as one of the justices of said court), which said wicked, mischievous and scandalous libel is to the tenor and effect following, that is to say: "After two days and nights' consideration, we now sit down in order to give Mr. W. an opportunity to see how he stands in the opinion of great and small. We accuse him of disgracing his office, of perverting the law, which, bad as it is, is yet worse in such hands; of doing injustice to his seat; of descending from his official dignity; of suffering his personal feeling to interfere with the discharge of his functions, &c. We do not pretend that we have related all of the above conversation with minute accuracy, or that we may not have forgotten some trivial circumstances; but that it is correct in substance we pledge our sacred honour, and would pledge our life, if it could be pledged. Let judge W. choke a week or so on this pill" (meaning said libel), "and we have one or two more as hard to swallow in reserve" (meaning that he, said S., had one or two more libels on said W. in reserve for future publication). "These, bitter as they are, are not the words of passion, but the deliberate expression of our conviction respecting the duty we owe to ourself and our country. We think we shall do service to God and man by removing this unjust magistrate from the seat he disgraces" (meaning that said W., in the discharge of his official duty as one of the justices of said Police Court, was an unjust judge, and that he disgraced said office by illegal and unjust conduct, that he ought to be impeached of crimes and misdemeanors, and ought to be removed and degraded from his office; and that so enormous and iniquitous were his acts, doings, conduct and behaviour in his said office as one of the justices of the Police Court as aforesaid, that in consequence of their enormity and iniquity, it would be doing service to God and man to have him, said W., removed from said office)], to the great damage and infamy of the said W., to the great scandal and dishonour of public justice, to the evil example, &c., against, &c., and contrary, &c.(*z*) (*Conclude as in book* 1, *chap.* 3).

(*z*) The part in brackets of this form is drawn from Com. *v.* Snelling, 15 Pick. 321. The only question raised on the indictment was on the propriety of the innuendoes. There was no express averment that the libel was of and concerning the removal of W. from office by impeachment. It was held that the first innuendo did not enlarge the meaning of the words of the libel; and that even if the second innuendo did so (which it was said it did not), it might be rejected as surplusage, the words of the libel being in themselves sufficient to sustain the indictment. Judgment was entered against the defendant.

Libel on an officer, said libel consisting of a paper alleged to have been read by the defendant at a public meeting, but which was in the defendant's possession, or destroyed, and consequently was not produced to the grand jury.(*a*)

That A. B., late, &c., on, &c., at, &c., and within the jurisdiction of the said court, being a person of evil mind and disposition, and wickedly and maliciously devising and intending to bring contempt, discredit and dishonour on the administration of public justice in the said city and county, to deprive C. D. (the said C. D. being, &c.) of his good name, fame and reputation, as well as unjustly to subject him, the said C. D., to high pains and penalties, unlawfully, wickedly and maliciously did publish and compose, and cause and procure to be composed and published, a certain false, scandalous and malicious libel, of and concerning the said C. D., in his office as aforesaid; the words and tenor of which said libel are to this inquest unknown, by reason that the said A. B. having the said libel in his possession and custody, hath altogether refused, and still refuses to produce the same, or to permit the same to be inspected by this inquest, although thereto often requested, to wit, by the attorney-general of this commonwealth, after the publication of the said libel, and at and before the sittings of this inquest, which said libel contained among other things, words of the substance and effect following, that is to say, (*here follows libellous matter*), to the great damage, injury and disgrace of the said A. B., to the great discredit and dishonour of public justice as aforesaid, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Seditious libel. The libellous matter consisting in an address to the electors of Westminster, of which the defendant was the representative, charging the government with trampling upon the people, &c.(*b*)

That Sir F. B., late, &c., being a seditious, malicious and ill-disposed person, and unlawfully and maliciously devising and intending to raise and excite discontent, disaffection and sedition among the liege subjects of our lord the present king, and amongst the soldiers of our said lord the king, and to move and excite the liege subjects of our said lord the king to hatred and dislike of the government of this realm, and to insinuate and cause it to be believed by the liege subjects of our said lord the king, that divers of the liege subjects of our said lord the king had been inhumanly cut down, maimed and killed by certain troops of our said lord the king, heretofore, to wit, on, &c., at, &c., unlawfully and maliciously did compose, write and publish, and cause to be composed, written and published, a certain scandalous, malicious and seditious libel, of and concerning the government of this realm, and of and concerning the said troops of our said lord the king, according to the tenor and effect following, (that is to say),

(*a*) Com. *v.* Strafford, Sup. Ct. Pa. Dec. T. 1845, No. 39. This case was tried before Judge Burnside, in 1846, at the Supreme Court, when the indictment was said by the court to be good, though no verdict was rendered, there having been a disclaimer and *nolle prosequi*.

(*b*) R. *v.* Burdett, 4 B. & A. 95. This was the indictment on which Sir Francis Burdett, after a struggle of great animation, was convicted and sentenced to three months' imprisonment, and a fine of £ 2000.

"To the electors of Westminster; gentlemen, on reading the newspapers this morning, having arrived late yesterday evening, I was filled with shame, grief and indignation, at the account of the blood spilled at Manchester; this then is the answer of the borough-mongers to the petitioning people, this the practical proof of our standing in no need of reform, these the practical blessings of our glorious borough-mongers' domination, this the use of a standing army in time of peace. It seems our fathers were not such fools as some would make us believe, in opposing the establishment of a standing army, and sending King William's Dutch guards out of the country. Yet would to Heaven they had been Dutchmen, Switzers or Hessians, or Hanoverians, or any thing rather than Englishmen, who did such deeds. What! kill men unarmed, unresisting! and, gracious God, women too, disfigured, maimed, cut down and trampled on by dragoons! (meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our said lord the king, had been inhumanly cut down, maimed and killed by the said troops of our said lord the king). Is this England? This a Christian land? a land of freedom? Can such things be and pass by us like a summer cloud, unheeded? Forbid it every drop of English blood in every vein that does not proclaim its owner bastard. Will the gentlemen of England support or wink at such proceedings? They have a great stake in their country. They hold great estates, and they are bound in duty and in honour, to consider them as retaining fees on the part of their country, for upholding its rights and liberties; surely they will at length awake and find they have other duties to perform besides following bullocks and planting cabbages. They never can stand tamely as lookers-on, whilst bloody Neros rip open their mothers' womb. They must join the general voice, loudly demanding justice and redress, and head public meetings throughout the united kingdom, to put a stop in its commencement to a reign of terror and of blood; to afford consolation as far as it can be afforded, and legal redress to widows and orphans and mutilated victims of this unparalleled and barbarous outrage. For this purpose I propose that a meeting should be called in Westminster, which the gentlemen of the committee will arrange, and whose summons I will hold myself in readiness to attend. Whether the penalty of our meeting will be death by military execution, I know not; but this I know, a man can die but once, and never better than in vindicating the laws and liberties of his country. Excuse this hasty address; I can scarcely tell what I have written. It may be a libel, or the attorney-general may call it so just as he pleases. When the seven bishops were tried for libel, the army of James the Second, then encamped on Hounslow Heath, for supporting military power, gave three cheers on hearing of their acquittal. The king, started at the noise, asked, 'What's that?' 'Nothing, sir,' was the answer, 'but the soldiers shouting at the acquittal of the seven bishops.' 'Do you call that nothing?' replied the misgiving tyrant, and shortly after abdicated the government. 'Tis true James could not inflict tortures on his soldiers—could not tear the living flesh from their bones with a cat o' nine-tails—could not flay them alive. Be this as it may, our

duty is to meet, and 'England expects every man to do his duty.' I remain gentlemen, most truly and faithfully, your most obedient servant, F. B." In contempt of our said lord the king and his laws, to the evil example of all others, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Publishing at a time of popular commotion resolutions attacking the government as bloodthirsty, &c.(c)

That on, &c., at, &c., ten thousand persons unknown, with force and arms, unlawfully did assemble armed with divers offensive weapons, to wit, sticks, clubs and daggers, bearing banners and flags, and were then and there making a great noise and disturbance, to the great terror and alarm of the peaceable subjects of our lady the queen, and that G. M. and J. H. S., together with certain other persons, forming and being a part of the London metropolitan police force, having theretofore been sworn in and then being special constables of the borough of Birmingham, in pursuance of the statute in such case made and provided, did by the order and direction of W. S., Esq., and J. R. B., Esq., justices of our said lady the queen, assigned to keep the peace, disperse, separate and remove and cause and procure to be dispersed, separated and removed, the said unlawful assembly of persons, and that they the said G. M. and J. H. S. were together with the said other persons forming part of the metropolitan police force, then and there acting in the due execution of their duty as such special constables, in dispersing and causing to be dispersed the said unlawful assembly of persons; and that the defendant intending to excite divers liege subjects of the queen to resist the laws and to resist the persons so being part of the metropolitan police force in the due execution of their duty, and to bring the said force into hatred and contempt, and to procure unlawful meetings, and to cause divers liege subjects of the queen to believe that the laws of this kingdom were unduly administered, and intending to disturb the public peace and to raise discontent in the minds of the subjects of the queen, and to raise and excite tumult and disobedience to the laws, did publish a certain false, &c., libel, of and concerning the said persons so being part of the London metropolitan police, and of and concerning the administration of law and justice within this realm, containing the false and malicious, scandalous, seditious and libellous matter following, that is to say:

"Resolutions unanimously agreed to by the general convention:

"Resolved, 1st, That this convention is of opinion that a wanton, flagrant and unjust outrage has been made upon the people of Birmingham by a bloodthirsty and unconstitutional force from London, acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people, and now, when they share in the public plunder, seek to keep the people in social slavery and political degradation.

"2d. That the people of Birmingham are the best judges of their

(c) R. *v.* Collins, 9 C. & P. 456. There was a verdict of guilty on this count, before Littledale J. in 1839.

own right to meet in the Bull-ring or elsewhere, have their own feelings to consult respecting the outrage given and are the best judges of their own power and resources to obtain justice.

"3d. That the summary and despotic arrest of Dr. T., our respected colleague, affords another convincing proof of the absence of all justice in England, and clearly shows that there is no security for life, liberty or property, till the people have some control over the laws they are called upon to obey.

"By order, . W. L., Sec."

To the great scandal, &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

Libel in German, in the Circuit Court of the United States.(*d*)

That B. M. and C. F., late of, &c., being ill-disposed persons, designing and intending to vilify and defame the government of the United States and the administration of justice therein, and to cause it to be believed that the judiciary courts of the said United States were actuated by unlawful motives and not by the duty imposed on them by the constitution of the United States aforesaid, and thereby to weaken and diminish the authority of the said courts and excite opposition against the same, on, &c., at, &c., wickedly and maliciously did print and publish and cause to be printed and published, in a certain newspaper then and there printed in the German language and called "Unpartheyische Harrisburg Zeitung," which German words signify, "The Impartial Harrisburg Newspaper," the false, scandalous, contemptuous and malicious words, matters and things following, that is to say, "Capt. John Fries. Die constitution der Vereinigten Staaten sagt hochverrath soll nur darein bestehen wenn man krieg gegen derselben erkläret oder ihren feinden anhanget und sie unterstützet," which German words signify "The constitution of the United States says high treason shall consist only in levying war against the same or in aiding or abetting their enemies." "Dieses würde den 30sten April, 1790, durch ein acte de congresses erkläret dass wann einise person die znden Vereinigten Staaten von America gehöret krieg gegen dieselben erkläret, oder ihren feinder anhanget und unter stutzet inden," &c. (*Here translate the last written sentence, proceed with the remainder of the libellous matter, translating the same sentence by sentence with proper innuendoes, and conclude*), in contempt of the said United States and the judicial courts thereof, to the great scandal and infamy of the judges and jurors of the Circuit Court of the said United States in and for the Pennsylvania district, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*d*) U. S. *v.* Meyer, Circuit Court United States for Pennsylvania, October, 1799, No. 6. A very curious feature in the case is, that though the indictment does not even pretend to be for a statutory offence, the defendants "submitted themselves to the judgment of the court, protesting their innocence." So far therefore from its being an understood thing in the courts at the period, that there are no common law offences against the United States, we find that a series of defendants, ably defended, in the midst of a struggle of great violence and ardour, do not even think it worth while to test the validity of an offence which is not only of a strict common law character, but to which even the "*contra formam*" is not attached.

Libel in French against a foreign potentate.(e)

That before and at the times of the printing and publication of the scandalous, malicious and defamatory libels and libellous matters and things aftermentioned, there subsisted and now subsists friendship and peace between our sovereign lord the king and the French republic and the subjects of our said lord the king and the citizens of the said republic; and that before and at those times, citizen N. B. was and yet is first consul of the said French republic, to wit, at, &c., and that J. P., late of, &c., well knowing the premises aforesaid, but being a malicious and ill-disposed person, and unlawfully and maliciously devising and intending to traduce, defame and vilify the said N. B. and to bring him into great hatred and contempt, as well among the liege subjects of our said lord the king as among the citizens of the said republic, and to excite and provoke the citizens of the said republic by force of arms to deprive the said N. B. of his consular office and magistracy in the said republic, and to kill and destroy the said N. B., and also unlawfully and maliciously devising as much as in him the said J. P. lay, to interrupt, disturb and destroy the friendship and peace subsisting between our said lord the king and his subjects and the said N. B., the French republic and the citizens of the same republic, and to excite animosity, jealousy and hatred in the said N. B. against our said lord the king and his subjects, on the sixteenth day of August, in the forty-second year of the reign of our sovereign lord George the Third, by the grace of God of the united kingdom of Great Britain and Ireland king, defender of the faith, at the parish of St. Anne within the liberty of Westminster in the County of Middlesex, unlawfully and maliciously did print and publish and cause and procure to be printed and published, a most scandalous and malicious libel, in the French language, of and concerning the said N. B., that is to say, one part thereof to the tenor following, that is to say:

"Le 18 Brumaire. An. viii. Ode attribuée a Chenier.

"Quelles tempêtes effroyables
Grondent sur les flots déchaînes," &c.

And in another part thereof to the tenor following, that is to say:

"Deja dans sa rage insolente;" &c.

Which said scandalous and malicious words, in the French language first above mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, "What frightful tempests growl on the unchained waves," &c. And which said scandalous and malicious words secondly above mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as the English words following, that is to say, "Already," &c. (*Conclude as above*).

Second count.

That the said J. P., so being such person as aforesaid, and unlaw-

(e) 2 Stark. on Slander 354. This was the form used in Peltier's case.

fully and maliciously devising and intending as aforesaid, to wit, on the twenty-sixth of August, in the forty-second year of the reign aforesaid, at the parish of St. Anne in the liberty of Westminster in the County of Middlesex, unlawfully and maliciously did print and publish and cause and procure to be printed and published, a certain other scandalous and malicious libel, containing therein among other things, divers other scandalous and malicious matters, in the French language, of and concerning the said N. B., in the form of an address to the French people, according to the tenor following, that is to say, "Citoyens," &c. Which said scandalous and malicious words, in the French language last before mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, "Citizens," &c., to the great scandal, disgrace and danger of the said N. B., to the great danger of creating discord between our said lord the king and his subjects and the said N. B., the French republic and the citizens of the said republic, in contempt, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sending a letter to a commissioner of revenue in the United States, containing corrupt proposals.(*f*)

That whereas, on the thirteenth day of May, one thousand seven hundred and ninety-four, it was enacted by the Senate and House of Representatives of the United States of America, in congress assembled, (*here set forth the act of congress, providing that a beacon and light-house should be constructed as soon as the jurisdiction of sufficient ground should be ceded to the United States by the State of North Carolina*); and whereas the legislature of the State of North Carolina did, on the seventeenth day of July, one thousand seven hundred and ninety-four, cede to the United States the jurisdiction of so much of the headland of Cape Hatteras in the same state, as the president of the said United States deemed sufficient and most proper for the convenience and accommodation of a light-house, and also a sufficient quantity of land for building on the said island, in the harbour of Occacock, called Shell Castle, a beacon of the kind, descriptions and dimensions aforesaid; and whereas, afterwards, to wit, on, &c., at, &c., C. D., Esq. (he the said C. D., then and there being commissioner of the revenue, in the department of the secretary of the treasury), then and there was appointed and instructed by the secretary of the treasury, by and with the authority of the president of the said United States, to receive proposals for building the light-house aforesaid, and beacon aforesaid, A. B., late, &c., being an ill-disposed person, and wickedly contriving and intending to bribe and seduce the said C. D., so being commissioner of the revenue, from the performance of the trust and duty so in him reposed, on, &c., at, &c., and within the jurisdiction of this court, wickedly, advisedly and corruptly did compose, write, utter and publish, and cause to be delivered to

(*f*) U. S. *v.* Worrell, 2 Dall. 384. Whatever may be said as to the jurisdiction of the federal courts over common law offences, there can be no doubt that as a matter of pleading this indictment is good.

the said T. C., a letter, addressed to him the said C. D., in the words and figures following, that is to say, (*here set forth the letter, and conclude*): to the evil example, &c., and against, &c., (*as in book* 1, *chap.* 3).

Writing a seditious letter with intent to excite fresh disturbances in a district in a state of insurrection.(*g*)

That whereas on, &c., in the Counties of W. and A. in the district of Pennsylvania, certain wicked, seditious and ill-disposed persons disaffected to the constitution and laws of the said U. S., and unlawfully and seditiously contriving and intending as much as in them lay to resist the government and defeat the laws of the same U. S., did unlawfully and seditiously assemble and gather themselves together, armed and arrayed in a warlike manner, to oppose the execution of the laws of the said U. S.; and whereas J. W., Esq., on the day and year aforesaid, he being an associate judge of the Supreme Court of the said U. S., did certify to the president of the said U. S., that in the said Counties of W. and A. laws of the said U. S. are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshal of the district; and whereas the president of the U. S. is required by the constitution thereof to take care that the laws thereof be faithfully executed; and whereas the president of the U. S. in pursuance of the powers and duties in him vested, did on, &c., call forth the militia of the State of P. to suppress such combinations and to cause the laws to be duly executed, and at the same time the president of the said U. S. did authorize and empower certain persons to act as commissioners with the hope of recalling the said turbulent and seditious persons to a sense of their duty and obedience to the laws of the said U. S., which persons so authorized did proceed to P. in the execution of the said powers and authority; and whereas in the County of W. in the district aforesaid, certain turbulent, ill-disposed and seditious persons did unite, combine and confederate with the said turbulent, wicked and seditious persons in the Counties of W. and A., and did agree to assemble together at P.'s ferry on the M., on, &c., with design further to oppose and resist the execution of the laws of the said U. S.; and the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, further do present, that R. L., late of, &c., yeoman, being an ill-disposed person, did on, &c., in the year aforesaid in the district aforesaid, wickedly, maliciously and seditiously write and publish and send to be delivered, a certain malicious and seditious letter,(*h*) directed to a certain Mr. William Moorehead, near G., the tenor of which said writing and letter is as followeth:

"Mr. W. M., near G. August ye 26th, 1794.

"Honourd Sr: as you have begun a good work in that country, (meaning thereby the said seditious opposition to the laws of the U.

(*g*) U. S. *v.* Lusk, Circuit Court, Phil. 1704. This indictment was drawn by Mr. Rawle, in 1794, but was never tried.

(*h*) See as to setting out the letter sent, Resp. *v.* Carlisle, 1 Dall. 35.

S.), we (himself the said R. L. and other persons in the said County of C. meaning) wish to have a hand in the fre (meaning that the said R. and other persons wished to unite with and support the said seditious opposition to the laws). as soon as I seed your appointment of meeting on ye 14th instant past (meaning the said meeting at P.), I advertised all round about us to meet on 2d day, and so we had a great meeting and our resolves is in the C. News Papers," &c.; (*proceeding with letter*); he the said R. L. wickedly, maliciously and seditiously intending by writing and publishing and sending to be delivered the said letter, to excite, encourage and promote as well the said William Moorehead as other persons in the said Counties of W., A. and W., to oppose the laws and resist the government of the said U. S., to the evil example, &c., in contempt, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Hanging a man in effigy.(*i*)

That A. B., in the county aforesaid, unlawfully, wickedly and maliciously intending to injure J. N., &c., unlawfully, wickedly and maliciously did make and cause and procure to be made, a certain gibbet and gallows, and also a certain effigy and figure, intended to represent the said J. N., and then and there unlawfully, wickedly and maliciously did erect, set up and fix, and cause and procure to be erected, set up and fixed, the said gibbet and gallows in a certain yard and place near unto a certain common highway there situate, called and near to a certain ferry called the Horse Ferry, where the said J. N. was used and accustomed to ply in the way of his trade and business of a waterman; and then and there unlawfully, wickedly and maliciously did hang up and suspend, and cause and procure to be hung up and suspended, the said effigy and figure, to and upon the said gibbet and gallows, with the name of the said J. N. inscribed on a piece of wood and affixed to the said effigy and figure, together with divers scandalous inscriptions and devices upon and about the same, reflecting on the character of the said J.; and did then and there keep and continue, and cause and procure to be kept and continued the said gibbet and gallows so erected and set up as aforesaid, with the said effigy and figure hung up and suspended to and from the same as aforesaid, together with the several inscriptions and devices aforesaid, so affixed as aforesaid, for a long space of time, to wit, for the space of four days then next following, and during all that time unlawfully, wickedly and maliciously did then and there publish and expose the said gibbet and gallows, with the said effigy and figure thereon, to the sight and view of divers good and worthy subjects of our said lady the queen, passing and repassing in and along the highway aforesaid; to the great scandal, infamy and disgrace of the said J. N., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*i*) Arch. C. P. 5th Am. ed. 730.

Insulting a justice in the execution of his office.(*j*)

That heretofore, to wit, on, &c., a special session of the peace was holden at, &c., before certain justices of the peace of our sovereign lady the queen for the said county of to wit, before P. Q., R. S. and X. Y., and others their fellows, being justices as aforesaid of the county of aforesaid, who had then and there assembled and met together, with purpose and intent to authorize and empower certain persons, then and there also assembled and attending, to keep respectively in their respective parishes within the said county of certain common inns and alehouses, as by the laws of this realm the said justices as aforesaid were authorized and empowered to do, at which said session so then and there holden as aforesaid, before the justices above named, and others their fellows as aforesaid, came A. B., late of, &c.; and the said A. B., on being then and there, to wit, at the said session so holden as aforesaid, before the said justices as aforesaid, demanded a license from the said P. Q., R. S. and X. Y., and others their fellows so as before assembled, in order that he the said A. B. might be authorized and empowered, at a certain house known and distinguished by the sign of the White Swan, at, &c., to sell ale for and during the year next ensuing; but the said P. Q., R. S. and X. Y., and others their fellows so then and there assembled, being justices of our said lady the queen for the county of aforesaid, then and there refused to grant any leave, license or authority to the said A. B. to sell ale at aforesaid, in the county aforesaid, for the said year then next ensuing; whereupon the said A. B., wickedly and maliciously intending to traduce the authority and impede the proceedings, as well as to vilify the characters of the said justices, so being then and there in the due and proper execution of their duties, uttered and pronounced, and loudly published to the said justices so assembled and met together as aforesaid, in the presence and hearing of divers of her majesty's liege subjects, these false, scurrilous and contemptuous words of and concerning the said P. Q., R. S. and X. Y., and others their fellows, justices as aforesaid then and there assembled, and of and concerning the execution of their said duties, that is to say, "You are all (meaning the said P. Q., R. S. and X. Y., and others their fellows, then and there assembled) a parcel of tyrannical villains, and ought to be hanged for depriving a poor man of his bread" (meaning that the said P. Q., R. S. and X. Y. and others their fellows, then and there assembled, ought to be hanged for depriving him the said A. B. of his bread, by refusing him the said A. B. a license to sell ale, which the said A. B. had then and there required from them the said P. Q., &c., and which they the said P. Q., R. S., X. Y., and others their fellows, justices as aforesaid, had then and there refused to grant to him the said A. B.; in disturbance of the administration of justice, and against, &c.(*k*) (*Conclude as in book* 1, *chap.* 3).

(*j*) Dickinson's Q. S. 6th ed. 392.

(*k*) Scandalous aspersions of a magistrate *in the execution of his office*, are regarded as criminal, and subject the offender to punishment, at the discretion of the court in which he is convicted; Holt on Lib. 153; 1 Russ. C. & M. 328. And to these the rule is strictly

For seditious words.(*l*)

That R. M., late of, &c., being a pernicious and seditious man, and a person of a depraved and disquiet mind, and intending and contriving to terrify and discourage the good people of this commonwealth from enlisting into the service thereof, and with all his might endeavouring to prevent the measures carrying on in support of the freedom and independence of America, and to bring the generals and other military officers of the armies of the state and of the said United States into hatred and contempt, and that the said R. M., his wicked contrivances and intentions aforesaid to perfect and render effectual, on, &c., at, &c., and within the jurisdiction of this court, in the presence and hearing of divers liege subjects of this commonwealth having discourse then and there concerning the army of the said United States, and the commanders and officers thereof, falsely, wickedly and maliciously and seditiously, these false, scandalous and malicious and seditious words, with a loud voice did pronounce and say, to wit, "The heads (meaning the generals and other military officers in the said army) of the continental army are convicts and rogues, and all those who join (meaning those who enlist in) the army (the army of the said United States meaning), are worse than fools, for they (meaning those who should so enlist) will be cheated," to the evil example, &c., and against, &c.(*m*) (*Conclude as in book* 1, *chap.* 3).

confined; for if the language, however opprobrious, apply to the justice in his private capacity, no indictment can be supported. So that if a man at a parish meeting apply to an *absent* magistrate abusive names, as if he say, "If he is a sworn justice, he is a rogue and a forsworn rogue;" or if he apply to him the names of an ass, fool, coxcomb or blockhead, no indictable offence will have been committed; 2 Stra. 1157–8; 2 Salk. 698; 2 Campb. 142. And it seems that to render *any* words thus indictable, they must be spoken *to* the magistrate, and not in his absence; 2 Cambp. 142; 2 Stra. 1157; R. *v.* Read, 1 Stra. 420–1; Dickinson's Q. S. 6th ed. 392.

(*l*) Drawn by Mr. Bradford in 1780.

(*m*) I have been favoured with the rolls of a few indictments used in Philadelphia, in 1716 and thereabouts, several of which relate to this branch of pleading. Two of them are inserted *verbatim et literatim.*

"The grand inquest for our lord the king, upon their respective oaths and affirmations do present, that Andrew Hamilton, late of the City of Philadelphia, Esq., the tenth day of October, in the first year of the reign of our lord George, by the grace of God king of Great Britain, France and Ireland, defender of the faith the third, at the City aforesaid, of the honourable Charles Gookin, Esq., lieutenant-governor of the province of Pennsylvania, then and still being, the wicked, opprobrious and reproachful words following did speak, utter and pronounce, viz.: Damn him (the said lieutenant-governor meaning). If he (the said Hamilton himself meaning) ever met the damned dog Gookin (the said lieutenant-governor again meaning) out of the province in which the said Gookin had command, or any other convenient place, that by the eternal God he (the said Hamilton himself meaning) would pistol him, and that he (the said lieutenant-governor again meaning) deserved to be shot or ript open for what he (the said lieutenant-governor again meaning) had done already, and swore by God (he himself again meaning) he could find the heart to do it, and would if he ever had him (the said lieutenant-governor again meaning) in a convenient place, to the evil example of others in like case delinquent, and against the peace of our said lord the king, his crown and dignity."

"The grand inquest of our lord the king, upon their respective oaths or affirmations presents, that Hugh Loudon, late of the City of Philadelphia, merchant, the tenth day of September, in the year of the reign of our lord George, by the grace of God king of Great Britain, France and Ireland, defender of the faith the third, at the City of Philadelphia, of Richard Hill, Esq., mayor of the city aforesaid, and James Logan, Esq., secretary of this

Another form for same.(*n*)

That N. B., late of, &c., labourer, being a wicked, seditious and evil disposed person, and greatly disaffected to our said lord the king, and contriving and intending the liege subjects of our said lord the king, to incite and move to hatred and dislike of the person of our said lord the king, and of the government established within this realm, on, &c., with force and arms at, &c., in the presence and hearing of divers liege subjects of our said lord the king, maliciously, unlawfully, wickedly and seditiously did publish, utter and declare with a loud voice, of and concerning our said lord the king, these words following, that is to say, "His majesty, George the Third (meaning our said lord the king) is * * * *, thank God for it; I (meaning the said A. B.) hope he (meaning our said lord the king) will soon be no more; damnation to all royalists;" to the great scandal of our said lord the king, in contempt of our said lord the king and his laws, to the evil and pernicious example of all others in the like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

province of Pennsylvania (the said Richard Hill and James Logan, justices of the Court of Common Pleas for the City and County of Philadelphia then and still being), the wicked, opprobrious and reproachful words following, openly and publicly did speak, utter and pronounce, viz.: that he (himself meaning) was wronged by the judgments of court in two bonds (the Court of Common Pleas held for the City and County of Philadelphia the aforesaid tenth day of September meaning), and that Richard Hill and James Logan (the said Richard Hill and James Logan, who were two of the justices of the said court who gave the said judgment against the said Hugh meaning) were the chief causes thereof, and that he (himself again meaning) would be revenged on them (the said Richard Hill and James Logan again meaning), though to the hazard of his body and soul, to the great contempt and deprivation of the authority and judgment of the said Richard Hill and James Logan and their associates, justices of the Court of Common Pleas, to the evil example of others in such case delinquents, and in manifest contempt of our said lord the king and his laws, and against the peace of our said lord the king, his crown and dignity."

To Mr. Ingraham, of Philadelphia, I am indebted for the following:

"City of Philadelphia, ss.:

"The grand inquest for our sovereign lord the king, who now is for the body of the City of Philadelphia aforesaid, upon their oath and solemn affirmations respectively do present, that Bryan M'Loughlin, late of the City of Philadelphia, labourer, being a wicked, evil minded person, and the allegiance due to our sovereign lord George the Second, by the grace of God of Great Britain, France and Ireland king, defender of the faith, &c., not regarding but seditiously and maliciously intending to move and excite discord and rebellion within the province of Pennsylvania, and to bring our said sovereign lord the now king into contempt with his subjects, the fourteenth day of June, in the twenty-eighth year of the reign of our said lord the king, at the City of Philadelphia aforesaid, and within the jurisdiction of this court, in the presence and hearing of divers liege subjects of our said lord the now king, wickedly and maliciously did publish, utter and with a loud voice pronounce English words of the following tenor and effect, that is to say: 'I' (himself the said Bryan M'Loughlin meaning), 'will lose my life for Charley,' (Charles, son to the person pretending to be king of England by the style and title of James the Third meaning); 'and I' (himself the said Bryan meaning) 'hope he' (the said Charles again meaning) 'will push up once more and enjoy his own again' (the crown of Great Britain meaning), 'and send Georgey' (our said sovereign king George the Second meaning) 'home to Hanover, where he belongs;' to the great scandal and contempt of our said lord the now king, to the evil and pernicious example of all others in such case offending, and against our said lord the now king, his crown and dignity, &c."

(*n*) 2 Stark. on Slander, 357.

Second count.

And the jurors, aforesaid, &c. That the said A. B. being such wicked, seditious and evil disposed person as aforesaid, and greatly disaffected to our said lord the king, and contriving and intending the liege subjects of our said lord the king, to incite and move to hatred and dislike of the person of our said lord the king, and the government established within this realm, on, &c., with force and arms at, &c., unlawfully, wickedly, maliciously and seditiously, in the presence and hearing of divers liege subjects of our said lord the king, again did publish, utter and declare of and concerning our said lord the king, and his good, true and faithful subjects, these words following, that is to say: "I (meaning the said A. B.) hope king George the Third (meaning our said lord the king) will soon be no more; damnation to all royalists." (*Conclude as before*).

Uttering blasphemous language as to God.

That A. B., of, &c., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and contriving and intending Almighty God to blaspheme and dishonour, on, &c., at, &c., and within, &c., in the presence and hearing of divers good citizens of this commonwealth, unlawfully, wickedly and blasphemously did say, pronounce and with a loud voice publish and proclaim these profane and blasphemous English words following, to wit, (*here insert the words*), to the great dishonour and contempt of Almighty God, to the evil example of all others in such cases offending, contrary to the form of the act of general assembly in such case made and provided, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Blaspheming Jesus Christ.(*o*)

That R., &c., on, &c., wickedly, maliciously and blasphemously did utter, and with a loud voice publish, in the presence and hearing of divers good and Christian people, &c., of and concerning the Christian religion, and of and concerning Jesus Christ, the false, scandalous, malicious, wicked and blasphemous words following, to wit: "Jesus Christ was a bastard, and his mother must be a whore," to the contempt of the Christian religion and the laws of this state, to the evil example of all others in like manner offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Blaspheming the Holy Ghost.(*p*)

That A. B. of, &c., labourer, being a person of an immoral and irreligious mind and disposition, and intending the Christian religion

(*o*) In an argument of great felicity and strength, a conviction under this indictment as at common law, was sustained in 1811 by Chancellor (then chief justice) Kent, when delivering the opinion of the Supreme Court in People *v.* Ruggles, 8 Johns. 291.

(*p*) Davis' Prec. 73.

to revile and bring into contempt, on, &c., at, &c., did wilfully commit the heinous crime of blasphemy by wilfully cursing and reproaching the Holy Ghost; that is to say, the said A. B. then and there in the presence and hearing of divers good and worthy citizens of said commonwealth, did wilfully, profanely and blasphemously speak, utter, publish and pronounce these profane and blasphemous words following, to wit, (*here insert the words spoken, verbatim, with proper innuendoes if the words require it*); to the great dishonour of religion, good morals and good manners, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Composing and publishing blasphemous libel.(q)

That A. K., &c., of, &c., on, &c., at, &c., with force and arms, disregarding the laws and religion of this commonwealth, and profanely devising and intending to bring the holy scriptures and the Christian religion into disbelief and contempt among the people of this commonwealth, unlawfully and wickedly did compose, print and publish, and did cause and procure to be composed, printed and published, a certain scandalous, impious, obscene, blasphemous and profane libel, of and concerning God, and of and concerning the holy scriptures, and of and concerning the Christian religion, which libel is published and contained in a certain printed sheet of paper, commonly called a newspaper, and said printed sheet of paper containing said libel is entitled "Boston Investigator," volume second, number thirty-nine, whereof said A. K. was editor and publisher, in which said libel and printed sheet of paper, so printed, published and composed, and so caused and procured to be composed, printed and published as aforesaid, by said A. K., the said A. K. did wilfully blaspheme the holy name of God, by denying and contumeliously reproaching God, his creation, government and final judging of the world, and by reproaching Jesus Christ and the Holy Ghost, and contumeliously reproaching the holy word of God. In one part of which scandalous and obscene libel, among other things there were and are contained certain scandalous, impious, obscene and blasphemous matter and things, of and concerning Jesus Christ, and of and concerning the Holy Ghost, and of and concerning the holy scriptures, and of and concerning the Christian religion, according to the purport and effect following, to wit, (*here follows a passage libelling our Saviour, which in consequence of its gross obscenity, is omitted*).

And in another part of said libel there were and are contained certain scandalous, impious, profane and blasphemous matter and things of and concerning God, and of and concerning the Christian religion, according to the purport and effect following, to wit:

"I cannot pass over the subject of prayer without adverting to the curious and strange predicament that God is placed in, by listening to the unceasing and endless variety, and what is worse, contradictory petitions, that are every moment ascending up or down to him. I think the old gentleman is more a subject of pity, than General Jack-

(q) The court held a conviction on this indictment proper in Com. v. Kneeland, 20 Pick. 206.

son was during his late visit; his bowing and shaking was very arduous, but it was all one way, congratulatory and pleasing, and he had some occasional respite, but only think of God having no respite whatever, day or night."

And in another place, said libel contains these scandalous, profane and blasphemous words, matters and things following, of and concerning God, to wit:

"It therefore appears to me that God must have an ear very different from any thing I can conceive of, to hear so many contradictory prayers all at once; and I am equally at a loss to imagine how he could recollect them all, and at what time they are apt to be answered. Perhaps he keeps a set of books, and clerks to enter all the prayers in; but another difficulty presents itself. How could he inform all those clerks at one time what to enter? Besides, when would he find time to examine these books so as to answer all the petitions at the proper time?"

And the said libel in another part thereof among other things, contains the following scandalous, profane and blasphemous words, matters and things of and concerning God, and of and concerning Jesus Christ, and of and concerning the holy scriptures, to wit:

"1. Universalists believe in a God, which I do not; but believe that their God with all his moral attributes (aside from nature itself), is nothing more than a mere chimera of their own imagination."

"2. Universalists believe in Christ, which I do not; but believe that the whole story concerning him is as much a fable and a fiction as that of the God Prometheus, the tragedy of whose death is said to have been acted on the stage, in the theatre at Athens, five hundred years before the Christian era."

"3. Universalists believe in miracles, which I do not; but believe that every pretention to them can either be accounted for on natural principles, or else is to be attributed to mere trick and imposture."

"4. Universalists believe in the resurrection of the dead, in immortality and eternal life, which I do not; but believe that all life is mortal, that death is an eternal extinction of life to the individual who possesses it, and that no individual life is, ever was or ever will be eternal:"

To the great scandal and contumelious reproach of God, and his holy name, his creation, government and final judging of the world, of Jesus Christ and the Holy Ghost, of the holy words of God, and of the Christian religion, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Obscene libel. First count, not setting forth libellous matter.(r)

That P. H. of in the county of labourer, being a scandalous and evil disposed person, and contriving, devising and intending the

(r) "The fourth and fifth counts in this indictment," said Parker C. J., in Com. v. Holmes, 17 Mass. 336, referring to the two counts in the text, "are certainly good; for it can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient."

morals as well of the youth as of other good citizens of said commonwealth to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, with force and arms at in the county aforesaid, knowingly, unlawfully, wickedly, maliciously and scandalously did utter, publish and deliver to A. B. a certain lewd, wicked, scandalous, infamous and obscene printed book, entitled "Memoirs of a Woman of Pleasure," which said printed book is so lewd, wicked and obscene that the same would be offensive to the court here and improper to be placed upon the records thereof; wherefore the jurors aforesaid do not set forth the same in this indictment; to the manifest corruption and subversion of the youth and other good citizens of said commonwealth in their manners and conversation, in contempt of law, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Publishing an obscene picture.

That the said P. H. being such person as aforesaid, and devising, contriving and intending as aforesaid, on, &c., at, &c., unlawfully, wantonly and maliciously did utter and publish to one C. D. a citizen of said commonwealth, a certain lewd, scandalous and obscene print on paper, representing a man in an indecent and obscene posture with a woman, that is to say, in the act and posture of carnal copulation with each other; which said lewd, scandalous and obscene print was contained and published in a certain printed book entitled "Memoirs of a Woman of Pleasure;" to the manifest corruption and subversion of the morals and manners of the youth of this commonwealth and of the citizens thereof, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Exhibiting obscene pictures.(*s*)

That J. S., late, &c., J. H., &c., being evil disposed persons, and designing, contriving and intending the morals as well of youth as of divers other citizens of this commonwealth to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on, &c., at, &c., and within the jurisdiction of this court, in a certain

See also Com. *v.* Sharpless, 2 S. & R. 91. It is necessary, however, that the pleader should expressly aver the indecency of the book or picture as the excuse for its non-setting forth, the same reasoning applying as obtains when a forged instrument is lost, or is in the defendant's possession, where such fact must be averred in order to explain the non-description of the instrument itself. See Wh. C. L. 84, where the cases are collected; and see also *ante*, p. 546.

(*s*) Sharpless *v.* Com., 2 S. & R. 91. A verdict was sustained by the Supreme Court on this indictment, Yeates J. emphatically declaring: "The destruction of morality renders the power of the government invalid, for government is no more than public order. It weakens the bands by which society is kept together. The corruption of the public mind in general, and debauching the manners of youth in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences, and in such instances courts of justice are or ought to be the schools of morals."

In such an indictment it was said, it need not be averred that the exhibition was public; if it be stated that the picture was shown to sundry persons for money, it is a sufficient averment of its publication. Nor is it necessary that the postures and attitudes of the figures should be minutely described: it is enough if the picture be so described as to enable the jury to apply the evidence and to judge whether or not it is an indecent picture; nor is it necessary to lay the house in which the picture is exhibited, to be a nuisance; the offence not being a nuisance, but one tending to the corruption of morals.

house there situate, unlawfully, wickedly and scandalously did exhibit and show for money to persons to the inquest aforesaid unknown, a certain lewd, wicked, scandalous, infamous and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman, to the manifest corruption and subversion of youth and other citizens of this commonwealth, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Against the printer of a newspaper for publishing an advertisement by a married woman, offering to become a mistress.(*t*)

That A. B., late, &c., in the county aforesaid, printer, being a person of an immoral and depraved mind and disposition, and unlawfully contriving and intending to bring the state of matrimony into public contempt and discredit, to corrupt the morals of the people of this commonwealth, and to induce the citizens thereof to commit the crimes of fornication and adultery, on at did unlawfully and wickedly print and publish and cause and procure to be printed and published, in a certain public newspaper called the, (*here insert the title of the newspaper*), a certain immoral and mischievous libel, in the form of an advertisement, which said immoral and mischievous libel is of the purport and effect following, to wit, (*here insert the advertisement verbatim, with proper innuendoes*); to the great scandal and reproach of religion, good morals and good manners, to the evil and pernicious example of all others in like case to offend, and against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER VIII.

OFFENCES AGAINST FOREIGN MINISTERS.

Assault on a foreign minister.

That A. B., late of, &c., on, &c., at, &c., and within the jurisdiction of this court, with force and arms, in and upon one C. D., then and there being a public minister, to wit, did make an assault, and him the said C. D., then and there being such public minister as aforesaid, did then and there strike and wound, and other wrongs to the said C. D. then and there did, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*t*) Davis' Prec. 156; 3 Chit. C. L. 887.

Second count.

That A. B., late of, &c., heretofore, on, &c., at, &c., and within the jurisdiction of this court, with force and arms, in and upon one C. D., then and there being a public minister, to wit, the in the United States of America, duly recognized and received as such by the president of the said United States, did make an assault; and him the said C. D. then and there being such public minister aforesaid, did then and there strike and wound, and other wrongs to the said C. D. then and there did, to the great damage of the said C. D., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

(*Like second count, substituting*): "duly received and recognized as such by the department of state of the said United States," *for* "duly recognized and received as such by the president of the said United States."

Fourth count.

That the said A. B., late of, &c., heretofore, to wit, on, &c., at, &c., and within the jurisdiction of this court, with force and arms, in and upon one C. D., then and there being a public minister, to wit, the in the United States of America, did make an assault; and him the said C. D. then and there being such public minister aforesaid, did then and there strike and wound, and did then and there infract the law of nations by offering violence to the person of the said C. D., so being such public minister as aforesaid, and other wrongs to the said C. D. then and there did, to the great damage of the said C. D., contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count.

(*Like fourth count, except before*): "did make an assault, and him the said then and there," &c., *insert* "duly received and recognized as such by the president of the United States."

Sixth count.

(*Like fourth count, omitting the charge of*): "strike and wound," &c.

Seventh count.

(*Same as sixth count, inserting before*): "did make an assault," &c., "duly received and recognized as such by the president of the United States."

Eighth count.

That the said A. B., late of, &c., heretofore, on, &c., at, &c., and within the jurisdiction of this court, with force and arms did infract the law of nations, by offering violence to the person of one C. D., the said C. D. then and there being a public minister, to wit, the in the United States of America, to the great damage of the said C. D., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Ninth count.

(*Same as eighth count, inserting after*): "in the United States of America," *and before* "to the great damage of the said," &c., "duly received and recognized as such by the president of the said United States."

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Contempt of the person of a foreign minister, by threatening bodily harm to another in his presence.(*a*)

That C. and L., late, &c., on, &c., at, &c., in the dwelling house of his excellency the French minister plenipotentiary, in the presence of F. B. M., unlawfully and insolently did threaten and menace bodily harm and violence to the person of the said F. B. M., he being consul-general of France to the United States, consul for the State of Pennsylvania, secretary of the French legation, &c., resident in the house aforesaid, and under the protection of the law of nations and this commonwealth, against, &c. (*Conclude as in book* 1, *chap.* 3). (*For final count, see p.* 17, 97 *n*, 123 *n*).

Arresting a foreign minister.(*b*)

That P. R. B., late of, &c., on, &c., at, &c., did imprison one L. B., he the said L. B. then and there being a public minister, to

(*a*) Res. *v.* De Long Champs, 1 Dall. 111.

(*b*) U. S. *v.* Benner. This indictment was drawn by Mr. G. M. Dallas in 1830, and was sustained in 1 Bald. 234. On arrest of judgment in this case, Mr. Justice Baldwin said:

"The reasons are two.

"1. That the only count on which the verdict is given against the accused, does not describe him as an officer; does not charge him with having executed process, nor state any offence against any act of congress or law of the United States.

"2. That the said count does not state that a public minister of any foreign power or state, authorized and received as such by the president of the United States, was imprisoned, or was or might have been arrested or imprisoned.

"The act of congress upon which this indictment is framed provides, in its different sections, for different classes of cases, and the counts of the indictment are made to meet the different provisions of these sections. The twenty-fifth section enacts, that if any writ or process shall be sued forth or prosecuted in any of the courts of the United States, or of a particular state, whereby the person of any ambassador, or other public minister of any foreign prince or state, authorized and received as such by the president of the United States, may be arrested or imprisoned, &c., such writ or process shall be adjudged to be utterly null and void.

"The twenty-sixth section enacts, that in case any person or persons, shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, &c.

"The twenty-seventh section enacts, that if any person shall violate any safe conduct, or passport duly obtained, and issued under the authority of the United States, or shall strike, wound, imprison, &c., by offering violence to the person of an ambassador or other public minister, such person, &c.

"The twenty-fifth and twenty-sixth sections afford protection and redress for public ministers, authorized and received as such by the president of the United States, and against arrest and imprisonment under and by virtue of any writ or process, sued forth and prosecuted in any court of the United States, or of a particular state, or by any judge or justice therein, and all the counts in this indictment intended to charge an offence in violation of these sections, do state that L. B. was a public minister, authorized and received as such by the president of the United States; that a writ was sued forth against him from an alderman of the City of Philadelphia, and that the defendant, being an officer, did execute the said writ, and thereby arrest the person of the said L. B.; upon these counts the defendant is acquitted by the verdict of the jury.

"The twenty-seventh section of the act is intended to cover other cases not described in the preceding sections, and makes it penal for any person to imprison the person of a public minister, although he may not be authorized and received as such by the president of the United States, and although the person who thus offers violence to his person, be not an officer, and does it not by virtue of any writ or process from any court, judge or justice. The count on which the defendant has been convicted, charges the offence punishable under this section of the act; which does not require that the defendant should

wit, the secretary of the legation from his majesty the king of Denmark, near the United States of America, in manifest infraction of the laws of nations, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Imprisoning same.

That the said P. R. B., afterwards, to wit, on, &c., at, &c., and within the jurisdiction of this court, with force and arms, did imprison the said L. B., he the said L. B. then and there being a public minister, to wit, an attache to the legation of his majesty the king of Denmark, near the United States of America, in manifest infraction of the laws of nations, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Same as first, stated more specially.

That heretofore, to wit, on, &c., at, &c., and within the jurisdiction of this court, a certain writ was sued forth and prosecuted by one G. H. U., from one J. B., then and there an alderman of the City of Philadelphia, whereby the person of the said L. B., then and there as aforesaid being a public minister, to wit, the secretary of the legation of his majesty the king of Denmark, near the United States of America, authorized and received as such by the president of the United States, was then and there arrested; and that the said P. R. B., afterwards, to wit, on, &c., at, &c., and within the jurisdiction of this court, being then and there an officer, to wit, a constable of the City of Philadelphia, with force and arms, did execute the said writ, and then and there and thereby arrest the person of the said L. B., then and there being as aforesaid a public minister as aforesaid, in violation of the laws of nations, to the great disturbance of the public repose, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

be an officer having executed process, nor that the public minister, who was imprisoned, should have been authorized and received as such by the president of the United States.

"The reasons for a new trial will now be considered.

"The second count on which the defendant has been convicted, relates to the same transaction, and the same public minister as the first, of which he is acquitted, and differs from it only in describing the minister as an attache to the legation of Denmark, and the first calls him the secretary of the legation; but it was the clear right of the jury, and so it was given them in charge, to find a general verdict of guilty, leaving it to the court to apply it to the counts in the indictment, or to select for themselves the count on which they would render the verdict, as in their opinion the evidence might warrant. If the count were bad in itself, such a verdict could not be maintained; but it is no objection to it, that it is substantially the same with another count on which the defendant has been acquitted, for the different counts of an indictment always relate to the same transaction, describing it in different ways, or with different circumstances, that the jury may apply their verdict to all or either of them, as the evidence shall warrant; or if the verdict be generally guilty, the application of it is made by the court. No injury or injustice is done to the defendant, who is put but once on his trial for the same offence. The jury, in this case, have not selected the count for their verdict of conviction to which the evidence most particularly applies; but this was for them to judge of, and is no cause of complaint on the part of the defendant; it cannot affect his punishment, and is clearly maintained for the evidence.

"It is our opinion that the reasons filed in the arrest of judgment are not maintained, and it is ordered that the motion be overruled."

Third count. Same in another shape.

That afterwards, to wit, on, &c., at, &c., and within the jurisdiction of this court, a certain writ was sued forth and prosecuted by one G. H. U., from one J. B., then and there an alderman of the City of Philadelphia, whereby the person of the said L. B., then and there as aforesaid being a public minister, to wit, an attache of the legation of his majesty the king of Denmark, near the United States of America, authorized and received as such by the president of the United States, was then and there arrested; and that the said P. R. B., afterwards, to wit, on, &c., at, &c., and within the jurisdiction of this court, being then and there an officer, to wit, a constable of the City of Philadelphia, with force and arms, did execute the said writ, and then and there and thereby as aforesaid, arrest the person of the said L. B., then and there being as aforesaid a public minister as aforesaid; in violation of the laws of nations, to the great disturbance of public repose, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add counts for offering violence and assaulting*).

Issuing process against a foreign minister.(c)

That on, &c., at, &c., A. D., being then and there a public minister of a foreign prince, to wit, the envoy extraordinary and minister plenipotentiary of his majesty the emperor of all the Russias, and being then and there duly authorized and received as such by the president of the United States of America, T. M., late of, &c., then and there knowingly, wilfully and unlawfully did sue forth certain process in a court of the State of Pennsylvania, to wit, in the District Court for the City and County of Philadelphia, in the words and characters following, that is to say, (*here set forth the process*), and whereby the (person) of the said A. D., then and there being a public minister, to wit, the envoy extraordinary and minister plenipotentiary of his said majesty the emperor of all the Russias aforesaid, then and there being duly authorized and received as such by the president of the United States of America as aforesaid, might be (arrested and imprisoned). And that D. A., late of the said district of Pennsylvania, attorney at law, was then and there the attorney knowingly, wilfully and unlawfully prosecuting in the said case, to wit, in the said process then and there sued forth by the said T. M. as aforesaid, whereby the (person) of the said A. D., then and there being a public minister, to wit, the envoy extraordinary and minister plenipotentiary of his said majesty the emperor of all the Russias as aforesaid, then and there duly authorized and received as such by the president of the United States as aforesaid, might be (arrested and imprisoned) as aforesaid. And that J. S., late of, &c., being then and there an officer employed for the service of process issuing for the said District Court for the City and County of Philadelphia, in

(c) This indictment was drawn by Mr. A. J. Dallas in 1813. The defendant was never tried.

the district aforesaid, to wit, a deputy of the sheriff of the County of Philadelphia, in the district of Pennsylvania aforesaid, did then and there knowingly, wilfully and unlawfully execute the said process, by then and there serving personally upon the said A. D., then and there being a public minister, to wit, the envoy extraordinary and minister plenipotentiary of his said majesty the emperor of all the Russias, then and there duly authorized and received as such by the president of the United States of America as aforesaid, a copy of the said process, to wit, the said process then and there sued forth by the said T. M. as aforesaid, whereby the said A. D. then and there being a public minister, to wit, the envoy extraordinary and minister plenipotentiary of his said majesty the emperor of all the Russias as aforesaid, then and there duly authorized and received as such by the president of the United States as aforesaid, might be (arrested or imprisoned), to wit, on, &c., at, &c., and within the jurisdiction of this court; the said T. M., D. A. and J. S., then and there knowingly, wilfully and unlawfully in manner aforesaid violating the laws of nations, and disturbing the public repose, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

Same as first, changing "person," *wherever it occurs in brackets into* "goods and chattels," *and* "arrested and imprisoned," *into* "distrained, seised and attached."

Third count.

Same as first, omitting wherever they occur the words "wilfully and knowingly."

Fourth count.

Same as second, omitting wherever they occur the words "wilfully and knowingly."

Opening and publishing letter of foreign minister.(*d*)

That whereas, mutual peace, amity and good understanding did on, &c., and still do subsist between the said United States and the king of Great Britain, and the ambassadors and public ministers of each of the said powers are lawfully and justly entitled to perfect freedom, immunity and security in their persons, papers, letters and despatches within the territory of the other powers, and whereas on the said tenth day of June in the year aforesaid, in the district aforesaid, and within the jurisdiction of this court, R. L., Esq., was ambassador and minister plenipotentiary from the said king of Great Britain to the said United States of America, and in that capacity resided at, &c., being the seat of the government of the said United States, and was so acknowledged and received by the president of the said United States, and then and there was entitled among other rights, privileges and immunities belonging and due to ambassadors and public ministers from foreign powers, to write to and correspond with the public servants and agents of his said sovereign the king of Great Britain, freely and without interruption, confidentially and

(*d*) U. S. *v.* Thomas, Phil. 1800. This indictment was drawn by Mr. Rawle, but was never tried.

with secrecy, and to have his public and private letters and despatches safely, securely and without examination or interruption, carried and conveyed through any part of the territory of the said United States. And whereas the said R. L., Esq., so being an ambassador and public foreign minister, acknowledged, received and resident as aforesaid, on the said tenth day of June in the year aforesaid, in the district aforesaid, and within the jurisdiction of this court, had written a certain letter on business respecting the public duties of the said R. L. in his public capacity aforesaid, to a certain J. R., Esq., president of the British province of Upper Canada, the said J. R. then and there being a public agent of the said king of Great Britain, to wit, in Upper Canada aforesaid, which letter bore date, &c., and also a certain other letter on such business, to the same J. R., Esq., which other letter bore date, &c., and the same two letters closed in a packet sealed with the seal of the said R. L., and subscribed with his the said R. L.'s name, to wit, with the letters "R. L.," and directed to the said J. R., Esq., by the words "The Honourable President R., &c., Toronto, Upper Canada," he the said R. L. so being ambassador and public minister as aforesaid, had caused to be delivered to a messenger or person employed for the purpose of safely conveying the same to the said J. R., Esq.; that D. T., late, &c., J. T., late, &c., and G. R., late of, &c., yeomen, well knowing the premises, but contriving and unjustly intending to interrupt and disturb the peace, amity and good understanding subsisting between the said United States and the said king of Great Britain, on, &c., at, &c., and within the jurisdiction of this court, maliciously, unlawfully and without the license of the said R. L., Esq., the said sealed packet superscribed and directed as aforesaid, enclosing the said two letters, did break open and the said two letters did then and there open and read, and the contents thereof did then and there promulgate and make publicly known.

And the grand inquest aforesaid upon their oaths and affirmations aforesaid, do further present, that the said D. T., J. T., G. P. and also W. D., late of, &c., contriving and unjustly intending as aforesaid, afterwards, to wit, on, &c., at, &c., and within the jurisdiction of this court, unlawfully and maliciously, and without the license of the said R. L., Esq., he the said R. L., Esq., then and there still being and continuing ambassador and minister plenipotentiary from the said king of Great Britain to the said United States, did print and publish, and cause to be printed and published the substance of the contents of the said two letters in a certain newspaper printed in Philadelphia aforesaid, called "The General Advertiser or the Aurora," in contempt and violation of the laws of nations, against the form of the treaty between the said United States and the said king of Great Britain, to the great damage of the said R. L., Esq., so being ambassador and minister plenipotentiary from the said king of Great Britain to the said United States, and against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER IX.

BIGAMY, ADULTERY AND FORNICATION.

[*So far as these offences approach open lewdness and lasciviousness they are examined ante, pp.* 423—455, *where the general principles applying to them as such are considered.*]

Bigamy generally.(*a*)

That J. S., late of, &c., labourer, on, &c., did marry one A. C., spinster, and her the said A. then and there had for wife; and that the said J. S. afterwards and whilst he was so married to the said A. as aforesaid, to wit, on, &c., at, &c., feloniously and unlawfully did marry and take to wife one M. T., and to her the said M. was then and there married, the said A. his former wife being then alive; against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on, &c., at, &c., was apprehended, (*or*, that the said J. S. now is in custody at, &c.), for the felony aforesaid.

Polygamy in Massachusetts.(*b*)

That M. M. of, &c., wife of one P. M., the younger of that name, at, &c., on, &c., she being then a singlewoman unmarried, by the name of M. D., was lawfully married according to the laws of said commonwealth to said P. M. the younger of that name, and him then and there had and took for her husband and cohabited with him as his lawful wife, and that afterwards she the said M. on, &c., at, &c., did unlawfully marry and take to her husband one W. M. B., she the said M. then and there being married and the lawful wife of said P. M., he the said P. M. then being her former husband and living; she the said M. never having been legally divorced from said P. M.; and

(*a*) Arch. C. P. 5th Am. ed. 742. The statute under which this is drawn, makes it a felony "if any person, being married, shall marry any other person during the life of the former husband or wife," &c. The Massachusetts and Virginia statutes are so closely analogous in their structure (see Wh. C. L. 552–3), as to make this form applicable in those states with but few variations.

By the English act, the county where the offender is apprehended or is in custody, has jurisdiction of the offence, and this is the cause of the averments to that effect in the text; which of course can be discharged as surplusage in this country where no such provision as to venire exists.

(*b*) See Com. *v.* Mash, 7 Metc. 472, where this count was held good.

In this case it was held, that under the Rev. Stats. c. 130, s. 2, if a woman who has a husband living, marry another person, she is punishable, though her husband has voluntarily withdrawn from her, and remained absent and unheard of, for any term of time less than seven years, and though she honestly believes, at the time of her second marriage, that he is dead.

that afterwards, to wit, hitherto at, &c., she the said M. after having married said W. M. B., continued to cohabit with said W. M. B. as her second husband, in this state, to wit, at, &c., whereby and by force of the statute in such case made and provided, she the said M. is deemed to be guilty of the crime of polygamy; and so the jurors aforesaid, on their oath aforesaid, do present and say, that said M. M. in manner and form aforesaid and at the time and place aforesaid, at, &c., did commit the crime of polygamy, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Bigamy in New York.

That A. B., late of, &c., yeoman, on, &c., did marry one C. D., and her the said C. D. did then and there have for his wife; and that the said A. B. afterwards, to wit, on, &c., with force and arms feloniously did marry and take as his wife one E. F., and to the said E. F. was then and there married (the said C. D. being then and there living, and in full life), against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Bigamy in Pennsylvania, against the man.(*c*)

That J. L., late, &c., yeoman, on, &c., at, &c., did marry one M. F., spinster, and her the said M. F. then and there had for his wife, and that the said J. L. afterwards, to wit, on, &c., with force and arms, &c., at, &c., feloniously did marry and to wife did take one E. R., spinster, and to her the said E. R. then and there was married (the said M. F. his former wife being then living, and in full life), against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Bigamy in Pennsylvania, against the woman.(*d*)

That H. S., otherwise called H. I., the wife of E. I., late of, &c., yeoman, on, &c., being then married, and then the wife of the said E. I., with force and arms at, &c., did unlawfully marry and take to husband one D. K., late of, &c., yeoman, and him the said D. K., did unlawfully receive and have as her husband, aforesaid, the said E. I., her former husband, being then alive, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Bigamy in North Carolina.(*e*)

That T. N., late of, &c., on, &c., in, &c., did marry one M. B., spinster, and her the said M. B. then and there had for his wife, and that the said T. N. afterwards, to wit, on, &c., with force and arms in, &c., feloniously did marry and take to wife one P. S., spinster, and to her the said P. S. then and there was married, the said M. B. his former wife being then alive, and in full life, in, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*c*) Drawn in 1795, by Mr. Jared Ingersoll, then attorney-general of Pennsylvania.
(*d*) Drawn in 1790, by Mr. Bradford, then attorney-general.
(*e*) This form was sustained in State *v.* Norman, 2 Dev. 222.

Polygamy under s. 5 and 6 c. 96 Rev. Stat. Vermont, where both marriages were in other states than that in which the offence is indicted.(*f*)

That W. P., on, &c., at, &c., did marry one H. P., and her, the said H., then and there had for his wife, and to her the said H. then and there was married, and that the said W. P. afterwards, to wit, at, &c., on, &c., did marry and to wife did take one J. C., and to her the said J. C. then and there was married; the said H., his former wife, being then and still alive (and the said marrying and taking to wife by the said W. of the said J., being unlawful by the laws of the State of New Hampshire), and that the said W. P. at, &c., from, &c., till the finding of

(*f*) State *v.* Palmer, 18 Verm. 570. This case, with the sheets of which I have been obligingly furnished by Mr. Washburn, the accomplished reporter of the state, presented two interesting points before the Supreme Court.

The indictment was founded on sections five and six of chapter ninety-nine of the revised statutes,—which are in these words:

Sect. 5. If any person, who has a former husband or wife living, shall marry another person, or shall continue to cohabit with such second husband or wife in this state, he or she shall, except in the cases mentioned in the following section, be deemed guilty of the crime of polygamy, and shall be punished by imprisonment, as in the case of adultery.

Sect. 6. The provisions of the preceding section shall not extend to any person whose husband or wife shall have been continually beyond the sea or out of the state for seven years together, the party marrying again, not knowing the other to be living within that time, or to any person who shall be, at the time of such marriage, divorced by sentence or decree of any court, having legal jurisdiction for that purpose, or to any person or persons in case the former marriage has or shall, by sentence of such court, be declared null and void, or to any person when the former marriage was within the age of consent, and not afterwards assented to.

"We are of opinion," said the court, "that the indictment is insufficient. The second marriage being in the State of New Hampshire, of whose laws we cannot judicially take notice, the respondent committed no offence against the laws of this state by such marriage; and, unless that marriage was unlawful by the laws of New Hampshire, Jane Cheney became his lawful wife, and perhaps the woman, to whom he was formerly married, by the same law ceased to be his wife. It could be no offence in him to cohabit in this state with the woman to whom he was lawfully married. There should, therefore, have been an allegation, that the second marriage, in New Hampshire, was unlawful, or the respondent committed no offence by continuing to cohabit with the woman in this state. We are of opinion, that without such an allegation, the indictment cannot be sustained. If the second marriage had been in this state, inasmuch as it was illegal, the former wife being living and the lawful wife of the person charged, the illegality of the second marriage would have been apparent, and the court could have judicially recognised its illegality.

"There is another objection raised to the indictment, which we are not disposed to decide at this time, with the limited means and time which we have for investigating it,—that is, whether the indictment should not have alleged that the respondent was not within any of the exceptions named in the providing clause.

"The general rule is, that when the exceptions are contained in the enacting clause, the indictment must negative them, and state that the respondent does not come within them, but when they are contained in a separate section, the respondent must show, in defence, that he comes within them. There is certainly great plausibility in the argument, that, as the exceptions are mentioned in the enacting clause of the fifth section, referring to the next section for the particulars, it should have been alleged that the respondent was not within them. This point, however, is not decided.

"It may also be worthy of some consideration, whether some farther legislation is not necessary to provide for a case, where both marriages are in a foreign government, the party continuing to cohabit with only one wife in this state. It is evidently a case not specially provided for, although the terms of the statute may be broad enough to reach such a case, if the second marriage was illegal."

I have inserted a clause in the form in this text to bring it up to the opinion of the Supreme Court on the first point. On the second point the current of authority, as well as the course of practice, is to consider it unnecessary to negative the exceptions of the defendant's wife having been beyond sea for seven years, &c., or a divorce having been granted.

this inquisition, feloniously did continue to cohabit with said J., his second wife, the said H. his former wife, being then and still living, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Adultery in Massachusetts under Rev. Stat. 130, *s.* 1, *against both parties jointly.*(*g*)

That C. E., late of, &c., and E. R. F., late, &c., on, &c., at, &c., did commit the crime of adultery with each other, by him the said C. E. having then and there carnal knowledge of the body of said E. R. F., and by her the said E. R. F. having carnal knowledge of the body of the said C. E., she the said E. R. F. being then and there a married woman, and having a lawful husband alive, and not being then and there the wife of said C. E.,(*h*) against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Adultery by a married man with a married woman, in Massachusetts.(*i*)

That A. B., of, &c., yeoman, on, &c., at, &c., did commit the crime of adultery with one C. D., the wife of one E. F., by having carnal knowledge of the body of her the said C. D., he the said A. B. being then and there a married man, and having a lawful wife alive, and he the said A. B. not being married to the said C. D.; and she the said C. D. being then and there a married woman, and the lawful wife of the said E. F., against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Adultery in Pennsylvania, against the man.(*j*)

That A. L., of, &c., labourer, on, &c., at, &c., and within the jurisdiction of this court, then and there being a married man and having a wife in full life, did commit adultery with a certain C. S., and a bastard child on the body of her the said C. S. then and there did beget, against, &c. (*Conclude as in book* 1, *chap.* 3).

Same against the woman.(*k*)

That C. B., of, &c., wife of J. B., on, &c., at, &c., then and there being a married woman, and having a husband in full life, adultery with a certain J. R. of the same county, mariner, did commit, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*g*) This method of joinder of the guilty agents was approved in Com. *v.* Elwell, 2 Metc. 190. It is not necessary, it was held in the same case, to allege that the one party knew the other was married; see Com. *v.* Call, 21 Pick. 510. The offence is completed by carnal intercourse, by a married person with a third party, whether such third party be married or not; *ib.*

(*h*) This allegation is essential; Moore *v.* Com., 6 Metc. 243.

(*i*) See Com. *v.* Moore, 6 Metc. 243.

(*j*) See Reed's Digest. (*k*) *Ib.*

Against an uncle and niece for an incestuous marriage, as a joint offence, in Virginia.(*l*)

That W. T., &c., on, &c., with force and arms at, &c., and within the jurisdiction of the Supreme Court of Law, holden in and for the said county of , unlawfully, wilfully and incestuously did intermarry with, and take to be his wife, a certain N. H., the niece of the said W. T., being the daughter E. H. the sister of the said W. T., and within the degrees prohibited by an act of the general assembly of Virginia, entitled "an act to regulate the solemnization of marriages, prohibiting such as are incestuous or otherwise unlawful," &c., and that the said W. T. and the said N. H. then and there, from the said, &c., until the taking of this inquisition, did unlawfully, willingly and incestuously continue to cohabit and live together as man and wife, against, &c. (*Conclude as in book* 1, *chap.* 3).

Adultery in North Carolina, against both parties jointly.(*m*)

That T. C., late of, &c., labourer, and A. W., late, &c., spinster, on, &c., and on divers other days and times both before and after that day, with force and arms at, &c., unlawfully did bed and cohabit together without being lawfully married, and then and there did com-

(*l*) Hutchins *v.* Com., 2 Va. Cases 332. Upon this indictment process issued against both of the said indictees, and was served upon them. At the April term of said court, in the year 1820, both of the said defendants appeared and pleaded "not guilty" to the said indictment, on which plea, issue was joined, and a jury was sworn to try the same, which found a verdict of "guilty" against both of the said defendants, and the court rendered a judgment accordingly. To that judgment, the present writ of error was awarded, upon a suggestion, that the said Nancy Hutchins was not indicted for the said offence, because the said indictment did not state in terms that she had intermarried with the said William Tankersly.

"And indeed it would seem at first sight, that there was an absence of that certainty and technical precision which the law requires in criminal prosecutions. But, when it is recollected, that it was impossible that he could have intermarried with her, unless she had also intermarried with him, and when upon an examination of the act of assembly it is seen that the offence is, in this respect, laid in the very words of the act, it seems to all the judges that there is all the certainty which reason or the law of the case requires. The judgment is therefore affirmed."

(*m*) State *v.* Cowell, 4 Iredell 231. In this case the jury found the defendants guilty of fornication, but not of adultery. On motion to the court on behalf of the state, for judgment against the defendants, the court below being of opinion that the verdict of the jury amounted to a verdict of acquittal, refused to render the judgment prayed for, and ordered that the defendants go without day.

From this judgment the solicitor for the state prayed for an appeal to the Supreme Court, which was granted, and in that court the judgment was delivered by Ruffin C. J.: "The court is of opinion, that the state is entitled to judgment against the defendants. In ordinary parlance, adultery is an aggravated species of fornication, both involving an illicit cohabitation between the sexes, but the latter is constituted where the parties are single, or at least one of them, while the former imports a violation of the marriage bed. It is true, that the signification of the words as generally received, would not be material if it were perceived that they were used by the legislature in a peculiar and different sense, for example, as meaning precisely the same thing, instead of different modifications of an offence of the same general nature. But the language of the legislature renders it clear, that those terms are used in the statute according to their common acceptation. The act begins with the words '*the crimes*' (in the plural number) 'of fornication and adultery, &c.' and concludes by enacting, 'that any person convicted of either of the aforesaid offences, shall be fined, &c.' An acquittal of one is therefore not necessarily an acquittal of the other; but the parties may be punished for that particular grade of the offence of which the jury finds them guilty."

mit fornication and adultery, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fornication and bastardy in South Carolina, against the man.

That A. B., &c., a free white woman, residing in the district of , in the state aforesaid, on, &c., at, &c., was delivered of a female bastard child, and that the said bastard child is likely to become a burthen upon the district of aforesaid. And the jurors aforesaid, upon their oaths aforesaid, do further present, that one C. D. is the father of the said bastard child, and has refused to enter into recognizance, with two good and sufficient sureties, in the penal sum of three hundred dollars, conditioned for the annual payment of twenty-five dollars, for the maintenance of the said child, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same in Pennsylvania.

That A. B., late, &c., on, &c., at, &c., and within the jurisdiction of this court, did commit fornication with a certain C. D. and a male bastard child on the body of her the said then and there did beget, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Same against a woman.(*n*)

That M. S., of the County of Philadelphia, spinster, on, &c., at, &c., and within the jurisdiction of this court, did commit fornication with a certain J. L. and did permit the said J. L. then and there to beget a male bastard child on the body of the same M. S., contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*n*) Mr. Ingraham, of Philadelphia, has been good enough to furnish me with an indictment for an offence, which though properly falling under conspiracy, may be considered, so far as the act attempted is concerned, under the present chapter. The form, it is said, was sustained after conviction, in Philadelphia, about the year 1700.

"That M. S., C. S. and R. K., &c., being persons of wicked and depraved minds, and wholly lost to a due sense of decency, morality and religion, on, &c., did, with force of arms at, &c., unlawfully and immorally, amongst themselves, conspire, combine, confederate and agree together to bring into contempt the holy estate of matrimony, and the duties enjoined thereby, and to corrupt the morals of his majesty's liege subjects, and to encourage a state of adultery, wickedness and debauchery; and that they did, according to said conspiracy, &c., on, &c., in and near certain public streets and highways, at, &c., in the presence and view of one J. B., and divers other liege subjects of his majesty, indecently, immorally, unlawfully, wickedly and wilfully, make and carry into effect and completion a sale of the said M. S. (then and there being the lawful wife of the said C. S.), from him the said C. S. to the said R. K., and with the consent and concurrence of the said M. S., and by such sale the said C. S. disposed of and sold all his marital rights of and concerning the said M. S. (and with her consent and concurrence), to the said R. K., for a certain valuable consideration, to wit, the sum of one shilling and a pot of beer," &c. (*Concluding as in conspiracy at common law*).

CHAPTER X.

FORESTALLING; HOLDING ILLEGAL VENDUE; MAINTENANCE; BRIBERY; CORRUPTION AND DOUBLE VOTING AT ELECTIONS; BETTING AT AN ELECTION; EMBRACERY; BETTING AT A HORSE RACE; RUNNING A HORSE AT A HORSE RACE; WINNING MONEY AT CARDS; BREACH OF THE PILOT LAWS IN MASSACHUSETTS.

Forestalling.(*a*)

That A. O., late of, &c., yeoman, on, &c., at, &c., did buy and cause to be bought of and from one A. S., twenty oxen, for the sum of two hundred pounds, of current money of New York, as he the said A. S. then and there driving the said twenty oxen to the market of to sell the said twenty oxen in the said market, and before the said twenty oxen were brought into the said market, where the same should be sold, in contempt of the laws of the said state, to the evil example of all others in the like case offending, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Regrating.(*b*)

That A. B., of, &c., on, &c., at, &c., in a certain market there, called the market, unlawfully did buy, obtain and get into his hands and possession, of and from one C. D., a large quantity of to wit, one hundred pounds' weight of at and for the price of for each and every pound of the said and that afterwards, to wit, on, &c., he the said A. B., at, &c., in the same market there, unlawfully did regrate the said one hundred pounds' weight of and did then and there sell the same again to one E. F., at and for the price of for each and every pound weight of the said with a deduction of on the whole price of the said one hundred

(*a*) *Offences.*—"*Forestalling* is the buying or contracting for any species of provisions or merchandise in the way to market, dissuading persons from bringing goods thither, or persuading them to enhance the price when there, so that prices may be raised in the market; 4 Bla. Com. 360; see 3 Inst. 535. *Regrating* is the buying corn or other victual, in any market, and selling it again in the same market, or within four miles of the same market, which has been supposed also, of necessity, to enhance prices; *ib.* *Engrossing* is the buying up a large quantity of any kind of food, with a view to sell again, so as to engross and control the market; *ib.* An old statute, 5 and 6 Edw. VI. c. 14, was directed against the supposed offences, which were believed to have a tendency to prevent the public from being supplied with the necessaries of life upon reasonable terms. This statute was repealed by 12 Geo. III. c. 71; yet the courts have still considered forestalling and engrossing, offences at common law; R. *v.* Waddington, 1 East 143; and as to regrating, the judges were equally divided; R. *v.* Rushton, Hil. Term, 40 Geo. III. It seems, however, that at the present day, acts of this kind would not be deemed offences conducted to an extent manifestly injurious to the public, or accompanied by circumstances manifesting a direct intention to do a public injury; see R. *v.* Webb and others, 14 East 406, and Pratt *v.* Hutchinson, 15 East 511;" Dickinson's Q. S. 380.

See for other forms, 2 Chit. C. L. 532.

(*b*) Davis' Prec. p. 124. The quantity must be stated; 1 East 538; 2 Stark. 654.

pounds' weight of being allowed and thrown back by the said A. B. to the said E. F., against, &c. (*Conclude as in book* 1, *chap.* 3).

Engrossing.(*c*)

That A. B., of, &c., on, &c., at, &c., did unlawfully engross and get into his hands, by buying of and from divers persons to the jurors aforesaid unknown, a large quantity, to wit, one thousand bushels of wheat, with intent to sell the same again for lucre, gain and at an unreasonable profit, against, &c. (*Conclude as in book* 1, *chap.* 3).

Against a person for holding a vendue without authority, under the Pennsylvania statute.

That P. V., late of, &c., on, &c., at, &c., and within the jurisdiction of this court, did expose to sale and sell and cause to be exposed and sold by public vendue and outcry, sundry goods, wares and merchandises of the value of twenty-four pounds fifteen shillings and sixpence, the same goods, wares and merchandises not being taken in execution and liable to be sold by order of law, neither taken nor distrained for rent being in arrear, nor the said P. being an executor or administrator, or selling the same goods as the goods and chattels of any testator or intestate, nor the said P. V. being about to remove, but the same being his own proper goods and he remaining and abiding, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Maintenance.(*d*)

That A. O., late, &c., on, &c., with force and arms at, &c., did unjustly and unlawfully maintain and uphold a certain suit, which was then depending in the court of the said people of the said state, before their judges, between A. P., plaintiff, and A. D., defendant, in a plea of debt, on behalf of the said A. P. against the said A. D., contrary to the form of the statute in such case made and provided, and to the manifest hinderance and disturbance of justice, and in contempt of the said people of the said state, and to the great damage of the said A. D., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Attempting corruptly to induce a member of the state House of Representatives, who was one of the committee of banks, to aid in procuring the recharter of a particular bank, at common law.(*e*)

That heretofore, to wit, on, &c., at, &c., and within the jurisdiction of this court, E. P., being then and there a member of the House

(*c*) Davis' Prec. p. 124. Taken by Mr. Davis, Prec. p. 123, from 2 Chit. 534.

(*d*) Conductor Generalis 263.

(*e*) This indictment was prosecuted to conviction and sentence, in June, 1846, by Mr. Kane, then attorney-general, and Mr. M'Allister, prosecuting attorney for Dauphin county.

Judge Eldred charged the jury upon the law of the case, in the following words:

"The defendant is indicted for bribery, or for attempting to bribe Victor E. Piollet, a member of the legislature of Pennsylvania.

"The question presented in this case is admitted to be one of great importance, not

of Representatives of the Commonwealth of Pennsylvania, duly elected and qualified, certain petitions and other papers signed by

only as it affects the commonwealth and its citizens, but as it regards the defendant who it appears has heretofore borne a good character. We feel the responsible position in which we are placed in this cause, for although it may be conceded that the jurors are judges of the law and the facts, we believe it to be the duty of the court, and that we are under equal obligations with the jury to instruct them upon the law, that should govern the cause, and to aid them in coming to a correct conclusion in relation to the facts, by drawing their attention to that part of the evidence which bears particularly on the question. As to the law, we have no case so far as we have been informed, where a member of parliament in England has been indicted for bribery, at common law, nor have we any case in this country, where a member of a state legislature has been indicted at common law for that offence; hence it is that we feel a responsibility in disposing of this question, unusual as it is—indeed a new case.

"We find the offence of bribery defined in 4th Black. Com. 139, to be, when a judge or other person connected with the administration of justice, takes an undue reward to influence his behaviour in office. It is punished in inferior offices with fine and imprisonment, *and in those who offer the bribe, the same.* But in judges it hath always been looked upon as so heinous an offence, that Chief Justice Thorpe was hanged for it, in the reign of Edward III. Mr. Russel, a late writer on criminal law, says (2 Russ. 122), 'bribery is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.'

"2 Russ. 124: 'Attempts to commit a misdemeanor, being itself a misdemeanor, attempts to bribe though unsuccessful, have in several cases been held to be criminal.'

"One of the objections to a conviction in this case, is that no person who is not in some way connected with, and whose business relates to the administration of justice, as administered through our courts, can be convicted of the offence of bribery, such as judges, justices, sheriffs, &c., and this position the defendant's counsel contend is fully sustained, in the above definitions of bribery, and cannot be extended to bribing or an attempt to bribe a member of the legislature. If this position is correct, there is an end to this prosecution. It seems from the ancient definition of this offence, that the person liable on this charge must be one connected with the administration of justice, or one whose ordinary business relates to the administration of *public* justice. But the highest judicial tribunals, both in England and this country, have decided that the offence extends to persons not immediately connected with the administration of justice. It has been decided in England, before our revolution, that the offence of bribery can be committed by *any person in an official situation, who will corruptly use the power or interest of his place for rewards or promises*, as in the case of one who was clerk to the agent, for French prisoners of war, and indicted for taking bribes in order to procure the exchange of some of them out of their turn; Rex *v.* Beale, cited in Rex *v.* Gibbs, 1 East R. 183.

"Bribery at elections for members of parliament was undoubtedly always a crime at common law, and consequently punishable by indictment or information—per Lord Mansfield in Rex *v.* Pitt, 3 Burr. 1335, Trinity Tr. 1767, and cited in note to Black. 179; and though an act of parliament was passed fixing certain penalties and punishment for this offence of bribery at elections of members of parliament, still it remained an offence at common law, and as such was liable to indictment.

"It has also been held to be a misdemeanor to attempt to bribe a cabinet minister and a member of the privy council to give the defendant an office in the colonies; Vaughan's case, 4 Burr. 2494. This case the counsel for the defendant insist supports their view of the question, inasmuch as the office that was selected was one that related to the administration of justice; but it will be noticed that the definition of the offence on which they rely, relates to the person who is liable to conviction, and not to the office or thing solicited or desired.

"Many other cases might be referred to in England on this subject if it were necessary. It is difficult to reconcile these cases with the definition of the offence of bribery as contended for by the defendant's counsel. They rather establish, and clearly so, that in England, bribery was an offence at common law, and it extended to persons *in official stations of great trust and confidence, although their office or business did not relate to the administration of justice in these courts.*

"I know of but one case for bribery tried in this state, and that is the case of the U. S. *v.* Worrel, cited in 2 Dall. 384. It was an indictment at common law, tried in the U. S. Court for the Pennsylvania district, before Justices Chase and Peters. Worrel was indicted at common law for attempting to bribe Tench Cox, a commissioner of the reve-

divers citizens of this commonwealth, were presented to the said House of Representatives, in and by which said petitions and papers

nue of the United States, in 1798. There was no act of congress nor statute of Pennsylvania on this subject at the time, and the defendant was convicted and sentenced under the indictment. Worrel was defended by eminent counsel; he was tried before judges distinguished as lawyers. During this investigation it was not suggested that an attempt to bribe a revenue commissioner, was not an offence at common law; nor was objection taken that the revenue commissioner was not an officer whose duties or business related to the administration of justice in our courts, and therefore not liable to indictment for bribery. On the contrary, it seems to be conceded that the offence would be punishable in our state courts which had common law jurisdiction, but the objection was, that the United States courts had not common law jurisdiction; that it was not given to the United States courts expressly by the constitution, and that which was not expressly given, was reserved to the states, and therefore it was that the states had reserved their common law powers, except such as were expressly adopted and defined by an act of congress in pursuance of the 8th section of the 1st article of the constitution of the United States, and of this opinion was Judge Chase.

"Judge Peters was of a different opinion. He observes 'that the power to punish misdemeanors is originally and strictly a common law power, and may be constitutionally used by the United States courts; *and whenever an offence aims at the corruption of its public officers, it is an offence against the well-being of the United States.*'

"It is not at all material how this difference of opinion between Justice Chase and Peters, in relation to the common law jurisdiction of the United States courts, has since been settled; it cannot affect this question pending in this court.

"If those authorities can be relied on, the ground taken here that an attempt to bribe a member of the legislature is not an offence, because a member of the legislature is not an officer connected with, or concerned in the administration of justice in our courts, is quite too narrow and limited. A member of our legislature certainly has as much to do with, and his ordinary business relates as much to the '*administration of public justice*,' in the language of one of the definitions given, as the clerk to the agent for French prisoners, or as a person who may bribe a voter at an election for members of parliament, or as Worrel, who was charged with attempting to bribe a commissioner of the revenue of the United States.

"But if it were necessary to bring this case within the words used in the definition of bribery, are we not justified in saying that the business of a member of the legislature sometimes 'relates to the administration of public justice'—if not ordinarily so. In the case of Braddee *v.* Brownfield, 2 W. & S. 278, Judge Sergeant says, that 'the exercise of a certain sort of a superior equity jurisdiction of a remedial character; a kind of mixed power, partly legislative, partly judicial; seems to have been practised by our legislature from time to time, in the shape of special laws.'

"There are cases where the legislative and judicial powers so commingle, that the exercise of a certain kind of judicial authority in the passage of a law, is in accordance with the precedents and not contrary to received constitutional provisions.

"I have given the subject a careful examination and consideration; it is one of vast importance to the community and to the individual concerned, who it appears has heretofore sustained a good character for honesty, integrity and morality. The offence charged is one highly injurious to public morals, and strikes at the root of our government. The power to preserve itself is necessary, and I believe concomitant with its existence, and through its law tribunals may punish offences of this nature tending to obstruct and pervert the due administration of its affairs. So far as the peace and quiet and happiness of the people are concerned, it is of as much importance that the law-making power should be as free from the imputation of corruption, as the judicial power who administers the laws thus made. The community have as deep an interest in protecting the law-makers from all corrupt and seducing temptations of bribes, as they have the judges who expound the laws.

"I am unwilling, if I had the power, to extend the criminal law one step beyond its known and defined limits, and the argument so earnestly and ingeniously urged by the defendant's counsel, that the offence charged was not indictable, or there would have been some precedent, either in England or this country found, where there was an indictment against a member of parliament, or member of the legislature, has received due consideration, and although precedents and similar cases are as stars to light our way, in examining questions of this kind, we must not in looking for them, lose sight of general principles, nor give up the principle because we cannot find a precedent.

"That bribery was an offence at common law, there can be no question in my mind,

certain charges and allegations were made touching the conduct and management of a certain bank, to wit, the Lehigh County Bank, being a banking corporation within said commonwealth, incorporated by and in pursuance of the laws thereof, and thereupon it was by the said House of Representatives committed and referred to him the said E. P., and others, also members of the said House of Representatives, to inquire into the truth of the charges and allegations so made, and to report thereon to the said House of Representatives, whereby it became and was the duty of the said E. P., in his capacity and character of a member of the House of Representatives of the Commonwealth of Pennsylvania, to inquire into the truth of the said charges and allegations, and to report thereon to the said House of Representatives as to truth and justice might appertain; and the

although one of the counsel for the defendent, if I understood him, contended that it was not so at the adoption of our constitution, and therefore the offence could not be punished except in those cases where provision has been made by statute. In this he is certainly mistaken. We have no statutes in Pennsylvania in relation to bribery except at elections, and bribery of jurors. It will hardly be seriously contended that a judge or magistrate, sheriff or constable, could not be indicted for bribery, although there is no statute declaring it to be an offence; they could be indicted at common law.

"It has always been held in England before the revolution, and by the judicial decisions of this country since, that the first settlers brought hither so much of the common law, as was applicable to their local situation and condition, and by constant usage have adopted those portions of the common law of England as tended to promote their welfare and happiness. This much of the common law, it is said they claimed as their birth-right; and this was the opinion of Judge Chase in the case of U. S. *v.* Worrel.

"Whilst our legislature recognized the common law of England so far as it applied to our local situation, they found it necessary from the difficulty in carrying out the rules of the common law, or from the inadequacy of the penalties, or because they were too severe, to make salutary regulations in relation to crimes and misdemeanors in particular cases, and this has been done without interfering with the common law remedy; and almost every day's observation shows, that persons are indicted at common law, when there is a remedy provided by statute, and also persons indicted for common law offences when we have no statute on the subject; and it seems to be well settled in Pennsylvania that whatever amounts to a *public wrong* may be the subject of indictment.

"I am of the opinion that any person who may corruptly offer a bribe to a member of the legislature in order to influence his behaviour in office and incline him to act contrary to the known rules of honesty and integrity, is indictable at common law in our courts in Pennsylvania.

"Having thus disposed of the law of the case, we have but little to say in relation to the facts which more exclusively belong to the consideration of the jury. If from the evidence you are satisfied that the defendant corruptly offered a sum of money to V. E. Piollet, in order to influence his behaviour while acting in the capacity of a member of the legislature, and incline him to act contrary to the known rules of honesty and integrity, the commonwealth's counsel have made out their case against the defendant.

"This case has been ably prosecuted, and defended with great skill and talent, and this consideration relieves the court from the necessity of referring particularly to the evidence, as it has been presented to the view of the jury by the counsel on both sides, in the light most favourable to the respective parties. Under this consideration, it is proper, perhaps, to say that with the motives of Mr. Piollet in bringing on this exposure, and the means resorted to by him to do so, we have nothing to do; we neither endorse his course nor condemn it. It is in no way material in this cause, further than as it may affect his testimony in the minds of the jury. It is but justice to him, however, to observe, that it appears from the evidence that Mr. Piollet at every stage of his proceedings consulted his friends and acted under their advice. It is the intent and motive of the defendant in this cause that is material; whether his motives were corrupt, whether he corruptly offered the money as testified to, for the purpose of influencing the action of Mr. Piollet contrary to his duty as a member of the legislature, is the main question in the cause."

By the act of March 3, 1847, Pamph. p. 217, passed on the heels of the above case, the bribery of any public officer is made a felony. In all cases covered by the act, the common law remedy, so far as Pennsylvania is concerned, is consequently abrogated.

inquest aforesaid upon their oaths and affirmations aforesaid, do further present, that D. M'C., late of, &c., at, &c., and within the jurisdiction of this court, well knowing the premises, but unlawfully, wickedly and corruptly devising, contriving and intending to tempt, seduce, bribe and corrupt the said E. P., so being a member of the House of Representatives of this commonwealth, duly elected and qualified, and as such engaged in inquiring into the truth of the said charges and allegations, and about to report thereon as aforesaid, to prostitute, abuse and betray his trust, and violate his duty as a member of the said House of Representatives, towards the good people of this commonwealth, he the said D. M'C., on, &c., at, &c., and within the jurisdiction of this court, with force and arms, did wickedly and corruptly offer and give to the said E. P. a large sum of money, to wit, the sum of four hundred dollars, in order thereby corruptly to influence, induce, persuade and bribe him the said E. P. in his capacity and character of a member of the House of Representatives of this commonwealth, to vote for, agree to and make a report in regard to the charges and allegations, so to him with others by the said House of Representatives committed and referred as aforesaid, which report should be in favour of the Lehigh County Bank, and against the truth of the said charges and allegations; to the great dishonour of the said E. P., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That the said D. M'C., yeoman, on, &c., at, &c., and within the jurisdiction of this court, wickedly, advisedly and corruptly did solicit, urge and endeavour to procure the said E. P., he the said E. P. then and there being a member of the House of Representatives of the Commonwealth of Pennsylvania, and a member of the said committee on banks, and then and there engaged in the discharge of his said duties as aforesaid, in inquiring into the truth of the said charges and allegations, touching the conduct and management of the said Lehigh County Bank, to vote for, agree to and make a report in said committee and as a member of said committee and in his character and capacity of a member of the House of Representatives of the Commonwealth of Pennsylvania, which report should be in favour of the said Lehigh County Bank, and adverse to the said charges and allegations; and in order corruptly to induce, influence, persuade and bribe him the said E. P. to vote for, agree to and make a report as aforesaid, he the said D. M'C., then and there well knowing the premises, did wickedly, advisedly and corruptly offer and give to the said E. P., a large sum of money, to wit, the sum of four hundred dollars; and the inquest aforesaid upon their oaths and affirmations aforesaid, do further present, that the said D. M'C., with like corrupt intent as aforesaid, then and there did wickedly, advisedly and corruptly offer and promise to pay to the said E. P., so as aforesaid being a member of the said House of Representatives, and a member of the said committee, and while engaged in his said duties as aforesaid, one hundred dollars in addition to the four hundred dollars offered and paid as aforesaid, when the report of the said committee on banks should be made (meaning when the report of the said committee touching the conduct and management of the said Lehigh

County Bank should be made and presented to the said House of Representatives, which report should be in favour of the said bank, and adverse to the said charges and allegations); to the great dishonour of the said E. P., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Endeavouring to bribe a constable.(*f*)

That heretofore, to wit, on, &c., at, &c., one A. B., Esq., then and yet being one of the justices of the peace in and for the county of duly qualified, appointed and sworn to discharge and perform the duties of said office, did then and there make and issue a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to any of the constables of the town of in the county aforesaid, thereby commanding them, upon sight thereof, to take and bring before him the said A. B., so being such justice as aforesaid, (*or some other justice of the peace for the said county if such be the warrant*), the body of one C. D., late, &c., to answer, (*as in the warrant*); and which said warrant afterwards, to wit, on, &c., at, &c., was delivered to E. F. of, &c., he the said E. F. then being one of the constables of the said town of aforesaid, duly appointed and qualified to discharge the duties of said office of constable, to be executed in due form of law. And the jurors aforesaid, upon their oath aforesaid do further present, that G. H., late of, &c., well knowing the premises, but contriving and unlawfully intending to pervert the due course of law and justice, and to prevent the said C. D. from being arrested and taken under and by virtue of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, at, &c., unlawfully, wickedly and corruptly did offer unto the said E. F., so being constable as aforesaid, and having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of dollars, if he the said E. F. would refrain from executing the said warrant and from taking and arresting the said C. D. under and by virtue of the same warrant, for and during fourteen days from that time, that is to say, from the time he the said G. H. so offered the said sum of to the said E. F. as aforesaid; and so the jurors aforesaid, upon their oath aforesaid do say, that the said G. H. in manner and form aforesaid did attempt and endeavour to bribe the said E. F., so being constable as aforesaid, to neglect and omit to do his duty as such constable and to refrain from taking and arresting the said C. D. under and by virtue of the warrant aforesaid; against, &c. (*Conclude as in book* 1, *chap.* 3).

Bribery of a judge of the United States, on the act of April 30, 1790, *s.* 21.(*g*)

That A. B. of, &c., on, &c., at, &c., within the district aforesaid, did give to one C. D. of, &c., he the said C. D. being then and there

(*f*) Taken by Mr. Davis, Prec. 78, from Arch. C. P. 322. (*g*) Davis' Prec. 79.

a judge of, (*here insert the style of the court*), duly and legally appointed and qualified to discharge the duties of that office, the sum of dollars as a bribe, present and reward, to obtain and procure the opinion, judgment and decree of him the said C. D. in a certain suit, (*controversy or cause*), then and there depending before him the said C. D. as judge as aforesaid of the said court, to wit, (*here state the nature of the suit*); the said office of judge of the said court being then and there an office and trust concerning the administration of justice within the said United States; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Against a justice of the Court of Common Pleas for accepting a bribe.(*h*)

That A. B. of, &c., esquire, on, &c., at, &c., in the county aforesaid, was one of the justices of the Court of Common Pleas, &c., (*here state the style of the court*), duly and legally appointed, qualified and sworn to discharge and perform the duties of that office; the same being an office of importance and trust concerning the administration of justice within this commonwealth; and that the said A. B., being then and there such justice of said Court of Common Pleas as aforesaid, contriving and intending the duties of his said office and the trust and confidence thereby reposed in him to prostitute and betray, did then and there unlawfully and corruptly accept and receive of one C. D. the sum of dollars as a bribe and pecuniary reward, to influence and induce him the said A. B. to, (*here state the facts relative to the subject-matters of the bribe*); and that he the said A. B. did thereby unlawfully, wilfully and corruptly prostitute, violate and betray for the bribe and pecuniary reward aforesaid, so as aforesaid by him the said A. B. in his said office taken, accepted and received, the duties of his office and the trust and confidence in him therein and thereby reposed; to the great scandal, dishonour and prostitution of the public justice of said commonwealth, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Corrupt interference with an election. First count, offering money to a voter to vote for a particular member of parliament.(*i*)

That before and at the time of the committing of the offences hereinafter mentioned, to wit, on, &c., the borough of was and still is a borough electing, sending and returning two members to serve for the said borough in the parliament of the united kingdom of Great Britain and Ireland, to wit, at aforesaid in the county aforesaid; and, &c., that before the committing the several offences hereinafter mentioned, to wit, on, &c., at, &c., an election of a member to serve in the parliament of, &c., as one of the members for the said borough of was expected shortly to be had and made, which said expected election afterwards, to wit, on, &c., at, &c., was had and made; and, &c., that S. L., late, &c., harness-maker, unlaw-

(*h*) Taken by Mr. Davis, Prec. 75, from 4 Bla. Com. 139; 3 Inst. 147; Rex *v.* Vaughan, 4 Burr. 2500; 2 Chit. C. L. 681.

(*i*) Cole on Crim. Informations, 2d Part, 187.

fully, wickedly and corruptly intending to hinder and prevent the free and indifferent election of a member to serve in the parliament, &c., for the said borough of and by illegal and corrupt means to procure J. H. S., Esq., commonly called the Hon. J. H. S. (who before and at the time of the said election was a candidate to represent the said borough of in the said parliament, to be elected a member to serve in the said parliament, &c., for the said borough of did on, &c., in, &c., unlawfully, wickedly and corruptly promise to one G. S. (he the said G. S. then and there and before and at the time of the said expected election claiming a right to vote at the election of a member or members as the case might be, to serve in the said parliament, &c., for the said borough of a large sum of money, to wit, the sum of nine pounds as a gift, bribe and reward to him the said G. S. to engage, corrupt and procure the said G. S. to give his vote at the said expected election of a member to serve in the said parliament for the said borough of for the said J. H. S. so being such candidate as aforesaid, that the said J. H. S. might be elected at the said election to serve in the said parliament for the said borough of and thereupon, afterwards, to wit, on, &c., at, &c., the said S. L. did in pursuance and fulfilment of the said promise, unlawfully, wickedly and corruptly give and cause and procure to be given to the said G. S. a large sum of money, to wit, the said sum of nine pounds, as a gift, bribe and reward to the said G. S., in order and with intent to induce, procure and corrupt the said G. S. by means of the said gift, bribe and reward, to give his vote for the said J. H. S. at the said expected election of a member to serve in the said parliament for the said borough of that he the said J. H. S. might be chosen and returned at the said election to serve in the said parliament for the said borough; to the great obstruction and hinderance of the freedom of election of a member to serve in the said parliament for the said borough, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Actually giving a bribe.

That the said S. L. further unlawfully, wickedly and corruptly contriving and intending as aforesaid, did afterwards, to wit, on, &c., last said, at, &c., the said election being then and there so expected as in the first count of this information mentioned, unlawfully, wickedly and corruptly give and cause and procure to be given to the said G. S., he the said G. S. then and there and before and at the time of the said first count mentioned, claiming a right to vote at the election of a member or members, as the case might be, to serve in the parliament, &c., for the said borough of a large sum of money, to wit, the sum of nine pounds, as a gift, bribe and reward to him to engage, corrupt and procure the said G. S. to give his vote at the said expected election of a member to serve in the said parliament for the said borough for the said J. H. S., who was then and there and before and at the time of the said election so then expected as aforesaid, a candidate to represent the said borough in the said parliament, &c., that he the said J. H. S. might be chosen and returned to serve in the said parliament for the said borough, to the great obstruction and hinderance of the freedom of the said expected election of a

member of parliament for the said borough, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Illegal voting under Rev. Stat. c. 4. *First count, Rev. Stat. c.* 4, *s.* 6.(*j*)

That A. C., &c., on, &c., at, &c., at a town meeting of the inhabitants of said T. at the election of governor and lieutenant-governor of said commonwealth and of senators for the district of Middlesex in said commonwealth, then and there duly holden, well knowing himself not to be a qualified voter, did wilfully give in a vote for the officers aforesaid, being the officers to be chosen; against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That, &c., on, &c., at, &c., at another town meeting of the inhabitants of said T., at the election of governor and lieutenant-governor of said commonwealth and for senators for the district of Middlesex, being then and there inquired of by the selectmen of T., presiding at said meeting and election, whether he the said defendant had paid any tax within any town or district in this state, to wit, the commonwealth aforesaid, did then and there wilfully give a false answer to said selectmen, namely, that he the said defendant had paid a tax assessed upon him in the City of Lowell in said county, within two years next preceding said election, to wit, a tax assessed to him in said Lowell in the year eighteen hundred and forty; whereas in truth and fact said defendant had not paid any such tax so assessed upon him in said Lowell in the year eighteen hundred and forty; and the said inquiry was then and there made of said defendant for the purpose of ascertaining his right to vote at said election, and said false answers were returned by him, he said defendant then and there fraudulently intending to procure his name to be inserted on the voters' list of said town and to obtain permission then and there to vote at said election; against, &c. (*Conclude as in book* 1, *chap.* 3).

Giving double vote; misdemeanor at common law.(*k*)

That of the county aforesaid, on, &c., at, &c., being admitted

(*j*) No technical exceptions were taken to either of these counts in Com. *v.* Shaw, 7 Mete. 52. A new trial was granted, however, with the understanding that if the attorney-general should enter a *nolle prosequi* on the second count, judgment should be entered on the first, it appearing that one of the allegations in the second count was not sustained by the evidence.

(*k*) This count, which in Com. *v.* Silsbee, 9 Mass. 417, was held sufficiently to set forth an offence at common law, is in several respects inartificially drawn. Perhaps it would have been better to have charged specifically that the defendant gave two votes, or three votes, instead of saying generally that he gave more than one. It is not straining a great deal to imagine a case in which "more than one" does not amount to two. The conclusion, "and the law of the same," &c., was meant, as appears from the argument, to refer to the common law and not to any particular statute; and if so, it is superfluous. As a statutory conclusion, on the other hand, it is untechnical and insufficient; Com. *v.* Stockbridge, 11 Mass. 279. These defects, however, may be considered as mere surplusage, and not only is the offence set forth with substantial accuracy, but the validity of the indictment itself as a precedent has been settled by the Supreme Court. In those states, however, where double voting is punishable by statute, the common law may be considered as merged in the statutory penalty, and such is clearly the case in Pennsylvania under the act of 21st March, 1806, s. 13; Wh. C. L. 7.

as a legal voter at the town meeting holden on the day and year aforesaid, at Salem in the said commonwealth, for the choice of town officers, did then and there wilfully, fraudulently, knowingly and designedly give in more than one vote for the choice of selectmen for said town of Salem at one time of balloting, to the great destruction of the freedom of elections, to the great prejudice of the rights of the other qualified voters in said town of Salem, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Embracery by persuading a juror to give his verdict in favour of the defendant and for soliciting the other jurors to do the like.(*l*)

That A. B. of, &c., on, &c., at, &c., knowing that a certain jury of the said County of B. was then duly returned, impanneled and sworn to try a certain issue joined in the Supreme Judicial Court then held and in session according to law, at B. aforesaid, in and for the said County of B., between C. D. plaintiff, and E. F. defendant, in a plea of the case; and then also knowing that a trial was to be had upon the said issue, on, &c., before the said Supreme Judicial Court then and there held for the said County of B., he the said A. B. wickedly and unlawfully intending and devising to hinder a just and lawful trial of the said issue by the jurors aforesaid returned, impanneled and sworn as aforesaid to try the said issue, on, &c., at, &c., unlawfully, wickedly and unjustly on behalf of the said E. F., the defendant in the said cause, did solicit and persuade one G. H., one of the jurors of the said jury returned, impanneled and sworn according to law for the trial of said issue, to appear and attend in favour of the said E. F., the said defendant in the said cause, and then and there did utter to the said G. H., one of the jurors as aforesaid, divers words and discourses by way of commendation on behalf of him the said E. F., the said defendant, and in disparagement of the said C. D., the plaintiff; and that he the said A. B. did then and there unlawfully and corruptly move and desire the said G. H. to solicit and persuade the other jurors returned, impanneled and sworn to try the said issue, to give a verdict for the said E. F., the defendant in the said cause, he the said A. B. then and there well knowing that the said G. H. was one of the jurors returned, impanneled and sworn to try the said issue; and that the jurors of said jury by reason of speaking and uttering the words and discourses aforesaid, did then and there, to wit, &c., give their verdict for the said E. F. the said defendant in the cause aforesaid; against, &c. (*Conclude as in book* 1, *chap.* 3.)

(*l*) Davis' Prec. 113. "This precedent is taken," says Mr. Davis, "in substance, from a similar precedent in Trem. P. C. 176, and is the only one to be met with either in that collection or in Coke's Entries, Chit. C. L., Stark. C. P., Cro. C. C. or Cro. C. A. There are two other precedents in an ancient book containing precedents of indictments, informations, &c., entitled 'Officium Clerici Pacis.'

"The last allegation in this precedent, viz. that the jury gave their verdict for defendant by reason of the solicitations, &c., is not necessary. The crime is complete by the *attempt*, whether it succeed or not; Hawk. b. I, c. 85, s. 1 and 2, and authorities there quoted."

Betting at an election.(*m*)

That D. S., late, &c., on, &c., at, &c., and within the jurisdiction of this court, did lay a wager and bet with a certain J. C., and that the said D. S. did then and there lay a wager and bet of fifty dollars with the said J. C., that a certain J. R. would be elected governor of the Commonwealth of Pennsylvania at an election to be held in said commonwealth under the constitution and laws of said commonwealth, on, &c., the said J. R. then and there being a candidate nominated for public office, to wit, for the office of governor of said commonwealth; contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Betting on a horse-race.(*n*)

That B. H. P., late, &c., heretofore, to wit, on, &c., at, &c., unlawfully did bet two dollars with a person to the jurors unknown, upon a horse-race, which said horse-race was not run upon a path or track made or kept for the purpose of horse-racing. And the jurors aforesaid, upon their oaths aforesaid, do further present, that B. H. P., late of the said county, on, &c., at, &c., did bet and wager bank notes, being valuable things, with a person to the jurors unknown, upon said horse-race, which said horse-race was not run upon a track or path made or kept for the purpose of turf-racing, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3.

Entering and running a horse at a horse-race.(*o*)

That H. H., late of, &c., yeoman, little regarding the laws and acts of assembly of this commonwealth, and not fearing the pains and

(*m*) Sherban *v.* Com., 8 Watts 213. The objection to this indictment was, that it did not state positively that there was an election pending. "We think the fair implication is," said Sergeant J., "not only that such bet was made, but that the election was to be held at that time."

(*n*) This count was sustained in State *v.* Posey, 1 Humph. 301.

"The act of 1820, c. 5, exempts turf-racing from the penalties inflicted by the statutes against gaming. Match races for short distances not being regarded by sportsmen as turf-racing, the exemption in this act was not considered as extending to such races. The act of 1833, c. 10 (Comp. Stat. 360), explanatory of the act of 1820, c. 5, declares that all horse-racing, without regard to the distance which may be run, where the same is run upon a track or path made or kept for the purpose of horse-racing, shall be deemed turf-racing, within the meaning of the acts of assembly of this state." This latter act evidently intended to change the law as it stood only as it regards the distance which may be run. It excepts only a quarter of a mile turf-racing, but it does not exempt them from the penalties of the acts against gaming, unless they be run "upon a track or path made or kept for the purpose of horse-racing." The indictment in this case alleges that the race was not run on a "track made and kept for horse-racing;" it is therefore not within the exemption of the act of 1833, and consequently is indictable as though the act had not passed. The legislature never intended to tolerate horse-races gotten up and run at distilleries, grog shops and musters, where crowds of excited, intoxicated persons would render it alike dangerous and demoralizing. Indeed the policy of the exemption of horse-racing from the penalties of the statutes against gaming, may in all cases be regarded, as questionable; and it is the duty of the courts to construe these statutes so as to suppress the mischief of gaining, and consequently to exempt such only as fall within the express provisions of the law."

(*o*) Drawn by William Bradford, Esq., the then attorney-general of this commonwealth.

penalties therein contained, on, &c., with force and arms at, &c., and within the jurisdiction of this court, unlawfully did enter, start and run for the sum of four thousand dollars, a certain horse to him the said H. H. belonging, and did then and there lay, bet and wager the sum of four thousand dollars upon his said horse so entered, started and run as aforesaid, to the evil example, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Winning money at cards.(*p*)

That H. H. and B. L., being persons of evil name and fame and dishonest conversation and not caring to get their livelihood by honest labour, but by fraud and deceit maintaining their idle course of life, on, &c., at, &c., and within the jurisdiction of this court, at an unlawful game, artifice and practice at cards, and by laying wagers with one B. C., relating to the playing of cards, did fraudulently and deceitfully by means of win, obtain and get to themselves of and from the said B. C. twenty dollars, of the goods and chattels of the said B. C., and him the said B. C. of his goods and chattels aforesaid then and there fraudulently and deceitfully in manner and form aforesaid deceive and defraud, to his great damage, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Breach of pilot laws in Massachusetts.

That B. F. R., of, &c., mariner, at, &c., on, &c., he the said R. then and there being a person not having a branch commission or warrant as a pilot or pilot's apprentice, for the harbour of Boston aforesaid, did undertake to pilot into the harbour of Boston aforesaid, a certain foreign vessel called the barque Empress, being a vessel of the burthen of more than two hundred tons, and coming from the port of New York in the State of New York, and not from a port in the State of Massachusetts, and not being a fishing vessel and not being a public ship belonging to the United States of America, nor a ship of war, but a merchant ship vessel, and certain branch pilots, to wit, (*set forth names of pilots*), having offered their services to the master of said barque Empress, said barque being bound then into the harbour of Boston aforesaid, before said vessel had passed a line drawn from Harding's Rocks to the outer graves, and from thence to Nahant-head, whereby and by force of the statute in such case made and provided, he the said B. F. R. hath forfeited a penalty for the said offence not exceeding fifty dollars, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*p*) Drawn by Mr. Bradford.

CHAPTER XI.

CHALLENGING TO FIGHT.

Sending a challenge at common law. First count, sending the letter containing the challenge.(*a*)

That J. S., late, &c., gentleman, being a person of turbulent and quarrelsome temper and disposition, and contriving and intending not only to vex, injure and disquiet one J. N. and do the said J. N. some grievous bodily harm, but also to provoke, instigate and excite the said J. N. to break the peace, and to fight a duel with and against him the said J. S., on, &c., at, &c., wickedly, wilfully and maliciously did write, send and deliver, and cause and procure to be written, sent and delivered unto him, the said J. W., a certain letter and paper writing containing a challenge to fight a duel with and against him the said J. S., and which said letter and paper writing is as follows, that is to say, (*here set out the letter with such innuendoes as may be necessary*), to the great damage, scandal and disgrace of the said J. N., in contempt of our lady the queen, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Provoking another to fight a duel.

That the said J. S., contriving and intending as aforesaid, afterwards, to wit, on, &c., with force and arms at, &c., wickedly and maliciously did provoke, instigate, excite and challenge the said J. N. to fight a duel with and against him the said J. S., to the great damage, scandal and disgrace of the said J. N., in contempt, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Provoking a man to send a challenge.(*b*)

(*Proceed as in the last precedent to the* * *and then thus*): wickedly, wilfully and maliciously did utter, pronounce, declare and say to and in the presence and hearing of the said J. N. these words following, that is to say), "you are a scoundrel and a liar, and I shall take care to let the world know that you are so," with intent to instigate, excite and provoke the said J. N. to challenge him the said J. S. to fight a duel with and against him the said J. N., to the great damage, &c., (*as in the last precedent but one*). (*If there be any doubt as to the words, lay them differently in different counts, and add a general count, not setting out the words but merely charging the defendant with having used threats and opprobrious language to the prosecutor, with intent, &c.*)

(*a*) Arch. C. P. 5th Am. ed. 714. (*b*) Arch. C. P. 5th Am. ed. 715.

Writing and delivering a challenge at the instance of a third person.(c)

That A. B., late of, &c., esquire, on, &c., at, &c., being of a turbulent, wicked and malicious disposition, and intending to procure great bodily harm and mischief to be done to C. D., late of, &c., in the county aforesaid, esquire, and also intending, as much as in him the said A. B. lay, to incite and provoke the said C. D. unlawfully to fight a duel with and against one E. F., late, &c., on, &c., with force and arms at, &c., did unlawfully, wickedly and maliciously write and cause to be written, a certain paper writing, in the words, letters and figures following, to wit, (*here set out the paper writing with the proper innuendoes*), which said paper writing (meaning and intending the same as such challenge as aforesaid), he, the said A. B., afterwards, to wit, on, &c., at, &c., unlawfully, wickedly and maliciously did deliver and cause to be delivered to the said C. D., against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. For delivering a written challenge as from and on the part and by the desire of E. F.(d)

That the said A. B., being such evil disposed person and disturber of the peace of our said lord the king, as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D., and to incite and provoke him the said C. D. unlawfully to fight a duel with and against the said E. F., afterwards, to wit, on, &c., with force and arms at, &c., did unlawfully, wickedly and maliciously deliver and cause to be delivered a certain written challenge as from and on the part and by the desire of the said E. F., to the said C. D. unlawfully to fight a duel with and against the said E. F., which said last mentioned challenge is as follows, that is to say, (*set out the challenge*), against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. For provoking and inciting the prosecutor to fight.(e)

That the said A. B. being such evil disposed person and disturber of the peace of our said lord the king, as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D., and to incite and provoke him the said C. D. unlawfully to fight a duel with and against the said E. F., afterwards, to wit, on, &c., with force and arms at, &c., did unlawfully, wickedly and maliciously provoke and incite the said C. D. (in the peace of God and our said lord the king then and there being), unlawfully to fight a duel with and against the said E. F., against, &c. (*Conclude as in book* 1, *chap.* 3).

For a verbal challenge.(f)

That A. B., of, &c., gentleman, being an evil disposed person, and intending to do great bodily harm and mischief to one C. D., and to provoke and incite him the said C. D. unlawfully to fight a duel with him the said A. B., on, &c., at, &c., in pursuance of, and for the completing of his said intent and design, did unlawfully, wickedly and maliciously, by opprobrious words and threatening language, provoke,

(c) 2 Stark. on Slander 361. (d) *Ib.* 362. (e) *Ib.*
(f) Davis' Prec. p. 87. Taken by Mr. Davis from 3 Chit. C. L. 850.

excite and challenge the said C. D. unlawfully to fight a duel with and against him the said A. B., against, &c. (*Conclude as in book* 1, *chap.* 3).

Giving a challenge in the presence of a justice of the peace.(*g*)

That G. W., of, &c., on, &c., at, &c., and within the jurisdiction of this court, with force and arms, &c., and in the presence and hearing of J. F., Esq., then and there being one of the justices of this commonwealth, the peace in the said county to keep, assigned, and in the due execution of his said office, unlawfully and contemptuously did provoke and challenge one A. H. to fight with him the said G. with deadly weapons, to wit, with pistols, in contempt of the laws, to the evil example of all others, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For sending a challenge in Pennsylvania.

That A. B., of, &c., on, &c., at, &c., and within, &c., a certain C. D., in the peace of God, &c., then and there being, with force and arms, &c., to fight with swords, pistols and other dangerous and destructive weapons, did provoke and challenge, with intention the said C. D. to kill and murder, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Accepting a challenge.

That C. D., of, &c., on, &c., at, &c., and within, &c., a provocation and challenge to fight with swords and pistols and other dangerous and destructive weapons, unjustly and unlawfully from a certain A. B. did accept, receive and take, contrary, &c., (*as above*).

Against a second for carrying a challenge, under the South Carolina statute.(*h*)

That B. C. Y., late of, &c., being resident in and citizen of the State of South Carolina aforesaid, intending to procure great bodily harm and mischief to be done to one T. C. P., of, &c., and to incite and provoke him the said T. C. P. unlawfully to fight a duel with and against one J. C. C., of, &c., on, &c., with force and arms at, &c., did unlawfully and wickedly carry, convey and deliver and cause to be carried, conveyed and delivered a certain written challenge of and from the said J. C. C., to the said T. C. P. to fight a duel with and against him the said J. C. C., which said written challenge is as follows, that is to say, (*here set out the letter with the proper innuendoes*), to the great damage of the said T. C. P., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same as first, omitting to set out letter.

(*g*) Drawn in 1789 by Mr. Bradford, then attorney-general.
(*h*) Held good in State v. Cunningham, 2 Spear 248.

Third count.

That the said B. C. Y., being resident, &c., intending to to procure great bodily harm and mischief to be done to one T. C. P., and to provoke and incite the said T. C. P. unlawfully to fight a duel with and against one J. C. C., on, &c., with force and arms at, &c., aforesaid, was directly concerned unlawfully in carrying to the said T. C. P. a challenge to fight a duel with and against the said J. C. C., which said challenge was in writing in the form of a letter addressed to Mr. T. C. P., as follows, that is to say, (*here set forth the letter with the proper innuendoes*), to the great damage of the said T. C. P., to the evil example of all others, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

For being a second in a duel.(*i*)

That A. B., of, &c., gentleman, on, &c., with force and arms at, &c., did voluntarily engage in a duel with one C. D., with dangerous weapons, to wit, with pistols, then and there loaded with gunpowder and leaden bullets, to the great hazard of the lives of the said A. B. and C. D., in which duel, engaged in as aforesaid, no homicide did ensue thereon; and the jurors, &c., do further present, that E. F., of, &c., gentleman, being a person regardless of the life of man, and holding in contempt the authority and government of the supreme giver and disposer of human life, on, &c., in the year aforesaid, with force and arms at B. aforesaid, in the county aforesaid, did knowingly and voluntarily become, and then and there knowingly and voluntarily was the second of the said C. D., and was then and there knowingly and voluntarily an agent and abettor of him the said C. D. in the duel and challenge aforesaid, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Challenging and posting at common law.(*j*)

That A. B., late of, &c., esquire, being a person of a turbulent, wicked and malicious disposition, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and wickedly and maliciously intending as much in him lay, not only to terrify and affright one C., a good and peaceable subject of our said lord the king, but also to kill and murder him, heretofore, to wit, on, &c., with force and arms at, &c., unlawfully and wickedly did provoke and challenge the said C. to fight a duel against him the said A. B. with sword and pistol, and, &c., that the said C. having then and there refused to fight with the said A. B. in pursuance of such wicked and unlawful challenge last aforesaid, he the said A. B. for the completing his aforesaid evil and wicked purpose and design, and further to provoke and incite the said C. to fight a duel against him the said A. B. in the manner aforesaid, afterwards, to wit, on the same day and year aforesaid, at C. aforesaid in the county aforesaid, did wicked-

(*i*) Davis' Prec. p. 90. This indictment was prepared by Mr. Davis, and is drawn upon the Mass. Stat. of 1804, c. 123, s. 6.

(*j*) 2 Stark. on Slander 363. See for a form for posting alone, p. 550.

ly and maliciously place, stick up and upon and caused to be placed, stuck up and exposed to public view, to wit, on the market house in C. aforesaid, a certain paper writing, with the name of him the said A. B. thereunto subscribed, containing certain scurrilous and abusive matter against the said C., of the tenor following, that is to say, (*here set out the letter with the proper innuendoes*), to the great damage and terror of him the said C. F., and against, &c. (*Conclude as in book* 1, *chap.* 3).

CHAPTER XII.

ATTEMPTS AND SOLICITATIONS TO COMMIT OFFENCES.(*a*)

Attempt to commit an offence in Massachusetts.

That A. B. of, &c., on, &c., at, &c., did attempt to commit an offence prohibited by law, to wit, did attempt with force and arms to, (*state*

(*a*) While an attempt to commit a felony is in itself a misdemeanor, 1 Hawk. P. C. 55; Higgins' case, 2 East R. 21; R. *v.* Kinnersly, 1 Strange 196; an attempt to commit even a misdemeanor is indictable; Higgins' case, 2 East R. 8; R. *v.* Phillips, 6 East 464; State *v.* Murray, 15 Maine 100; Com. *v.* Harrington, 3 Pick. 26; State *v.* Arey, 7 Conn. 267; Damarest *v.* Haring, 6 Cow. 76; State *v.* Keys, 8 Verm. 57; see Wh. C. L. 5, n. Thus it is an indictable offence to advise A., against whom a sheriff has a precept and whom he is about to arrest, to draw a line on the ground and forbid the officer to pass it, asserting at the time that if the sheriff passed the ground and A. killed him, the law was on A.'s side, State *v.* Caldwell, 2 Tyler 212; to lie in wait near a jail, by agreement with a prisoner, and to carry him away, People *v.* Washburn, 10 Johns. R. 160; to send threatening letters, U. S. *v.* Ravara, 2 Dall. 297; to challenge another to fight with fists, Com. *v.* Whitehead, 2 Boston Law R. 148; to challenge another to fight under any circumstances, though not in such a way as to constitute the statutory offence, State *v.* Farrier, 1 Hawks 487; State *v.* Taylor, 3 Brev. 243; or to even intimate to another a desire to fight with deadly weapons, Com. *v.* Tibbs, 1 Dana 524.

In an indictment for attempting to commit an offence it is not necessary to maintain an exactness as great as that which is essential in an indictment for the offence itself, R. *v.* Higgins, 2 East 5; see Wh. C. L. 80; as in an indictment for an assault with intent to murder, it is not necessary to set forth the instrument used, State *v.* Dent, 3 G. & J. 8. Nor in an assault with intent to pick from the pocket, is it necessary to set out the money attempted to be stolen; Com. *v.* Rogers, 5 S. & R. 463. In an indictment under the New York statute, as will be presently shown, for soliciting the commission of an offence, the particular manner in which the solicitation was made need not be set out; People *v.* Bush, 4 Hill 133.

Every solicitation of another to commit an indictable offence, whereby felony or misdemeanor is itself an act amounting to a misdemeanor at common law; Dickinson's Q. S. c. 6, s. 1; Wh. C. L. 562. Thus, to solicit a servant to steal the goods of his master is a misdemeanor, although no felonious act be done in pursuance of the incitement, or any further step beyond the soliciting be taken towards the commission of the felony; R. *v.* Higgins, 2 East R. 5. Again, to solicit a member of the privy council to accept a bribe for the disposal of an office, R. *v.* Vaughan, 4 Burr. R. 2494; to solicit a woman to com-

the offence), that being an offence prohibited by law, and in such attempt did then and there do a certain overt act towards the commission of said offence, to wit, did then and there with force and arms, (*state the act done, &c.*); but said A. B. then and there did fail in the perpetration of said offence, and was intercepted and prevented in the execution of the same, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Attempting to commit arson, &c., in New York, under 2 *Rev. Stat.* 698, *s.* 3. *First count, attempting to set fire, &c.*(*b*)

That, &c., on, &c., at, &c., did attempt unlawfully, feloniously and wilfully to set fire to a certain barn of J. S., situate, &c., with intent to injure the said J. S., &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Soliciting another to commit arson, &c.

That, &c., on, &c., at, &c., unlawfully, falsely and wickedly did solicit and incite one K. unlawfully, feloniously and wilfully, in the night time, to set fire to a certain barn of said J. S., situate, &c.; against, &c. (*Conclude as in book* 1, *chap.* 3).

Attempting to set fire to a house, at common law.

That M. I., late of, &c., spinster, on, &c., at, &c., and within the jurisdiction of this court, with force and arms the dwelling house of S. C. there situate, unlawfully and wickedly did attempt and endeavour to set fire to, burn and destroy with an intent feloniously, voluntarily and maliciously to burn and consume the same, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Conveying instruments into a prison with intent to facilitate the escape of a prisoner.(*c*)

That heretofore, to wit, on, &c., at, &c., A. B., Esq., then being one of the justices of the peace in and for the said county of duly and legally authorized and qualified to discharge and perform the

mit adultery, State *v.* Avery, 7 Conn. 267; to promise money to a member of a corporation if he will vote for a particular individual as mayor, R. *v.* Plympton, 2 Ld. Raym. 1377; or to offer a bribe to a juryman, Young's case, cited 2 East R. 14–16, are themselves misdemeanors; and the same principle applies to all cases where an ineffectual attempt is made to induce another to commit an offence. On a prosecution for misdemeanor in inciting another to commit a felony, it is not necessary for the prosecutor to show negatively that the felony was not completed; but he may leave it to the defendant to show, if he thinks fit, that the misdemeanor was urged in the greater offence, or in the absence of such proof he may be convicted of such solicitation; R. *v.* Higgins, 2 East R. 19, 20, per Grose J.

(*b*) People *v.* Bush, 4 Hill 133. The first of these counts was held good under 2 R. S. 583, 2d ed., s. 3; and the second as a misdemeanor at common law. The general principle was laid down that in cases of indictments for attempts, it was not necessary to point out the specific means by which the attempt was to be consummated.

(*c*) Davis' Prec. 117. "This precedent," says Mr. Davis, "is drawn upon the second section of the statute of Massachusetts of 1784, c. 41. It also concludes at common law. See a similar precedent in Stark. 612, drawn upon the statute of 16 Geo. II. c. 31, s. 1; also another in Cro. C. A. 328."

duties of that office, did make out his warrant of commitment in due form of law, bearing date the day and year aforesaid, directed to the keeper of the commonwealth's gaol in aforesaid, his under-keeper or deputy, by which said warrant of commitment the said justice did require the keeper of said gaol, his under-keeper or deputy, to receive into their custody the body of one C. D. who was therewith sent to them the said keeper, his under-keeper or deputy (the said C. D. having been brought before him the said justice and charged upon the oath of E. F. with having feloniously taken, stolen and carried away a certain gelding of the value of dollars, the property of him the said E. F.), and him the said C. D. safely to keep until he should be discharged by due course of law; which said warrant of commitment is as follows, (*here set forth the warrant of commitment*); by virtue of which said warrant the said C. D. afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, was conveyed, committed and delivered to the commonwealth's said gaol situated in said B. and to the keeper thereof, for the cause aforesaid, to wit, for the felony and larceny aforesaid; and the said C. D. was then and there lawfully detained and kept a prisoner in the aforesaid gaol, under the custody of I. J., Esq., then the keeper of said gaol, for the felony aforesaid. And the jurors aforesaid upon their oath aforesaid, do further present, that K. L. of in the county aforesaid, labourer, on the day of at B. aforesaid, in the county aforesaid, did unlawfully convey and did cause and procure to be unlawfully conveyed into the said gaol and prison, two steel files, being instruments proper to facilitate the escape of prisoners out of the gaol and prison aforesaid, and the same files did then and there deliver and cause and procure to be delivered to the said C. D. (he being then and there a prisoner in said gaol and prison and then and there lawfully detained therein for the felony and larceny aforesaid), without the knowledge and privity of said keeper of said gaol and prison or of any under-keeper of the same, which said files being such instruments as aforesaid, were then and there so conveyed into the said gaol and prison and delivered to the said C. D. as aforesaid, by him the said K. L. with an intent that he the said C. D. might thereby and therewith break the said gaol and prison and unlawfully work himself out of the same, and with intent to aid and assist the said C. D. to escape and attempt to escape from and out of the said gaol and prison, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Lying in wait near a gaol in order to secure a prisoner's escape, at common law.(*d*)

That A. B., Esq., then being one of the justices of the peace in for the county of duly and legally commissioned, authorized and qualified to discharge the duties of that office, did make out his warrant of commitment in due form of law, under his hand and seal,

(*d*) This was meant as a statutory misdemeanor, but as the offence was not stated as such, the indictment was sustained as at common law; People *v.* Tompkins, 9 Johns. 71.

dated, &c., directed to the keeper of · (his under-keeper or deputy), by which said warrant, (*setting out the warrant*), as by the same warrant more fully appears, by virtue of which said warrant of commitment, afterwards, to wit, on, &c., at, &c., A. B. then being keeper of the said gaol, &c., of the said county, &c., did receive the said W. M. as a prisoner in the gaol aforesaid, &c.(*e*) And the inquest aforesaid, &c., do further present, that J. T., &c., on, &c., at, &c., being well acquainted with the premises aforesaid, and while the said A. T. was then in the gaol aforesaid, under the custody aforesaid, did unlawfully and knowingly combine and conspire with the said A. T., and near the said gaol did lie in wait, to the intent and purpose that the said A. T. might thereby be enabled to escape; and that pursuant to the contrivance and conspiracy of the defendant with the said A. T., and by his means and procurement she did escape and go at large from the said gaol, and so the said J. T. did convey the said A. T. away and assist her in escaping from the said gaol, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Keeping keys with intention to commit burglary.(*f*)

That J. C., late of, &c., yeoman, on, &c., at, &c., and within the jurisdiction of this court, with force and arms, &c., twenty false keys made of iron, in his custody and possession unlawfully had and kept, with a wicked intent on the dwelling house of the citizens of this state in the night time feloniously and burglariously to break, and with the same false keys to open and enter and the goods and chattels of the same citizens in the same dwelling house being, feloniously and burglariously to steal, take and carry away, against, &c. (*Conclude as in book* 1, *chap.* 3).

Administering poison with intent to murder.(*g*)

That A. B., &c., on, &c., in the county aforesaid, feloniously and unlawfully did administer to one J. N. (administer to or cause to be taken by any person), a large quantity of a certain deadly poison called white arsenic, to wit, two drachms of the said white arsenic (any poison or destructive thing), with intent then and there and thereby feloniously, wilfully and of his malice aforethought, the said J. N. to kill and murder, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add a count stating that the defendant*): "did cause to be taken

(*e*) See 2 Chit. C. L. 175.

(*f*) Drawn by Mr. Bradford in 1789.

(*g*) Arch. C. P. 5th Am. ed. This form is based on 7 Wm. 4 and 1 Vict. c. 85, s. 2, which enacts that "whosoever shall administer or cause to administer to or cause to be taken by any person, any poison or other destructive thing," "shall be guilty of felony," &c. The form in the text, however, would undoubtedly be held good as at common law in those states where no statute exists.

The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment for administering sponge mixed with milk, not alleging the sponge to be destructive, was held bad; R. v. Powles, 4 C. & P. 571. If there be any doubt whether the poison was intended for J. N., add a count stating the intent to be "to commit murder" generally; See Rex v. Ryan, 2 M. & R. 213.

by J. N. a large quantity," &c.; (*and if the description of poison be doubtful, add counts describing it in different ways; add one count stating it to be*): "a certain destructive thing to the jurors aforesaid unknown."

CHAPTER XIII.

REVOLT, PIRACY AND VIOLATION OF THE LAWS CONCERNING THE SLAVE TRADE.

Making a revolt.

That H. G., et al., all late, &c., on, &c., in and on board of a certain American ship or vessel called the Hibernia, then lying within the jurisdiction of a foreign state or sovereign, to wit, at, &c., the same then and there being an American ship or vessel, belonging to certain persons, citizens of the United States, whose names are to the jurors aforesaid as yet unknown, of which ship or vessel one A. B. was then and there master, with force and arms did make a revolt in said ship or vessel (by unlawfully, wilfully and with force usurping the command of such ship and vessel from the said the master thereof, *or*, by unlawfully, wilfully and with force depriving the said the master thereof, of his authority and command on board of the said vessel, &c.),(*a*) they the said H. G., et al., then and there being the crew of the said ship or vessel, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*Add count for endeavouring to commit revolt, as in next form*).(*b*)

(*a*) One of the segments of the passage in brackets or an averment of a similar character under the act, is made necessary by the decision of Judge Kane, in the case of U. S. *v.* Almeida, Dist. Ct. U. S., Phil., Feb. 1847. "The indictment," he said, "on which these prisoners were convicted a few days ago, charges that on the first day of November last, upon the high seas, &c., they being 'seamen of an American vessel, to wit, the barque Pons, with force and arms, did then and there feloniously make a revolt on board the said ship, contrary,' &c.

"A motion has been made in arrest of judgment, on the ground that the offence is not set forth in the indictment with adequate certainty; and it has been contended, that under the acts of congress now in force, it was incumbent on the prosecution to set out more specifically the acts, which make up the offence charged.

"The question presented by the record is more interesting than difficult; but as it appears to be of the first impression, it properly invites an exposition of the views of the court in deciding it.

"The law secures to every man who is brought to trial on a charge of crime, that the

acts which constitute his alleged guilt, shall be set forth with reasonable certainty in the indictment which he is called upon to plead to. This is his personal right—indispensable, to enable him to traverse the facts, if he believes them to be untruly charged—to deny their asserted legal bearing, if in his judgment they do not establish the crime imputed to him—or to admit at once the facts and the conclusion from them, if he be conscious of guilt. It is important to his protection also, in case he should be a second time charged for the same offence, that there should be no uncertainty as to that for which he was tried before. And besides all this, which may be supposed to regard the accused alone; it is necessary for the proper action and justification of the court, that it should clearly appear from facts patent on the record, that a specific, legally defined crime has been committed, for which sentence is to be awarded according to the laws that apply to it.

"There are exceptions, or rather limits, to the application of this principle; but they all refer themselves to the peculiar character of the offence charged. Thus, an indictment against a 'common barrator,' or for 'keeping a common gaming house,' or 'a house of ill-fame,' is good without a specification of acts; for the essence of the offence in these cases is habitual character. So also, where the charge is not the absolute perpetration of an offence, but its primary characteristic lies in the intent, instigation or motion of the party towards its perpetration; the acts of the accused, important only as developing the *mala mens*, and not constituting of themselves the crime, need not be spread upon the record. Such are certain cases of conspiracy, and those of attempt or solicitation, to commit a known crime; where the mental purpose may not have matured into effective action, or has had reference to criminal action by a third party—a class of exceptions this last, which vindicates much of the judicial action under this statute.

"But these are only exceptions: the principle is as broad as the common law. It is not enough, and never has been, to charge against the party a mere legal conclusion, as justly inferential from facts that are not themselves disclosed on the record. You may not charge treason, murder, or piracy, in round general phrases. You must set out the act which constitutes it in the particular case.

"Following out the principle, it has always been held that where various acts have been enumerated in a statute, as included in the same category of crime, and to be punished alike, it is not enough to charge the violation of such a statute in disjunctive or alternative terms. That is to say, you may not charge its violation to have been in this or that or another particular, leaving the defendant uncertain which or how many of the enumerated particulars he is to answer to. He is entitled to precise notice of the accusation against him.

"All these are long recognized rules of the criminal law, framed for the protection of innocence, and not unfrequently essential to its safety. The court has no right to disregard them, if it would; on the contrary, it is called upon by the highest duty that man can owe his fellow, to see to it that they lose none of that efficiency for good which is due to the uniformity and certainty of their application. The defendants have asserted of record, that in their case these rules of pleading have not been conformed to, that they have not had such notice of the offence charged against them as the law requires, and that there is not now within the judicial knowledge of the court that precise and specific assurance of their guilt, which can warrant us in pronouncing sentence upon this verdict. If it be so, they are not too late in bringing the fact to our notice.

"The indictment it is understood, is in accordance with the precedents under the Crimes' Act of 1790. By the 8th section of that act (1 Stor. P. S. 84), it was enacted, that if any seaman shall lay violent hands on his commander, thereby to hinder him from defending his ship, or the goods committed to his trust, 'or shall make a revolt in the ship,' he shall be adjudged to be a pirate and a felon; and by the 12th section, it was enacted that if any seaman shall confine the master of any ship or vessel, or 'endeavour to make a revolt' in such ship, he shall on conviction suffer imprisonment and fine.

"Almost all the indictments that have been framed under this act for offences similar to the present, have charged the offence in the words of the 12th section, for 'endeavouring to make a revolt;' U. S. *v.* Bladen, 1 P. C. C. R. 213; U. S. *v.* Smith, 3 W. C. C. R. 78; U. S. *v.* Smith and Combs, 3 W. C. C. R. 526; U. S. *v* Kelly, 4 W. C. C. R. 528; U. S. *v.* Smith, 1 Mas. 147; U. S. *v.* Hamilton, 1 Mas. 443; U. S. *v.* Keefe, 3 Mas. 475; U. S. *v.* Hemmer, 4 Mas. 105; U. S. *v.* Haines, 5 Mas. 272; U. S. Gardner, 5 Mas. 402; U. S. *v.* Barker, 5 Mas. 404; U. S. *v.* Savage, 5 Mas. 460; U. S. *v.* Thompson, 1 Sumn. 168; U. S. *v.* Morrison, 1 Sumn. 448; U. S. *v.* Ashton, 2 Sumn. 13; U. S. *v.* Cassedy, 2 Sumn. 582; U. S. *v.* Rogers, 3 Sumn. 342. Now, as we have already remarked, a charge for such an offence as was the subject of all these cases, resting merely in the endeavour, not going to the perfected act, was, according to all the authorities, well laid in the succinct descriptive words of the section; and in the only cases under the 8th section, in which the principal offence of making a revolt was charged, (U. S. *v.* Sharp, 1 P. C. C. R. 118; Same *v.* Same, 1 P. C. C. R. 131; and U. S. *v.* Haskell, 4 W. C. C. R. 402), the indictment was quashed

or the judgment arrested on other grounds, or else the acquittal of the prisoner made it unnecessary to discuss the question which is now before us. No sentence has ever been pronounced on such a conviction.

"Indeed, the courts before whom the cases were tried on indictments like this, though the particular question was not raised upon the pleadings, felt themselves embarrassed by the undefined phraseology of the act of congress, and Judge Washington more than once recommended to the jury not to find the defendant guilty of either making or endeavouring to make a revolt, however strong the evidence might be; (see U. S. *v.* Sharp, and U. S. *v.* Bladen, *ut supra*).

"The question of the meaning of these terms was at last submitted to the Supreme Court of the United States, in a case that went up on a certificate of division from this circuit (U. S. *v.* Kelly, *ut supra*, and Wheat. 417), and in the spring of 1826 the import of the act of congress of 1790 was judicially determined.

"In 1835, however, a new act of congress (4 Stor. P. S. 2416) was passed, which, obviously referring to the language of the Supreme Court in Kelly's case, yet not adopting it, proceeded to declare what violations of law should thereafter be deemed to constitute the crime of revolt. The language of the first section of this act is as follows:

"'If any one or more of the crew of any American ship or vessel on the high seas, or on any other waters within the admiralty or maritime jurisdiction of the United States shall unlawfully, wilfully and with force, or by fraud, threats or other intimidations usurp the command of such ship or vessel from the master, or other lawful commanding officer thereof, or deprive him of his authority and command on board thereof or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any other person not lawfully entitled thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt or mutiny and felony; and shall on conviction thereof be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labour not exceeding ten years, according to the nature and aggravation of the offence.'

"The unlawful acts, which now fall within the definition of a maritime revolt, are distributed by the language of this section into four categories or classes:—1. Simple resistance to the exercise of the captain's authority. 2. The deposition of the captain from his command. 3. The transfer of the captain's power to a third person. 4. The usurpation of the captain's power by the party accused.

"It is impossible to analyze the section as I have done, without remarking that the offences which it includes, however similar in character, differ widely in degree. The single act of unpremeditated resistance to the captain cannot be identified with his formal degradation from the command, still less with the usurpation of his station, without overlooking the gradations of crime, and confounding the accidental turbulence of a heated sailor with the deliberate and daring and triumphant conspiracy of mutineers.

"This indictment however makes no reference to these statutory distinctions. It pursues the precedents in use before the act, and charges all the prisoners, simply and alike, with 'making a revolt:' and in this we are told, it conforms to other indictments which have been framed by different attorneys for the United States since the act was passed. But is there in this such a clear and specific description of the offence of each of these men as the rules of criminal pleading prescribe, and the language of the act has made easily practicable? Is it more than a charge in the alternative or disjunctive, when the terms in which the charge is made must be resolved into alternative or disjunctive propositions in order to be understood? Does this court see, on inspecting the record of this conviction, and will other courts, who may hereafter refer to it for a precedent, see here that clear reference to the grades of guilt recognized by the act of congress, which should explain the difference properly to be made in the sentences of the prisoners?

"The circumstances of the case, as they are known to the judge who presided at the trial, illustrate the force of this last question. Among the prisoners is a principal officer of the ship, who, according to the evidence upon which the jury convicted him, was the moving spirit and principal actor of the revolt, who struck the captain to the deck with a deadly weapon, imprisoned him, bound, in a darkened state-room, with a sentry at the door, while he himself usurped the command of the ship, continuing to exercise it till he was within two hours' travel of the city. Another prisoner is a simple seaman, whose offence consisted in omitting to interfere for the captain's rescue, rather than in any more direct agency against him. Had the several categories of crime which the 8th section indicates, formed the subjects of charge in as many counts of the indictment, is it not altogether possible that, upon the same evidence, one of these men would now stand convicted on several charges, the other of but one, and that the lightest on the list?

"But this is illustration merely: the argument is independent of it. The party accused is entitled to the most clear specification of his offence that its character and circumstances reasonably admit of; and it cannot be said that he has had this, when a more direct des-

Endeavouring to make a revolt.(*bb*)

That A. B., late of, &c., C. D., late of, &c., and E. F., late of, &c., (*specify every one separately, as above*), heretofore, to wit, on, &c., with force and arms on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there the master and commander, did then and there endeavour to make a revolt, they the said A. B., C. D. and E. F., then and there being, (*state number*), of the crew of the said American called the against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same, setting out the "endeavour" to consist in a conspiracy, &c.

That the said A. B., C. D. and E. F., heretofore, to wit, on, &c., with force and arms upon the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there the master and commander, did then and there endeavour to make a revolt, in this, that they the said A. B., C. D. and E. F., did then and there combine, conspire and confederate with K. L. and M. N., on board of said called the to make a revolt in and on board of said called the they the said then and there being, (*state number*), of the crew of the said called the , against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

(*Like second count, striking out*): "did then and there endeavour to make a revolt, in this, that they the said ."

Fourth count.

(*Like third count, substituting*): "did then and there combine, conspire and confederate with some other person or persons, on board of said vessel, being a called the to the jurors aforesaid unknown, to make a revolt, &c.," *for* "did then and there combine, conspire and confederate with on board of said called the to make a revolt, &c."

cription is furnished in the very words of the act under which he is indicted. The judgment, therefore, must be arrested.

"In thus deciding upon the insufficiency of the indictment, the court is not insensible to the consideration that perhaps very little of essential wrong might have been sustained by either of the prisoners if we could lawfully have proceeded to the sentence. The facts cannot be more faithfully examined, nor the merits of the case more ably developed in argument, nor as it seems to us, more candidly and intelligently apprehended by the jury, than they were in the protracted and laborious trial which recently closed. But we have no right to consider of policy, at best probable, in reference to a single case, when we are called on to apply the general principles of established law, and to register a precedent for the future action of the court. We perform a single and unmixed duty, when we declare, upon the call of the accused, what are their legal rights."—MS. Report.

(*b*) A count for a revolt may be joined with a count for an endeavour to commit a revolt, and after a general conviction, judgment will not be arrested on account of such joinder. U. S. *v.* Peterson, 1 Wood. & Min. 305.

(*bb*) U. S. *v.* Veal, New York, 1847. The defendant was convicted.

Fifth count. Same as first, setting out the endeavour to consist in a solicitation of others to neglect their duty, &c.

That the said A. B., C. D., &c., heretofore to wit, on, &c., with force and arms on the high seas, out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there the master and commander, did then and there endeavour to make a revolt on board of said called the in this, that they the said A. B., C. D., &c., did then and there solicit, incite and stir up others of the crew of the said called the to the jurors aforesaid unknown, to neglect their proper duty on board of the said called the they the said being then and there of the crew of the said called the against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count.

(*Like fifth count, substituting*): "did then and there solicit, incite and stir up others of the crew of the said vessel, being a called the to the jurors aforesaid unknown, to disobey and resist the lawful orders of the said the master of the said called the ," *for* "did then and there solicit, incite and stir up others of the crew of the said called the to the jurors aforesaid unknown, to neglect their proper duty on board of the said called the ."

Seventh count.

(*Like sixth count, substituting*): "did then and there solicit, incite and stir up other and others of the crew of the said vessel, being a called the to the jurors aforesaid unknown, to betray their proper trust on board thereof, they the said then and there being of the crew of the said called the against the peace, &c.," *for* "did then and there," &c.

Eighth count. Same as first count, setting out the endeavour to consist in an assemblage of the crew in a riotous manner, &c.

And the jurors aforesaid on their oath aforesaid, do further present, that the said heretofore, on the day of in the year of our Lord one thousand eight hundred and with force and arms on the high seas, out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one was then and there the master and commander, did then and there endeavour to make a revolt in and on board of said called the in this, that they the said did then and there assemble with others of the crew of the said vessel, to the jurors aforesaid unknown, in a tumultuous and mutinous manner, they the said being then and there of the crew of the said called the against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Ninth count.

(*Like eighth count, inserting after*): "in a tumultuous and muti-

nous manner," "in and on board of said called the and did then and there make a riot in and on board of the said called the ."

Tenth count. Same as first, laying the time with a continuendo.

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Rioting on board ship.

That A. B., C. D., &c., heretofore, on, &c., with force and arms on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there master and commander, did then and there make a riot in and on board of the said called the they the said A. B., C. D., then and there being of the crew of the said called the against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Endeavouring to revolt, &c., by rioting, &c.

That the said A. B , C. D., heretofore, on, &c., with force and arms on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there master and commander, did then and there endeavour to make a revolt in and on board of said called the in this, that they the said did then and there, to wit, on board of said vessel, being a called the assemble with some other person or persons, to the jurors aforesaid unknown, then and there being of the crew and company of said called the in a tumultuous and mutinous manner, and did then and there make a riot in and on board of the said called the they the said then and there being of the crew of the said called the against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Confining the master, &c.

That heretofore, to wit, on, &c., with force and arms on the high seas, out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there the master and commander, did then and there unlawfully confine the said he the said then and there being the master, and belonging to the company of said called the and they the said then and there being of the crew of the said called the against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Piratically and feloniously running away with a vessel, and aiding and abetting therein, &c., and assaulting master. First count, running away with vessel.(c)

That A. B., late of, &c., mariner, C. D., late of, &c., mariner, and E. F., late of, &c., mariner, heretofore, to wit, on, &c., with force and arms upon the high seas, out of the jurisdiction of any particular state of the United States of America and within the jurisdiction of this court, did piratically and feloniously run away with a certain vessel, being a called the belonging and appertaining to a person or persons, then being a citizen or citizens of the United States of America, but whose names are to the said jurors unknown, they the said A. B., C. D., E. F., then and there being mariners of said vessel, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first count, substituting*): "belonging and appertaining to G. H., I. K., L. M., then being citizens (or a citizen) of the United States of America," *for* "belonging and appertaining to a person or persons then being a citizen or citizens of the United States of America, but whose names are to the said jurors unknown."

Third count. Running away with goods, &c.

That A. B., C. D., &c., heretofore, to wit, on, &c., with force and arms upon the high seas, out of the jurisdiction of any particular state of the United States of America and within the jurisdiction of this court, in and on board of a certain vessel, being a called the belonging and appertaining to I. K., L. M., then being citizens (or a citizen) of the United States of America, they the said A. B., C. D., &c., being then and there mariners of said vessel, did then and there piratically and feloniously run away with the following goods and merchandise, to wit, (*here particularize the articles and value of each*), in and on board the said vessel, then being of the goods and chattels of some person or persons to the jurors aforesaid unknown, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Same stated more specially.

That heretofore, to wit, on, &c., with force and arms upon the high seas, out of the jurisdiction of any particular state of the said United States of America and within the jurisdiction of this court, did piratically and feloniously run away with the following goods, wares and merchandise, to wit, (*here specify articles as in preceding count*), of the goods and chattels of all which goods, wares and merchandise were then and there in and on board a certain vessel, being a called the owned by the said I. K., L. M., N. O., citizens of the United States of America, they the said I. K., L. M., &c., being then and there mariners of the said vessel, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count.

(*Same as fourth count, substituting*): "the following goods and merchandise, to wit, (*here specify some of the wearing apparel, &c.,*

(c) United States v. Babe, Circuit Court, New York, 1844. The defendant was convicted and sentenced, but was afterwards pardoned.

of any of the officers or others), of the goods and chattels of some person or persons to the said jurors unknown, all which said goods and merchandise were then and there in and on board a certain vessel, being a called the . owned in whole or in part by I. K., a citizen of the United States of America," *for* "the following goods, wares and merchandise, to wit, ( ), of the goods and chattels of I. K., all which goods, wares and merchandise were then and there in and on board a certain vessel, being a called the owned by the said citizens of the United States of America."

Sixth count. Assaulting master and running away with goods, &c.

That A. B., C. D., &c., heretofore, to wit, on, &c., with force and arms upon the high seas, out of the jurisdiction of any particular state of the said United States of America and within the jurisdiction of this court, in and on board of a certain vessel, being a called the owned by I. K., L. M., citizens (or a citizen) of the said United States of America, then and there piratically and feloniously did assault one G. H., the said then and there being the master and commander of said and did then and there upon the high seas aforesaid, in and on board of said called the out of the jurisdiction of any particular state of the said United States and within the jurisdiction of this court, piratically and feloniously put the said G. H., being such master as aforesaid, in great bodily fear and danger of his life, and the said called the and the tackle and apparel of the said of the value of dollars, together with, (*specify articles and value as in third count*), of the goods and chattels of R. S., T. V., &c., citizens of the United States of America, (*here specify articles as in fifth count*), all of which said goods, wares and merchandise were then and there in and on board of said vessel, being a called the of the goods and chattels of some person or persons to the jurors aforesaid as yet unknown, and then and there upon the high seas aforesaid, in the place aforesaid, and within the jurisdiction aforesaid, being under the care and custody and in the possession of the said G. H., being then and there the master and commander of said schooner as aforesaid, they the said A. B., C. D., &c., with force and arms, from the care, custody and possession of the said then and there, to wit, upon the high seas aforesaid, in the place aforesaid, and within the jurisdiction aforesaid, piratically, feloniously and against the will and consent of the said G. H., did steal, take and run away with, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Seventh count. Against principal offender for running away with vessel.

That (*here insert the name of the person most de ply concerned*), late of, &c., heretofore, on, &c., with force and arms on the high seas, out of the jurisdiction of any particular state of the United States of America, within the admiralty and maritime jurisdiction of the said United States and within the jurisdiction of this court, did piratically and feloniously run away with a certain other vessel, being a called the belonging and appertaining to I. K., citizens (or a citizen) of the United States of America, he the said A. B., then and

there being a mariner of said vessel, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Eighth count. Against others as accessaries.

That W. B., late of, &c., mariner, and (*or if more, recite separately as before*), C. K., late of, &c., mariner, before the said piracy and felony was committed in form aforesaid, to wit, on, &c., on the high seas, out of the jurisdiction of any particular state of the said United States of America and within the jurisdiction of this court, with force and arms did unlawfully and feloniously, knowingly and wittingly aid and assist, procure, command, counsel and advise the said the piracy and felony last aforesaid, in manner and form last aforesaid, to do and commit, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Breaking and boarding a ship, assaulting, &c., the crew and stealing, &c., the cargo.(*d*)

That J. P., (*and others, naming them*), of, &c., on, &c., upon the high sea, out of the jurisdiction of any particular state, did piratically and feloniously set upon, board, break and enter a certain ship called the then and there being a ship belonging to certain persons to the jurors aforesaid unknown, and then and there piratically and feloniously did make an assault in and upon certain persons whose names are to the jurors aforesaid unknown, being mariners in the same ship, and then and there piratically and feloniously did put the aforesaid persons, mariners of the same ship as aforesaid and in the ship aforesaid then and there being, in personal fear and danger of their lives, then and there in the ship aforesaid upon the high sea aforesaid, and out of the jurisdiction of any particular state as aforesaid; and piratically and feloniously did then and there steal, take and carry away five hundred boxes of sugar of the value of twenty thousand dollars, (*here set forth all the articles stolen with the value of each*), of the goods and chattels of certain persons to the jurors aforesaid unknown, then and there upon the high sea aforesaid, out of the jurisdiction of any particular state, being found in the aforesaid ship in custody and possession of the said mariners of the said ship, from the said mariners in the said ship and from their custody and possession then and there upon the high sea aforesaid, out of the jurisdiction of any particular state as aforesaid; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Piratically breaking into, taking and carrying away a ship and certain goods on board the same.(*e*)

That C. D., late of, &c., mariner, (*and eight others with the like additions*), on, &c., with force and arms upon the high seas, out of

(*d*) Davis' Prec. 227. This was the form in U. S. *v.* Palmer, 3 Wheat. 611.
(*e*) Lewis' Cr. Law 645.

set upon, board, break and enter a certain merchant ship called the Governor Strong, then being a ship belonging exclusively to citizens of the United States to the said jurors as yet unknown, and then and there piratically and feloniously did assault certain mariners whose names to the said jurors are also yet unknown, in the same ship and in the peace of the said United States then and there being; and did then and there upon the high sea aforesaid, out of the jurisdiction of any particular state, piratically and feloniously put the said mariners in great fear and bodily danger of their lives; and the said merchant ship and the apparel and tackle of the same of the value of three thousand dollars, together with seventy chests of opium of the value of five thousand dollars, then being in and on board the same ship, of the goods and chattels of certain citizens of the United States to the said jurors yet unknown; and then and there upon the high sea aforesaid, out of the jurisdiction of any particular state, being under the care and custody and in the possession of the mariners aforesaid, they the said C. D., (*and others, naming them*), from the care, custody and possession of the mariners aforesaid, then and there, to wit, upon the high sea aforesaid, out of the jurisdiction of any particular state, piratically, feloniously and by force and violence and against the will of the mariners aforesaid, did steal, rob, take and run away with; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Against a seaman for laying violent hands upon his commander, with intent to prevent his fighting in defence of his ship.(*f*)

That A. B. of, &c., on, &c., on the high sea, out of the jurisdiction of any particular state, he the said A. B. then and there being a seaman on board a certain ship called the belonging exclusively to certain citizens of the said United States to the jurors aforesaid yet unknown, in and upon the body of one C. D., he the said C. D. then and there being the commander of the said ship called the on the high sea aforesaid, out of the jurisdiction of any particular state, feloniously and piratically did make an assault; and that the said A. B. being then and there such seaman as aforesaid in and on board the ship aforesaid, feloniously and piratically did lay violent hands upon him the said C. D., commander of said ship as aforesaid, and the commander of him the said A. B. on board the same ship, with intent thereby piratically and feloniously to hinder and prevent him the said C. D., commander of said ship as aforesaid, from fighting in defence of his said ship, and of the goods and chattels then, &c.

Attempting to corrupt a seaman to turn marauder and to run away with a ship.(*g*)

That J. P., late of, &c., mariner, on, &c., on the high seas, out of

(*f*) Davis' Prec. 225.

(*g*) U. S. *v.* Paschal. Under this indictment, which was prepared by Mr. A. J. Dallas in 1810, the defendant was convicted and sentenced.

the jurisdiction of any particular state of the said United States and within the jurisdiction of this court, being then and there a seaman in and on board of a certain schooner called the Concord, then and there belonging and appertaining to W. M. of the said district, mariner, and J. C. of the said district, merchant, both citizens of the said United States, of which schooner the said W. M. was also then and there master, did then and there with force and arms in and on board of the said schooner, upon the high seas, out of the jurisdiction of any particular state of the said United States and within the jurisdiction of this court, wilfully and unlawfully attempt and endeavour to corrupt a certain W. S., then and there being a mariner in and on board of the said schooner then and there being, to turn pirate and then and there to run away with the said schooner and certain goods, wares and merchandises then and there on board of the said schooner, being, to wit, on the high seas, out of the jurisdiction of any particular state of the said United States and within the jurisdiction of this court, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

That he the said J. P., late of, &c., mariner, on, &c., on the high seas, out of the jurisdiction of any particular state of the said United States and within the jurisdiction of this court, then and there a seaman in and on board of a certain schooner called the Concord, then and there being, which schooner then and there belonged and appertained to the said W. M., late of the said district, mariner, and J. C. aforesaid, late of the said district, merchant, both citizens of the said United States, and of which schooner the said W. M. was also then and there master, did then and there with force and arms in and on board of the said schooner, upon the high seas, out of the jurisdiction of any particular state of the said United States and within the jurisdiction of this court, wilfully and unlawfully endeavour to make a revolt in the said schooner, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Against an accessary to a piracy before the fact.(*h*)

(*Set forth the charge against the principal as in the preceding precedents, as the case may be, and then proceed as follows*): "that E. F. of, &c., before the piracy and felony aforesaid was committed in manner and form aforesaid, to wit, on the said day of in the year aforesaid, on the high sea, out of the jurisdiction of any particular state, did piratically and feloniously, knowingly and wittingly aid and assist, procure, command, counsel and advise the said A. B. the piracy and felony aforesaid to do and commit. And the jurors aforesaid, upon their oath aforesaid do further present, that the felony and piracy aforesaid so as aforesaid done and committed by the said A. B., did affect the life of him the said A. B.; and that the said A. B. did do and commit the piracy and felony aforesaid in manner aforesaid, upon the high sea, without the jurisdiction of any par- the jurisdiction of any particular state, did piratically and feloniously

(*h*) Davis' Prec. 226..

ticular state, upon and in pursuance of the aid, assistance, procurement, command, counsel and advice aforesaid, of the said E. F., given and rendered as aforesaid to the said A. B. by him the said E. F.; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Against an accessary to a piracy after the fact.(*i*)

(*Set forth the charge against the principal, as in the preceding precedents, as the case may be, and then proceed as follows*): That E. F., of, &c., afterwards, to wit, on, &c., on the high seas, (*or on the land, if such be the fact, naming the place*), out of the jurisdiction of any particular state, well knowing that the said A. B. had done and committed the felony and piracy aforesaid, did knowingly entertain and conceal the said A. B., and did knowingly receive and take into the custody of him the said E. F. the said vessel, goods and chattels, which had been by the said A. B. piratically and feloniously taken as aforesaid, he the said E. F. then and there well knowing the same to have been piratically and feloniously taken as aforesaid, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Fitting, equipping and preparing, and being concerned in fitting, &c., vessels for the slave trade in ports of the United States, as master or owner, under the act of 20th April, 1818, *2d and 3d s.*(*j*)

That C. F., late of, &c., (merchant, labourer, mariner or otherwise), after the passing of the act of congress of the United States of America, entitled "an act in addition to 'an act to prohibit the introduction of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight,' and to repeal certain parts of the same," that is to say, after the twentieth day of April, in the year of our Lord one thousand eight hundred and eighteen, to wit, on, &c., in the year of at the port of in the district of within the jurisdiction of the United States,(*k*) and within the jurisdiction of this court, did for himself as master, (he the said then and there being a citizen of the said United States), fit,(*l*) equip, load and prepare a certain vessel, being a called the for the purpose of procuring, and with the intent to employ(*m*) said in the trade and business of procuring negroes, mulattoes or persons of colour, from some foreign kingdom, place or country to the said jurors unknown, to be transported to some port or place to the said jurors unknown, to be held, sold or otherwise

(*i*) Davis' Prec. p. 226.

(*j*) U. S. *v.* Davis, U. S. Circuit Court, New York, 1846. The defendants were acquitted, but no exception was taken to the indictment.

(*k*) This is necessary. U. S. *v.* Gooding, 12 Wheat. 460.

(*l*) The particulars of the fitting, &c., need not be specified. U. S. *v.* Gooding, 12 Wheat. 460.

(*m*) "With intent that said vessel *should be* employed," is defective. The words in the text must be used.

disposed of as slaves, or to be held to service or labour, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first count, substituting*): "from a foreign country, to wit, from the continent of Africa," *for* "from some foreign kingdom, place or country to the said jurors unknown."

Third count.

(*Same as second count, substituting*): "owner" *for* "master."

Fourth count.

(*Same as second count, substituting*): "did for some other person or persons to the said jurors unknown, as master," *for* "did for himself as master."

Fifth count. Same as first, but leaving out allegation that offence was after the act, and averring defendant caused the vessel to sail.

That the said C. F., heretofore, to wit, on, &c., in the port of a port or place within the jurisdiction of the said United States, and within the jurisdiction of this court, did for himself as master (he the said then and there being a citizen of the said United States), cause a certain ship or vessel, being a called the to sail from the port of a port or place within the jurisdiction of the said United States, for the purpose of procuring, and with the intent to employ said † in the trade and business of procuring negroes, mulattoes or persons of colour, from some foreign kingdom, place or country to the said jurors unknown, to be transported to some port or place to the said jurors also unknown, to be held, sold or otherwise disposed of as slaves, or to be held to service or labour, contrary to the true intent and meaning of the act of congress of the United States of America, entited "an act in addition to 'an act to prohibit the introduction of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight,' and to repeal certain parts of the same," approved on twentieth day of April, in the year of our Lord one thousand eight hundred and eighteen.

Sixth count.

(*Same as fifth count, substituting*): "from a foreign country, to wit, from the western coast of the continent of Africa," *for* "from some foreign kingdom, place or country to the said jurors unknown."

Seventh count.

(*Same as fifth count, substituting*): "did as owner," *for* "did for himself as master."

Eighth count.

(*Same as sixth count, substituting*): "did as owner," *for* "did for himself as master."

Ninth count.

(*Same as fifth count, substituting*): "did as master, for some other person or persons to the jurors aforesaid as yet unknown," *for* "did for himself as master."

Tenth count. Preparing the vessel, &c.

That the said C. F., heretofore, to wit, on, &c., in the port of a port or place within the jurisdiction of the said United States, and

within the jurisdiction of this court, did for himself as master of a certain ship or vessel, being a called the (he the said then and there being a citizen of the said United States), prepare the said for the purpose of procuring, and with the intent to employ the said in the trade and business of procuring negroes, mulattoes or persons of colour, from a foreign country, to wit, the continent of Africa, to be transported to some port or place to the said jurors unknown, to be sold as slaves, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Eleventh count.

(*Same as tenth count, substituting*): "did for some person or persons whose names are to the said jurors unknown, as master," *for* "did for himself as master."

Twelfth count.

(*Same as tenth count, substituting*): "did for himself as owner," *for* "did for himself as master."

Thirteenth count. Aiding and abetting in preparing, &c.(*n*)

That C. F., late of, &c., mariner, heretofore, to wit, on, &c., in the port of a port or place within the jurisdiction of the said United States, and within the jurisdiction of this court, did as master of a certain ship or vessel, being a called the (he the said then and there being a citizen of the said United States), aid and abet in fitting, equipping, loading or otherwise preparing the said for the purpose of employing the said called the (*proceed and conclude as in fifth count, from* †).

Fourteenth count.

(*Same as thirteenth count, substituting*): "owner" *for* "master."

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Serving on board of a vessel engaged in the slave trade, under act of 10th May, 1800, 2d and 3d s. First count, the vessel being American.

That A. B., late of, &c., heretofore, to wit, on, &c., on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, did voluntarily serve on board a certain vessel being a called the which said called the was then and there a vessel of the United States, and was then and there employed and made use of in the transportation of slaves from some foreign country or place to the said jurors unknown, he the said A. B. then and there being a citizen of the United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count, the vessel being foreign.

That A. B., late of, &c., heretofore, to wit, on, &c., on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, did voluntarily serve on board a certain vessel being a called the which

(*n*) It would even seem unnecessary under the statute, that there should appear on the record any principal offender to whom the defendant might be aiding or abetting. U. S. *v.* Gooding, 12 Wheat. 460.

said called the was then and there a foreign vessel, and was then and there employed in the slave trade, he the said A. B. being then and there a citizen of the United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Same as first, stated more specially.

That A. B., late of, &c., heretofore, to wit, from, &c., to, &c., and during all the time between the said days, on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, did voluntarily serve on board a certain vessel being a called the , which said called the was then and there a vessel of the United States, and was then and there employed and made use of in the transportation of slaves from some foreign country or place to the said jurors unknown, to some other foreign country or place to the said jurors also unknown, he the said A. B. being, during all the time aforesaid, a citizen of the United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

(*Same as third count, inserting*): "a foreign vessel," *instead of* "a vessel of the United States."

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Another form for the same.(*o*)

That on, &c., a certain schooner called the Matilda, was a vessel of the said United States, and being so a vessel of the said United States, was unlawfully and voluntarily employed and made use of in the transportation and carrying of slaves from one foreign place to another, to wit, from the Island of Bravo in Africa, a foreign place, to the Islands of St. Nicholas, Bonavista, Mayo and St. Jago, all foreign places, in Africa aforesaid; and that J. S. H., late of the district aforesaid, mariner, a citizen of the said United States, then and there mate of the said schooner Matilda, did then and there, within the jurisdiction of this court, voluntarily and unlawfully serve in the capacity and station of mate aforesaid on board the said vessel, the same being then and there unlawfully and voluntarily employed and made use of in the transportation and carrying of slaves from one foreign place to another as aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Fitting out slaver, &c.

That P. H., after the twentieth day of April, in the year of our Lord one thousand eight hundred and eighteen, to wit, on, &c., and on divers days and times before and since said last mentioned day, and after the said twentieth day of April, in the year of, &c., with force and arms upon the high seas and without the jurisdiction of any particular state, but within the jurisdiction of the United States, did as

(*o*) In neither this nor the last indictment were the defendants tried. The first was prepared in New York and the latter in Philadelphia.

master of or some other person whose name is to the jurors aforesaid as yet unknown, cause a certain vessel called the "Spitfire" to sail from a port within the jurisdiction of the United States, to wit, the port of New Orleans in the State of Louisiana, for the purpose and with the intent to employ said vessel in the trade and business of procuring negroes and persons of colour from a foreign place or country, to wit, from that place and country called Africa, to be transported to a place or country called Cuba, to be held, sold and otherwise disposed of as slaves. the said vessel called the Spitfire having before her being caused to sail from said port of New Orleans, as aforesaid, and after the said twentieth day of April, in the year, &c., to wit, on, &c., and on several days and times before and after the said last mentioned day, been fitted and equipped, loaded and otherwise prepared by a person or persons, as owner or owners thereof, whose name or names being to the said jurors as yet unknown, in a port within the jurisdiction of the United States, to wit, the said port of New Orleans, in the said State of Louisiana, for the purpose of procuring negroes or persons of colour from a foreign place or country, to wit, from that place or country called Africa, to be transferred to a port and place to some port in the place and country called the Island of Cuba, to be sold and disposed of as slaves, against, &c. (*Conclude as in book* 1, *chap.* 3).

That heretofore and after the twentieth day of April, in the year, &c., a certain person commonly known and called by the name of D. J., otherwise called D. J. M., did for himself as owner, fit, equip and otherwise prepare a certain vessel called the Spitfire, in a port within the jurisdiction of the United States, to wit, the port of New Orleans, in the State of Louisiana, and did then and there cause the said vessel to sail and be sent away from the said port of New Orleans, for the purpose and with the intent of employing the said vessel in the trade and business of procuring negroes and persons of colour from a foreign country, to wit, Africa, to be transported to a place and country called Cuba, to be held, sold and disposed of as slaves, contrary to the form of the statute of the United States in such case made and provided; and that he the said P. H., with force and arms on the high seas, without the jurisdiction of any particular state and within the jurisdiction of the United States, on, &c., and on divers days and times after the day last mentioned, was aiding and abetting therein and in causing the said vessel to sail and be sent away from the said port of New Orleans, with intent and for the purpose to employ said vessel in the trade and business of procuring negroes and persons of colour from a foreign country, to wit, Africa, to be transferred to said place called Cuba, to be held, sold and disposed of as slaves, against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 27 *n*, 123 *n*).

Forcibly confining and detaining negroes taken from the coast of Africa with intention of making slaves of them, and for aiding and abetting, under act of 15*th May*, 1820, *s.* 5.

That C. F. D., late of, &c., heretofore, to wit, on, &c., with force and arms in, &c., on the coast of Africa, out of the jurisdiction of any

particular state of the United States of America, on waters within the admiralty and maritime jurisdiction of this court, he the said then and there being * one of the ship's company of a certain vessel being a called the owned wholly or in part by a citizen or citizens of the United States of America, whose names are to the said jurors unknown, did ** piratically and feloniously, forcibly confine and detain negroes, whose names are to the said jurors also unknown, in and on board of the said vessel, being a called the with the intent of him the said to make slaves of the aforesaid negroes, they the said negroes not having been held to service by the laws of either of the states or territories of the said United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Like the first count, except instead of*): "owned wholly or in part by a citizen or citizens of the United States," &c., *insert*, "which said called the was then and there navigated for and in behalf of a citizen or citizens of the United States," &c.

Third count.

(*Same as first to* *, *and proceed*): "a citizen of the United States of America, and he the said then and there being one of the ship's company of a certain vessel being a called the which said vessel being a called the was then and there a foreign vessel, engaged in the slave trade, did," &c., (*here proceed and conclude as in first count, from* **).

Fourth count. Same as first count; against a part of defendants as principals and the others as accessaries.

That C. F. D., late of, &c., together with certain other persons to the jurors aforesaid as yet unknown, heretofore, to wit, on, &c., on the coast of Africa, out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States and within the jurisdiction of this court, they the said persons to the jurors aforesaid as yet unknown, being of the crew and ship's company of a certain vessel being a called the owned wholly or in part by a citizen or citizens of the United States of America, whose names are to the said jurors also unknown, did piratically and feloniously confine and detain negroes, whose names are to the said jurors unknown, in and on board of the said vessel, being a called the with the intent of them the said persons to the jurors aforesaid unknown, to make slaves of the aforesaid negroes, they the said negroes not having been held to service by the laws of either of the states or territories of the said United States; and that the said C. F. D. was then and there piratically and feloniously present, aiding and abetting the said persons to the jurors aforesaid as yet unknown, in forcibly confining and detaining the said negroes in and on board the said vessel aforesaid, in the manner and at the time and place last aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count.

(*Like the fourth count, except instead of*): "was then and there

piratically and feloniously present, aiding and abetting," &c., *insert*, "did then and there piratically and feloniously aid and abet the said persons to the jurors aforesaid as yet unknown, in forcibly confining and detaining in and on board said vessel the aforesaid negroes."

Sixth count.

And so the jurors aforesaid on their oath aforesaid do say, that the said and the said persons to the jurors aforesaid as yet unknown, at the time and place last aforesaid, being of the crew and ship's company of the said vessel, being a called the owned wholly or in part by a citizen or citizens of the United States of America, whose names are to the said jurors unknown, did piratically and feloniously confine and detain the said negroes, whose names are to the aforesaid jurors unknown, in and on board of the said vessel, being a called the with the intent of them the said and the said persons to the jurors aforesaid as yet unknown, to make slaves of the aforesaid negroes, they the said negroes not having been held to service by the laws of either of the states or territories of the said United States, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Taking on board and receiving from the coast of Africa, negroes, &c., under act of 20th April, 1818, *s.* 4.(*p*)

That B. M., late of, &c., heretofore, to wit, on, &c., with force and arms (in the harbour of on the coast of Africa), on waters within the admiralty and maritime jurisdiction of the United States, out of the jurisdiction of any particular state of the said United States and within the jurisdiction of this court, he the said B. M., then and there being a citizen of the said United States of America, did take on board and receive negroes, whose names are to the said jurors unknown, in and on board of a certain vessel, being a called the from (the harbour of aforesaid, on the coast of Africa aforesaid), they the said negroes not being inhabitants of the said United States, nor held to service by the laws of either of the states or territories of the said United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first count, except inserting*): "they the said negroes not being inhabitants of either of the states or territories of the said United States, and they the said negroes not having been held to service by the laws of either of the said states or territories of the said United States," *instead of* "they the said negroes not being inhabitants of the said United States."

Third count.

(*Same as second count, inserting instead of*): "did take on board and receive," &c., "did aid and abet in taking on board and receiv-

(*p*) United States *v.* Mansfield, U. S. Circuit, New York, 1845. The defendant forfeited his recognizance and was never tried.

ing negroes, whose names are to the said jurors unknown, in and on board of a certain vessel, being a called the from aforesaid, to wit, from the coast of Africa aforesaid, they the said negroes not being inhabitants of, nor held to service by the laws of either of the states or territories of the United States."

Fourth count.

(*Same as third count, except*): "was then and there present aiding and abetting in taking on board and receiving."

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Forcibly bringing and carrying away negroes from the coast of Africa, for the purpose of making slaves of them, under act of 15*th May,* 1820, *s.* 4.(*q*)

That C. F. D., late of, &c., in the circuit and district aforesaid, heretofore, to wit, on, &c., with force and arms, at the on the coast of Africa, being a port or place within the admiralty and maritime jurisdiction of the United States of America, out of the jurisdiction of any particular state of the said United States of America and within the jurisdiction of this court, he the said C. F. D., then and there being one of the ship's company of a certain vessel, being * a called the owned in whole or in part by a certain person or persons whose names are to the said jurors unknown, then and still being a citizen or citizens of the United States of America, did piratically and feloniously receive negroes, whose names are to the said jurors also unknown, in and on board of said vessel, being a called the at on the coast of Africa aforesaid, with the intent of him the said to make slaves of the aforesaid negroes, they the said negroes having been on, &c., seized on a foreign shore, to wit, at aforesaid, on the coast of Africa aforesaid, by some person or persons whose names are to the said jurors unknown, they the said negroes not having been held to service or labour by the laws of either of the states or territories of the United States, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first count, except*): "did piratically and feloniously, forcibly bring and carry negroes, whose names are to the said jurors also unknown, in and on board of said vessel, being a called the from the on the coast of Africa aforesaid, with the intent," &c., *instead of* "did piratically and feloniously receive."

Third count.

(*Same as first count down to* *, *and then proceed*): a citizen of the United States of America, and he the said C. F. D., being then and there one of the ship's company of a certain vessel, being a called the which said called the was then and there a foreign vessel engaged in the slave trade, did piratically and felo-

(*q*) United States *v.* Driscoll, New York, 1845. The defendant was not tried, having forfeited his recognizance.

niously receive negroes, whose names are to the said jurors unknown, in and on board of said foreign vessel, being a called the at the on the coast of Africa, with the intent of him the said to make slaves of the aforesaid negroes, they the said negroes having been on, &c., seized on a foreign shore, to wit, at aforesaid, on the coast of Africa aforesaid, by some person or persons whose names are to the said jurors also unknown, they the said negroes, not having been held to service or labour by the laws of either of the states or territories of the United States, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

(*Same as third count, except*): "did piratically and feloniously, forcibly bring and carry negroes, whose names are to the said jurors unknown, in and on board of said foreign vessel, being a called the from the on the coast of Africa aforesaid, with the intent," &c., *instead of* "did piratically and feloniously receive," &c.

(*For final count, see p.* 17, 97 *n*, 123 *n*).

CHAPTER XIV.

OFFENCES AGAINST THE POST OFFICE LAWS AND REVENUE LAWS.

Mail robbery by putting the driver's life in jeopardy, &c., with dangerous weapons and robbing from his personal custody certain bank bills, letters and packets, to the jurors, &c., unknown.(*a*)

That J. T. H., late of, &c., yeoman, together with a certain L. H. and a certain J. A., on, &c., in the night of the same day, in the public highway at H. county at the district aforesaid, in and upon one D. B., then and there being the carrier of the mail of the said United States, and the person entrusted therewith, and in the peace of God and of the said United States then and there being, with force and arms at the district aforesaid, feloniously did make an assault and him the said D. B. in bodily fear and danger of his life in the highway aforesaid, then and there did put and with the use of certain dangerous weapons, to wit, pistols and dirks, which the said J. T. H. then and there in his hands held, he, the said J. H., did put in jeopardy the life of said D. B., he the said D. B. then and there being entrusted with and having the custody of the said mail * of the said United States, and

(*a*) U. S. *v.* Hare, before Duval and Houston Js., 2 Wheel. C. C. 283.

the mail aforesaid so entrusted and in the custody as aforesaid of said D. B., certain bank bills, letters and packets to the jurors aforesaid unknown, belonging to certain persons to the jurors aforesaid unknown, from the personal custody and care of the said D. B., and against his will in the highway aforesaid at the district aforesaid, then and there feloniously and violently did rob, steal, take and carry away, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

*Second count. Same as first to *, then proceed*:

and the said mail of the said United States from the custody, possession and care of said D. B. and against the will of said D. B., in the highway aforesaid at the district aforesaid, did then and there feloniously and violently rob, steal, take and carry away, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

(*Same as first, omitting the qualification of*): "dangerous weapons," (*and averring the robbery to be of the*): "said mail of the United States, then and there containing sundry letters," &c.

Another form for same. First count, robbing of the mail and putting in jeopardy with pistols.(*b*)

That J. P., otherwise called J. M., late of, &c., yeoman, and G. W., late of, &c., yeoman, on, &c., at, &c., and within the jurisdiction of this court, with force and arms in and upon one S. M'C., in the peace of God and of the said United States of America then and there being, then and there being the carrier of the mail of the said United States, and then and there having the custody of the said mail and then and there proceeding with said mail from the city of P. to the borough of R., feloniously did make an assault and him the said carrier did then and there of the said mail feloniously rob, and in then and there effecting the said robbery did then and there, by the use of dangerous weapons, to wit, pistols, put in jeopardy the life of the said S. M'C., he the said S. M'C. then and there being as aforesaid the carrier of the said mail of the United States, and having then and there the custody thereof, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said J. P., otherwise called J. M., and the said G. W., afterwards, to wit, on, &c., at, &c., and within the jurisdiction of this court, with force and arms in and upon the said S. M'C. (then and there being a carrier of the mail of the United States), and then and there having the custody of the said mail, * and then and there proceeding with the said mail from the city of P. to the borough of R., feloniously did make an assault and him the said S. M'C. in bodily fear and danger of his life then and there feloniously did put, and the said mail of the United States from him the said S. M'C., then and there as aforesaid a carrier of the mail of the United States, and then and there having the custody thereof, then and there feloniously, violently and against his will, did steal, take and carry away; and in then and there effecting the robbery so as aforesaid described, did then and there by

(*b*) U. S. *v.* Wilson, 1 Bald. 78. The defendants were convicted, and one of them executed.

the use of dangerous weapons, to wit, pistols, put in jeopardy the life of the said S. M'C., then and there being the carrier of the mail of the United States, and then and there having the custody thereof, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Same as first down to *, *and then proceed*: feloniously did make an assault, and the life of him the said S. M'C. by the use of dangerous weapons did then and there put in jeopardy, and the said mail of the United States from him the said S. M'C. then and there feloniously, violently and against the will of him the said S. M'C. did steal, take and carry away, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Obstructing the mail.(c)

That W. M'C., late of, &c., yeoman, on, &c., at, &c., and within the jurisdiction of this court, with force and arms, knowingly and wilfully did obstruct and retard the passage of the * mail of the United States, ** contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first, inserting at* * *the words*) "driver of the," (*and at* ** *the words*) "conveying the same."

Third count.

(*Same as second, inserting*) "carrier" *in place of* "driver."

Fourth count.

(*Same as first, inserting at* * *the words*) "carriage carrying the."

Opening a letter in the United States mail.(d)

That heretofore, to wit, on, &c., at, &c., and within the jurisdiction of this court, one G. T., late of, &c., yeoman, did open a letter directed to a certain C. M., which had been in a post office, to wit, the post office at P., and before it had been delivered to the said person to whom it was so directed, with a design to obstruct the correspondence, to pry into another's business and secrets, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second and third counts, for embezzling, &c.

Stealing from the mail of the United States. First count, stealing the mail.(e)

That A. B., late of, &c., in, &c., heretofore, to wit, on, &c., with force and arms in, &c., and within the jurisdiction of this court, did then and there feloniously steal the mail of the United States of

(c) The defendant was convicted and sentenced, on evidence showing that on the arrival of the cars containing the mail at the depot in Philadelphia, he drove his cab over the rails, and prevented the progress of the mail; U. S. *v.* M'Carran, Phil. 1847. The indictment was prepared by Mr. Pettit, U. S. attorney, to whom I have the pleasure of acknowledging my obligations both for this and for other accurate and valuable precedents.

(d) U. S. *v.* Tilghman, Phil. 1837. Drawn by Mr. J. M. Read, then district attorney. The defendant was acquitted on this count.

(e) U. S. *v.* Hoff. The defendant was convicted and sentenced.

America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Stealing from the mail certain letters and packets.

That A. B., late of, &c., heretofore, to wit, on, &c., with force and arms at, &c., and within the jurisdiction of this court, did then and there feloniously steal and take from and out of a mail of the United States of America, certain letters(*f*) and packets, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Taking letters from the mail and opening and embezzling them.

That A. B., late of, &c., heretofore, to wit, on, &c., with force and arms at, &c., in the Southern District of New York in the Second Circuit, and within the jurisdiction of this court, did then and there feloniously take the mail of the United States of America, and certain letters and packets therefrom, and did open, embezzle and destroy such mail, letters and packets, the same containing articles of value, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Stealing a letter, specifying its contents, and by whom sent.

That A. B., late of, &c., on, &c., at, &c., and within the jurisdiction of this court, a certain letter, then lately before put into a mail of the United States of America, at the post office at, &c., in, &c., by C. D., and intended to be conveyed by mail from said to the post office at, &c., for and to be delivered to E. F., at, &c., which said letter did then and there contain an article of value, to wit, (*here specify the article, and value of the same*), the said letter then and there, to wit, at, &c., and within the jurisdiction of this court, he the said A. B., then and there with force and arms feloniously did steal and take from and out of a mail of the said United States of America, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count. Same as fourth, without averment of contents.

That A. B., late of, &c., on, &c., with force and arms at, &c., and within the jurisdiction of this court, did then and there feloniously take from and out of a mail of the United States, a certain letter, then lately before, to wit, on, &c., put into a mail of the United States of America, at, &c., and within the jurisdiction of this court, which said letter was directed to E. F., at, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count.

That A. B., late of, &c., on, &c., with force and arms at, &c., and within the jurisdiction of this court, did then and there feloniously take a certain letter directed to E. F., at, &c., said letter containing an article of value, from and out of a mail of the United States of America, and did open and embezzle said letter, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Seventh count.

That A. B., late of, &c., on, &c., with force and arms at, &c., and within the jurisdiction of this court, did then and there feloniously

(*f*) This is full enough, no particular description of the letter being necessary; though if the letter be particularly described, it must be proved as laid; U. S. *v.* Lancaster, 2 M'Lean 431.

take a certain letter directed to E. F., at, &c., said letter containing an article of value, to wit, a certain for the payment of and of the value of from and out of the mail of the United States of America, and did then and there open and embezzle said letter, containing said article of value, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 27 *n*, 123 *n*).

Another form for same, with counts for opening, &c. First count, stealing a letter and packet.(*g*)

That heretofore, to wit, on, &c., at, &c., and within the jurisdiction of this court, W. K. of, &c., yeoman * did then and there steal and take from and out of the mail of the United States a letter and packet, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Same, stating route of mail.

(*Same as first count to* *, *and then proceed*): "did then and there steal and take from and out of a mail, to wit, the mail of the United States, then and there proceeding from H. in the State of Pennsylvania, to wit, at, &c., towards D. in the State of P., to wit, at, &c., aforesaid, a letter and packet, contrary, &c., and against," &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Stating direction of letter.

(*Same as first count to* *, *and then proceed*): "did then and there steal and take from and out of the mail of the United States a letter addressed to contrary, &c., and against," &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Same, stating both route and direction of letter.

(*Same as first down to* *, *and then proceed*): "did then and there steal and take from and out of a mail, to wit, the mail of the United States, then and there proceeding from to wit, at, &c., towards to wit, at, &c., a certain other letter, to wit, a letter from J. L., addressed to contrary, &c., and against," &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count. Embezzling and destroying letter.

(*Same as first count to* *, *and then proceed*): "did then and there embezzle and destroy a letter and packet, which had been in a post office, before it was delivered to the person and persons to whom it was directed, contrary, &c., and against," &c. (*Conclude as in book* 1, *chap.* 3).

Sixth, seventh and eighth counts. For embezzling, &c., varying the statement of route and direction as in second, third and fourth counts.

Ninth count. Against person employed in post office for opening, &c.

That afterwards, to wit, on, &c., at, &c., and within, &c., the said W. K. being then and there a person employed in a department of the post office establishment, did then and there unlawfully open a letter with which he was then and there entrusted and which had come to his possession, and which was intended to be conveyed by

(*g*) U. S. *v.* Kromer, Phil. 1836. This indictment was prepared by Mr. Gilpin. The defendant was convicted and sentenced.

post, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Tenth count. Against carrier for embezzling and destroying letter. That afterwards, to wit, on, &c., at, &c., and within, &c., the said W. K. being then and there a person employed in a department of the post office establishment, to wit, as a carrier(*i*) of the mail of the United States from the post office at H. to the post office at D., to wit, at the district aforesaid did embezzle and destroy a letter with which he was then and there entrusted and which had then and there come to his possession, and was then and there intended to be conveyed by post, then and there containing a bank note, to wit, a bank note of the Bank of Pennsylvania for one hundred dollars, marked with the letter S. and numbered No. 162; contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Secreting and embezzling from the United States mail a letter containing money, the party being connected with a post office, and the letter being directed to certain persons under the name of a firm.(*j*)

That J. W., late of, &c., on, &c., was a person employed in one of the departments of the post office establishment of the said United States, to wit, a clerk, (*or otherwise*), in the post office at(*k*) in the district aforesaid, and that on, &c., in the said post office at, &c., a certain letter,(*l*) then lately before sent by one C. D. of, &c., and intended to be conveyed by post to certain persons using trade and commerce in the city of in said Southern District of New York, under the name, style and firm of and which said letter contained (*state the contents of said letter and the value*),(*m*) came into the possession of him the said J. W., so then and there being employed as a clerk in the said post office at aforesaid, and that he the said J. W. being so employed in the said post office and the said letter so then and there containing the said having so as aforesaid come into the possession of him the said J. W., he the said J. W. did then and there with force and arms on, &c., at, &c., feloniously secrete the said letter so then and there containing the said contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Like first count, substituting*): "feloniously embezzle the said letter," &c., *for* "feloniously secrete the said letter."

Third count.

(*Like first count, substituting*): "feloniously secrete and embezzle the said letter," *for* "feloniously secrete the said letter."

(*i*) A carrier is within the act; U. S. *v.* Belew, 2 Brock. 280.

(*j*) U. S. *v.* Wisner, New York, 1844. The defendant was convicted. See for a similar form *ante*, p. 199.

(*k*) The "employment" must be distinctly alleged; U. S. *v.* Nott, 1 M'Lean 499.

(*l*) Though it may be prudent to describe the letter with the particularity that follows, yet it would seem to be enough to aver that it came into the hands of the postmaster, without stating where it was mailed or by what route it was conveyed; U. S. *v.* Lancaster, 2 M'Lean 431; U. S. *v.* Martin, *ib.* 256.

(*m*) Neither the letter nor the notes enclosed in it need be specifically described, though if they are, a variance will be fatal; U. S. *v.* Lancaster, 2 M'Lean 431.

Fourth count.

(*Like first count, except instead of*): "he the said J. W. did then and there with force and arms, on, &c., at, &c., feloniously secrete the said letter so then and there containing the said ," *insert*, "he the said the said of the value aforesaid, with force and arms feloniously did steal out of the aforesaid letter."

Fifth count.

(*Like fourth count, except instead of*): "feloniously did steal," &c., *insert*, "feloniously did take."

Sixth count.

(*Like fifth count, except instead of*): "feloniously did take," *insert*, "feloniously did steal and take."

Seventh count. For embezzling, &c., averring specially the character and route of letter, &c.

That on, &c., one A. B. of, &c., deposited in the post office of the said United States at aforesaid, a certain letter addressed and directed to C. D., at, &c., by the name and description of, (*repeat the name of the firm if such is the case*), being the name, style and firm under which the said on, &c., used trade and commerce and transacted commercial business in the said city of which said letter then and there containing, (*state the contents*), which said letter so as aforesaid containing the said was intended to be conveyed by post to the city of in the district aforesaid, to the said C. D. so as aforesaid using trade and commerce under the name, style and firm of C. D. at the said city of

And the jurors aforesaid on their oath aforesaid, do further present, that afterwards, to wit, on, &c., the said letter so containing the said and so intended to be conveyed by post, came into the possession of J. W., of, &c., the said J. W. on, &c., at, &c., being a person employed in one of the departments of the post office establishment of the said United States of America, to wit, being a person employed as a clerk in the post office of the said United States at, &c., and that he the said J. W. being then and there so employed as aforesaid, and the said letter containing the said so intended to be conveyed by post, having then and there come into the possession of him the said J. W., he the said J. W. did then and there with force and arms feloniously embezzle the said letter so containing the said against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Eighth count.

(*Like seventh count, except instead of*): "with force and arms feloniously embezzle the said letter so containing the said ," *insert*, "with force and arms feloniously steal and take the said of the value aforesaid, out of the aforesaid letter."

Ninth count.

(*Like eighth count, except instead of*): "with force and arms feloniously steal and take the said of the value aforesaid, out of the aforesaid letter," *insert*, "with force and arms feloniously secrete the said letter so containing the said of the value aforesaid."

Procuring and advising a person entrusted with the mail to secrete it.(*n*)

That J. B. M., &c., did at, &c., on, &c., procure, advise and assist J. J. S. to secrete, embezzle and destroy a mail of letters, with which the said J. J. S. was entrusted, and which had come to his possession and was intended to be conveyed by post from in the district aforesaid, to also in said district, containing bank notes, the said J. J. S. being at the time of such procuring, advising and assisting, then and there a person employed in one of the departments of the post office establishment, to wit, a carrier of the mail of the United States from aforesaid, to aforesaid, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Procuring and advising a person entrusted with the mail to secrete a particular letter.

That the said J. B. M. did procure, advise and assist J. J. S. to secrete, embezzle and destroy a letter addressed by J. S. to J. B., with which the said J. J. S. was entrusted, and which came to his possession and was intended to be conveyed by post from in the district aforesaid, to aforesaid, containing sundry bank notes, amounting in the whole to sixty dollars, of a denomination to the jurors aforesaid unknown, and of the issue of a bank to the said jurors also unknown, the said J. J. S. being at the time of such procuring, advising and assisting, then and there a person employed in one of the departments of the post office establishment, to wit, a carrier of the mail of the United States from aforesaid, to aforesaid, contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Smuggling under 19 *s. of act of August* 30, 1842—(*tariff act*)—*Peters' Statutes at Large* 565.(*o*)

That B. L., late of, &c., heretofore, to wit, on, &c., at, &c., and within, &c., (*or otherwise*), knowingly and wilfully, with intent to defraud the revenue of the United States of America, did (smuggle and) clandestinely introduce into the United States of America, to wit, into the port and district of, &c., in the circuit and district aforesaid, and within the jurisdiction of this court, † certain goods, wares and merchandise, * subject to duty by law, and which should have been invoiced, without paying or accounting for the duty due and payable on said goods, wares and merchandise, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first count to* *, *and then proceed*): to wit, (*specify the articles, marks and quantities particularly*), of the value of dollars, all of which said goods, wares and merchandise were subject to duty by law, and which should have been invoiced, without paying or accounting for the duty to which said goods, wares and mer-

(*n*) United States *v.* Mills, 7 Peters 138.

(*o*) United States *v.* Loewi, New York. The defendant was acquitted, but no question was raised on this indictment.

chandise were so subject as aforesaid, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

(*Like second count, except instead of*): "all of which said goods, wares and merchandise were subject," &c., *insert*, "which said goods, wares and merchandise so smuggled as aforesaid, were then and there by the laws of the United States of America subject to duty, and should have been invoiced, he the said B. L., at the time he so smuggled the said goods, wares and merchandise as aforesaid, not having paid or accounted for the duty to which the said goods, wares and merchandise were subject as aforesaid," against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count. Like the first count, omitting the words in brackets.

Fifth count.

That B. L., late of, &c., heretofore, to wit, on, &c., at, &c., knowingly and wilfully with intent to defraud the revenue of the United States of America, did smuggle and clandestinely introduce into the United States, to wit, into the City of New York in the Southern District of New York and within the jurisdiction of this court, certain goods, wares and merchandise, to wit, (*as is specified in preceding counts*), of the value of dollars, which said goods, wares and merchandise so smuggled and clandestinely introduced into the United States of America as aforesaid, were subject to duty by law and should have been invoiced, he the said B. L. at the time he so smuggled and clandestinely introduced the said goods, wares and merchandise as aforesaid, well knowing that the duty due and payable upon said goods, wares and merchandise had not been paid or accounted for, and he the said B. L., at the time he so smuggled and clandestinely introduced the said goods, wares and merchandise as aforesaid, well knowing that the said goods, wares and merchandise had not been invoiced, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count.

(*Same as first count to* †, *and then proceed*): in a certain vessel, being a called the certain goods, wares and merchandise, to wit, (*here specify articles, &c., as in second count*), of the value of which said goods, wares and merchandise so smuggled and clandestinely introduced into the United States of America as aforesaid, were unladen from said called the without any permit from the collector and naval officer of the port and district of the City of New York for such unlading, he the said B. L., at the time he so smuggled and clandestinely introduced said goods, wares and merchandise as aforesaid, and at the time said goods, wares and merchandise were unladen without a permit as aforesaid, not having paid or accounted for the duty to which said goods, wares and merchandise were subject as aforesaid, and the duty to which said goods, wares and merchandise were subject as aforesaid, not being paid or accounted for by any person or persons whatsoever, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

CHAPTER XV.

TREASON.

Levying war against the United States, with overt acts, the first charging levying war generally, the second, resisting the execution of a particular law by preventing the marshal from serving process, and the third, resisting the same by rescuing prisoners taken by the marshal.(*a*)

That J. F.,(*b*) late of the County of Bucks in the State and District of Pennsylvania, yeoman, &c., owing allegiance(*c*) to the United States of America, wickedly devising and intending the peace and tranquillity of the said United States to disturb and to prevent the execution of the laws thereof within the same, to wit, a law of the said United States, entitled an act, &c., and also a law of the said United States, entitled an act, &c., on, &c., in the state and district aforesaid,(*d*) and within the jurisdiction of this court, wickedly and traitorously(*e*) did (*f*) intend to levy war(*ff*) against the said United States within the same, and to fulfil and bring to effect the said traitorous intention of him the said J. F., afterwards, that is to say, on, &c.,(*g*) in the said state, district and county aforesaid, and within the jurisdiction of this court,(*h*)

(*a*) The indictment against John Fries, on which he was originally tried and convicted before Judge Iredell and Judge Peters, in 1799, contained but one overt act, viz. the first one in the present form; see Davis' Prec. 256. A new trial was granted, and before the second venire issued, Mr. Rawle, then district attorney, moved to quash the first indictment, which being done, the one in the text was substituted.

(*b*) Under the constitutional limitation it has been doubted whether in the United States the common law principle that all are principals in treason is applicable; U. S. *v.* Burr, 4. Cranch 472, 501; but it appears that the common law is unaltered as regards the individual states; Davis' Va. Crim. Law 38.

(*c*) "If any person or persons, owing allegiance to the United States of America, shall levy war against them," &c., "he shall," &c.; act of April 30th, 1790, s. 1. Under this section the averment in the text is essential.

(*d*) Though the venire must be put in a county where an overt act can be proved, yet the proof of one overt act will entitle the prosecution to introduce additional overt acts of the same species in other counties; 2 Chit. C. L. 63; 1 East P. C. 125; 4 East R. 171; Fost. 9.

(*e*) This word is essential, being the distinguishing qualification of the offence; 2 Ld. Raym. 870; Comb. 259; 1 East P. C. 115.

(*f*) The usual form is "did compass, imagine and intend," 2 Chit. C. L. 68; see form on p. 639; though "intend" is enough.

(*ff*) See *post*, n. (*j*), also p. 639.

(*g*) The same laxity is allowed in pleading time to an overt act, as in pleading time in other cases; see *ante*, p. 8; though of course overt acts should be laid as committed subsequently to the intending of the treason. Formerly the several overt acts were laid at distinct times, but this, it seems, is unnecessary; 1 East P. C. 125; Fost. 8, 9, 194; 1 Hale 122; 2 Chit. C. L. 66.

(*h*) Any number of overt acts may be introduced, and either of them, like the several assignments in perjury or false pretences, will be enough by itself to support a conviction; 1 East P. C. 123; 2 Chit. C. P. 66.

One species of treason may be laid and proved as an overt act of another; 1 East P. C. 62, 117; and therefore it is usual to insert in the indictment one count for "levying war," showing the overt acts, and then to add a second "for adhering to the enemies of the Unit-

with a great multitude of persons whose names are to the said grand inquest unknown, to a great number, to wit, the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and other warlike weapons, as well offensive as defensive, being then and there unlawfully and traitorously assembled, did traitorously assemble and combine against the said United States, and then and there with force and arms wickedly and traitorously, and with the wicked and traitorous intention to oppose and prevent by means of intimidation and violence the execution of the said laws of the said United States, within the same, did array and dispose themselves in a warlike and hostile manner against the said United States,(*i*) and then and there with force, in pursuance of such their traitorous intention, he the said J. F. with the said persons so as aforesaid traitorously assembled, armed and arrayed in manner aforesaid, wickedly and traitorously did levy war(*j*) against the said United States.

(And(*k*) further to fulfil and bring to effect the said traitorous intention of him the said J. F., and in pursuance and in execution of the said wicked intention and traitorous combination to oppose, resist and prevent the said laws of the said United States from being carried into execution in the state and district aforesaid, he the said J. F., afterwards, to wit, on, &c., in the state, district and county aforesaid, and within the jurisdiction of this court, with the said persons, whose names to the grand inquest aforesaid are unknown, did wickedly and traitorously assemble against the United States with the avowed intention by force of arms and intimidation, to prevent the execution of the said laws of the said United States within the same, and in pursuance and execution of such their wicked and traitorous combination and intention, he the said J. F., then and there with force and arms, with the said persons to a great number, to wit, the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and other warlike weapons as well offensive as defensive, being then and there unlawfully and traitorously assembled), did wickedly and traitorously resist and op-

ed States," and repeating the same overt acts; 2 Chit. C. L. 64; see *ib.* for precedents, 73 and 74. But it seems that no overt can be given in evidence under any breach of treason, unless it be expressly laid as an overt act of such treason, although it be laid as an overt act of some other treason in the same indictment; 2 East P. C. 117.

Two witnesses to an overt act are not absolutely necessary to authorize the grand jury to find a bill; 1 Burr's trial 196; though the contrary opinion was expressed on Fries' trial; *ib.* p. 14.

(*i*) This manner of charging the hostile assemblage is approved in East P. C. 58, 116; 2 East R. 11; 1 Hale ed. by Stokes and Ing. 150; 2 Chit. C. L. 64.

(*j*) To say nakedly that the defendant "levied war," is not enough in England; 1 East P. C. 116–17; Wh. C. L. 582; Carlisle's case, 1 Dall. 35; nor under the constitution and act of congress is it probable the law would be considered as different. The practice, as will be seen, has always been to introduce overt acts, or at all events to introduce a specification of what the overt acts consisted in. Still, as levying war is an overt act by itself, no other overt act need be alleged, where it is charged that what was done by the defendant was done in a warlike manner; 2 Chit. C. L. 65.

(*k*) It is sufficient, in stating several overt acts, to couple them together by an "and" without repeating "and the jury further present," &c., or the like, but that form is the proper one in laying distinct species of treason; 1 East P. C. 116; see Holt 686–7; 4 Harg. St. Tr. 702.

pose the marshal of the said United States in and for the said Pennsylvania district, in the execution of the duty of his office of marshal aforesaid, and then and there with force and arms with the said great multitude of persons, so as aforesaid unlawfully and traitorously assembled and armed and arrayed in manner aforesaid, he the said J. F. wickedly and traitorously did oppose and resist and prevent the said marshal of the said United States from executing the lawful process to him directed and delivered against sundry persons inhabitants of the county aforesaid and district aforesaid, and charged upon oath before the judge of the District Court of the said United States for the said district, with having entered into a conspiracy to prevent the execution of the said law of the United States, entitled an act, &c., which process duly issued by the said judge of the said District Court of the district aforesaid, the said marshal of the said United States then and there had in his possession and was then and there proceeding to execute, as by law he was bound to do; and so the said grand inquest, upon their respective oaths and affirmations aforesaid do say, that the said J. F. in manner aforesaid as much as in him lay, wickedly and traitorously did prevent, by means of force and intimidation, the execution of the said law of the said United States, in the said state and district of Pennsylvania.

(*Repeat passage as in brackets and then proceed*): did traitorously with force and arms and against the will of the said marshal of the said United States and for the district aforesaid, liberate and take out of his custody sundry persons by him before that time arrested, and in his lawful custody then and there being by virtue of lawful process against them issued by the said judge of the District Court of the said United States for the said Pennsylvania district, on a charge upon oath of a conspiracy to prevent the execution of the said law of the said United States, entitled an act, &c.; and so the grand inquest aforesaid upon their respective oaths and affirmations aforesaid do say, that the said J. F. as much as in him lay, did then and there in pursuance and in execution of the said wicked and traitorous combination and intention, wickedly and traitorously by means of force and intimidation prevent the execution of the said law of the said United States, entitled an act, &c., and the said law of the said United States entitled an act, &c., in the state and district aforesaid, contrary to the duty of his said allegiance,(*l*) against, &c., and also against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Another form for same.(*n*)

That A. B., late of, &c., attorney at law, being an inhabitant of, and resident within the United States, and under the protection of

(*l*) This conclusion has been held indispensable; 1 East P. C. 115; 2 Chit. C. L. 63. Under the act of April 30th, 1790, s. 1, as has been noticed, there must be somewhere in the indictment the express allegation that the defendant owed allegiance to the United States of America, and the practice is not only to charge such allegiance in the body of the indictment, but to aver the defendant to have offended against it in the conclusion.

(*n*) Davis' Prec. 251. This indictment was used against Aaron Burr, and is taken from the proceedings transmitted to congress. The superfluous matter probably copied from

the laws of the United States, and owing allegiance and fidelity to the said United States, not weighing the duty of his said allegiance, but wickedly devising and intending the peace and tranquillity of the said United States to disturb, and to stir, move, and excite insurrection, rebellion and war against the said United States, on, &c., at, &c., and within the jurisdiction of this court, unlawfully, falsely, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion against the said United States; and in order to fulfil and bring to effect the said traitorous compassings, imaginations and intentions of him the said A. B., he the said A. B., afterwards, to wit, on, &c., at, &c., and within the jurisdiction of this court, with a great multitude of persons (whose names to the grand inquest aforesaid are at present unknown), to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, dirks and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely and traitorously join and assemble themselves together, against the said United States, and then and there, with force and arms did falsely and traitorously, and in a hostile and warlike manner, array and dispose themselves against the said United States; and then and there, on, &c., at, &c., and within the jurisdiction of this court, in pursuance of such their traitorous intentions and purposes aforesaid, he the said A. B., with the said persons so as aforesaid traitorously assembled, armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy war against the said United States, contrary to the duty of the allegiance and fidelity of the said A. B., against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Traitorously adhering to, and giving aid and comfort to the enemies of the United States.(*o*)

That on, &c., and long before, and continually from thence hitherto, an open and public war was, and yet is prosecuted and carried on between the United States of America, and the persons exercising the powers of government in France; and that A. B., late of, &c., a citizen of the said United States, well knowing the premises, but not regarding the duty of his allegiance, but as a traitor against the said United States, and wholly withdrawing the allegiance, fidelity and obedience, which every citizen of the said United States of right ought to bear towards the government and people thereof, and conspiring, contriving and intending, by all the means in his power, to aid and assist the persons exercising the powers of government in France, and being enemies of the said United States,(*p*) in the prose-

the obsolete English forms is here omitted. See 4 Cranch 471–488, for an exposition of the law of treason against the United States.

(*o*) Davis' Prec. 253; 2 Chit. 63–73; Gordon's Digest 699, art. 3584.

(*p*) It must appear on the face of the indictment that the persons adhered to were enemies; Arch. 496.

cution of the said war against the said United States, heretofore, and during the said war, to wit, on, &c., aforesaid, and on divers other days and times, as well before as after that day, the said A. B., with force and arms at, &c., maliciously and traitorously did adhere to, and give aid and comfort to the said persons exercising the said powers of government in France, then being enemies of the said government of the said United States; and that in the prosecution, performance and execution of his the said A. B.'s treason and traitorous adhering aforesaid, and to fulfil, perfect and bring the same to effect, he the said A. B., as such traitor as aforesaid, during the said war, to wit, on, &c., aforesaid, and on divers other days and times, as well before as after that day, at, &c., with force and arms, maliciously and traitorously did(*q*) conspire, consult, consent and agree with one J. H. I., one W. J. and divers other false traitors, whose names are to the jurors aforesaid unknown, to aid and assist, and to seduce and procure others, citizens of the said United States, to aid and assist the said persons exercising the powers of government in France, and being enemies to the United States as aforesaid, in a hostile invasion of the dominions of the said United States, and in the prosecution of the said war against the said United States; against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Aiding and comforting the enemy, with overt acts specially pleaded, consisting of sending provisions in a vessel to one of the enemy's vessels.(*r*)

That on, &c., an act of the congress of the U. S. of A., entitled "an act declaring war between the U. K. of G. B. and I. and the dependencies thereof, and the U. S. of A. and their territories," was approved by the president of the U. S. of A., and that continually from thence, to wit, from the said, &c., hitherto, by land and sea an open and public war was and yet is prosecuted and carried on between the said U. S. of A. and their territories and the said U. K. of G. B., &c., that is to say, at the County of Philadelphia aforesaid, in the district of Pennsylvania aforesaid, and that the king, &c., and his subjects continually thence, to wit, from the said, &c., hitherto and yet, were and are enemies of the said U. S. of A., that is to say, at, &c., and that W. P., late of, &c., mariner, a citizen of the said U. S. of A., owing allegiance and fidelity to the said U. S. of A., well knowing the premises but not regarding the duty of his allegiance, not having the fear of God in his heart, but being moved and seduced by the instigations of the devil, as a false traitor against the said U. S. of A., and wholly withdrawing the allegiance and fidelity which every true and faithful citizen of the U. S. of A. should and ought of right to

(*q*) An allegation that the defendant sent intelligence to the enemy, has been held sufficient, without setting forth the particular letter or its contents; Resp. *v.* Carlisle, 1 Dall. 35.

(*r*) United States *v.* Prior, 3 Wash. C. C. R. 234. The indictment contained five counts, the first four of which were abandoned by the district attorney for want of evidence, and on the last the defendant was acquitted. The bill was drawn by Mr. A. J. Dallas, the district attorney.

bear toward the said U. S. of A., and wickedly continuing and with all his strength intending to aid and assist the said king, &c., and his subjects, then being enemies of the said U. S. of A. in the prosecution of the said war against the said U. S. of A., heretofore and during the said war, to wit, on, &c., and on divers other days as well before as after the said last mentioned day, with force and arms at, &c., maliciously and traitorously did adhere to the said king, &c., and his subjects, &c., then being, &c., giving them aid and comfort; and that in the * prosecution, performance and execution of his treason and traitorous adhering aforesaid, he the said W. P., as such false traitor as aforesaid, during the said war, to wit, on, &c., and on divers other days as well before as after the last mentioned day, * at, &c., with force and arms, maliciously and traitorously did conspire, consult, consent and agree with divers other false traitors, whose names are to the said grand inquest unknown, to aid and assist the said king, &c., in a hostile blockade of the said U. S. of A., and in the prosecution of the said war against the said U. S. of A. And in further prosecution, (*here insert part on p.* 641 *between* ** *and continue*): at, &c., with force and arms, maliciously and traitorously did procure and prepare and cause to be procured and prepared a certain schooner called the P., and certain mariners whose names are to the said grand inquest unknown, for the unlawful and traitorous purpose of conveying and transporting in and on board of the said schooner called the P., by the said W. P. traitorously procured and prepared and caused to be procured and prepared as aforesaid, certain provisions and necessaries, that is to say, (*here specify articles*), from, &c., unto certain ships and vessels of war belonging to the said king of, &c., and officered and manned by his subjects, † the said king, &c., and his said subjects, the said officers and men of the said ships and vessels of war, then and yet being enemies of the said U. S. of A., and the ships, &c., then being in and near the bay and river D., hostilely employed in blockading the ports and harbours of the said river D. in the said U. S. of A., † to the intent unlawfully and traitorously to deliver and cause to be delivered the said provisions and necessaries, to wit, (*here specify the articles*), ‡ at, to and on board of the said ships, &c., some or one of them for the aid and comfort, supply, sustenance and use of the officers and crews of the said ships, &c., being subjects of the said king, &c., as aforesaid, and being then and yet, together with their said king, enemies of the said U. S. of A., in the prosecution of the said war against the said U. S. of A. ‡

And in further prosecution, (*here insert part on p.* 641 *between* ** *and continue*): at, &c., with force and arms, did take and receive and cause to be taken and received in and on board of the said schooner called the P., whereof the said W. P. was then and there owner and master, certain provisions, for the unlawful and traitorous purpose of conveying and transporting the said provisions, &c., in and on board of the said schooner called the P., from, &c., into certain ships, &c., belonging to the said king, &c., and officered and manned by his subjects, (*here insert part on p.* 641 *between* †† *and continue*): to the intent unlawfully and traitorously to deliver and

cause to be delivered the said provisions, &c., to wit, (*specifying them*), by the said W. P., traitorously taken and received and caused to be taken and received in and on board of the said schooner called the P. as aforesaid, (*here insert part on p.* 641, *between* ††)

And in further, (*here insert part on p.* 641, *between* ** *and continue*): at, &c., with force and arms maliciously and traitorously into a certain schooner called the P., by the said W. P. then and there maliciously and traitorously procured and prepared and caused to be procured and prepared as aforesaid for his traitorous purposes aforesaid, then and there having on board of the said schooner called the P. certain provisions, &c., to wit, (*specifying them*), by the said W. P., then and there maliciously and traitorously taken and received on board thereof as aforesaid for his traitorous purposes aforesaid, then and there did enter and in and with the said schooner P. did maliciously and traitorously sail and depart from, &c., towards certain ships, &c., belonging to the said king, &c., and manned by his subjects, (*here insert part on p.* 641 *between* ††), to the intent the said provisions, &c., to wit, (*specifying them*), by the said, &c., traitorously taken and received and caused to be taken and received on board the said schooner called the P. as aforesaid, unlawfully and traitorously to deliver and cause to be delivered (*here insert part on p.* 641 *between* ‡‡).

And in further, (*here insert part on p.* 641 *between* **), at, &c., with force and arms maliciously and traitorously did convey and transport and cause to be conveyed and transported in the said schooner called the P., whereof the said W. P. was then and there owner and master, certain provisions, &c., toward and to certain ships, &c., belonging to the said king, &c., and officered and manned by his subjects, (*here insert part on p.* 641 *between* †† *and continue*): to the intent unlawfully and traitorously the said provisions and necessaries to deliver and cause to be delivered, (*here insert part on p.* 641 *between* ‡‡).

And the said provisions and necessaries by the said W. P. so traitorously conveyed and transported and caused to be conveyed and transported in the said schooner called the P. from, &c., toward and to the said ships of war for the traitorous purposes aforesaid, the said W. P. maliciously and traitorously delivered and caused to be delivered, (*here insert part on p.* 641 *between* ‡‡), to wit, at, &c.

And in further, (*here insert part on p.* 641 *between* **), at, &c., with force and arms maliciously and traitorously did then and there procure and prepare and caused to be procured and prepared a certain schooner called the P., with certain mariners whose names are to the said grand inquest unknown, and maliciously and traitorously did then and there take and receive and cause to be taken and received in and on board of the said schooner called the P. certain provisions, &c., to wit, (*specifying them*), and did then and there maliciously and traitorously enter into the said schooner called the P. and did then and there maliciously and traitorously sail and depart in the said schooner called the P. with the said provisions, &c., on board thereof as aforesaid from, &c., down the river and bay of D. toward the high seas, to the intent the said provisions and necessaries by the

said W. P. traitorously taken and received and caused to be taken and received in and on board of the said schooner called the P. as aforesaid, maliciously and traitorously to deliver and cause to be delivered on the high seas aforesaid, to the said enemies of the said U. S. of A., in and on board of a certain vessel of war (whose name is to the said grand inquest unknown), belonging to the said king, &c., then and yet an enemy of the said U. S. of A., for the aid, comfort, supply, sustenance and use of the said enemies of the said U. S. of A. in carrying on and prosecuting the said war against the said U. S. of A.

And in further, (*here insert part on p.* 641 *between* ** *and continue*): on the high seas, out of the jurisdiction of this court, to wit, at, &c., with force and arms maliciously and traitorously did then and there deliver and cause to be delivered from and out of a certain schooner called the P. then and there being, whereof the said W. P. was then and there master, unto the said enemies of the said U. S. of A., then and there being and on board of a certain vessel of war whose name is to the said grand inquest unknown, belonging to the said king, &c., then and yet being an enemy of the said U. S. of A., certain provisions, &c., for the aid, comfort, supply, sustenance and use of the said enemies of the said U. S. of A., in the prosecution of the said war against the said U. S. of A.

§ And in further, (*here insert part on p.* 641 *between* ** *and proceed*): being in and on board of a certain ship of war whose name is to the said grand inquest unknown, belonging to the said king, &c., then and yet an enemy of the said U. S. of A., the said ship of war lying and being in the bay of D., to wit, at, &c., did then and there maliciously and traitorously § undertake to procure and cause to be procured from the shore and territory of the said U. S. of A. ‖ certain provisions, necessaries and articles of food, to wit, to the intent the said provisions, necessaries and articles of food, the said bullocks and live stock by the said W. P. traitorously procured and caused to be procured as aforesaid, maliciously and traitorously to deliver and cause to be delivered to and on board of the said last mentioned ship of war, for the aid, comfort, supply, sustenance and use of the officers and crews thereof, being enemies of the said U. S. of A., in the prosecution of the said war against the said U. S. of A. ‖

(*Here insert part on p.* 643 *between* §§ *and proceed*): depart from the said ship of war last mentioned in a boat, and did maliciously and traitorously proceed in the said boat towards and to the territory of the said U. S. of A. for the traitorous purpose of procuring and causing to be procured, (*here insert part on p.* 643 *between* ‖‖ *and conclude*): in contempt of the said U. S. of A., their constitution and laws, to the evil example of all others in like case offending, contrary to the duty of allegiance of him the said W. P., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Illegal outfit of vessel, &c., against a foreign nation, &c.(*s*)

That J. M., late of, &c., in the district aforesaid, mariner, on, &c., within the port of Philadelphia, being a port of the United States, to wit, in the said district of Pennsylvania, did unlawfully * fit out and arm a certain brig or vessel, called "The Friends," then lying and being within the port aforesaid, with intent that the said brig or vessel should be employed in the service of the king of the united kingdom of Great Britain and Ireland, being a foreign prince with whom the said United States are and then were at peace, to cruise and commit hostilities upon the citizens and property of the Batavian Republic, and upon the citizens and property of the French Republic, being foreign states, with whom the said United States are and then were at peace, and upon the citizens and property of other states, being foreign states with whom the said United States are and then were at peace, to the evil example of others in the like case offending, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first, inserting at * the words*): "attempt to."

(*Add third and fourth counts, averring that defendant did* "unlawfully procure to be fitted out and armed," &c., *and that he* "was unlawfully concerned in furnishing, fitting out and arming," *the rest being as in first count.*)

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Beginning, setting on foot, providing and preparing the means of a military enterprise or expedition, against the territory or dominions of a foreign prince.(*t*)

That W. S. S., late of, &c., did on, &c., within the (territory(*u*) and) jurisdiction of the said United States, to wit, at, &c., begin a certain military expedition to be carried on, from thence against the dominions of a foreign prince, to wit, the dominions of the king of Spain, the said United States then and there being at peace with the said king of Spain, against, &c., to the evil example of all others in like case offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

That the said W. S. S., afterwards, to wit, on, &c., within the (territory and) jurisdiction of the said United States, to wit, at, &c.,

(*s*) U. S. *v.* Metcalfe. This indictment was drawn by Mr. A. J. Dallas, in 1804. The defendant pleaded *nolo contendere*.

(*t*) This indictment was used in the trial of Smith, for engaging in Miranda's expedition; and, with a verbal alteration in the fourth and fifth counts, is the same as those used on the trial of Ogden for the same offence, and on the trial of La Croix, for setting on foot an expedition against Mexico, in 1814. It is founded on the fifth section of the act of June 5th, 1794, which declares, "that if any person shall within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means of any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, with whom the United States are at peace, every such person so offending, shall, upon conviction be adjudged guilty of a misdemeanor," &c.

(*u*) The words in brackets were inserted by Mr. Dallas in the indictment against La Croix.

with force and arms did set on foot a certain military enterprise, to be carried on from thence against the territory of a foreign prince, to wit, the territory of the king of Spain, the said king of Spain then and there being at peace with the said United States, against, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

(*Same as second count down to* "force and arms," *and then proceed as follows*): Set on foot a certain other military enterprise, to be carried on from thence against the territory of a foreign prince, to wit, against the province of Caraccas, in South America, the said province of Caraccas then and there being the territory of the king of Spain, and the said king of Spain then and there being at peace with the said United States, against, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

(*Same as second count down to* "force and arms," *and then proceed as follows*): Provide the means, to wit (thirty men and three hundred dollars in money), for a certain other military enterprise, to be carried on from thence against the dominions of a foreign prince, to wit, against the dominions of the king of Spain in South America, the said king of Spain then and there being at peace with the said United States, against, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fifth count.

(*Same as second count down to* "force and arms," *and then proceed as follows*): Prepare the means, to wit (thirty men and three hundred dollars in money), for a certain other military expedition, to be carried on from thence against the province of Caraccas, in South America, the said province of Caraccas then and there being the territory of a foreign prince, to wit, the territory of the king of Spain, and the said king of Spain then and there being at peace with the said United States, against, &c., to the evil example, &c., against, &c. (*Conclude as in book* 1, *chap.* 3).

Sixth count.

(*Same as second count down to* "force and arms," *and then proceed as follows*): Provide the means, to wit, (thirty men, whose names are to the jurors aforesaid yet unknown, and three hundred dollars in money), for a certain other military expedition, to be carried on from thence against the dominions of some foreign state, to the jurors aforesaid unknown, yet with whom the said United States were then and there at peace, against, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Seventh count.

(*Same as second count down to* "force and arms," *and then proceed as follows*): Set on foot a certain other military enterprise, to be carried on from thence against the dominions of some foreign state, to the jurors aforesaid yet unknown, with whom the said United States were then and there at peace, against, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Conspiracy to impede the operation of certain acts of congress. First count, conspiracy alone.(*v*)

That H. S., &c., on, &c., at, &c., within the jurisdiction of this court, with divers other persons to the said grand inquest unknown, did unlawfully combine and conspire together with intent to impede the operation of a law of the United States, entitled "an act to provide for the valuation of lands and dwelling houses, and the enumeration of slaves within the United States," and also a law of the said United States, entitled "an act to lay and collect a direct tax within the United States," and to intimidate and prevent the assessors and other persons appointed to carry the same acts into execution, from undertaking, performing and fulfilling their trusts and duties, * to the evil example, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Overt act; rioting, &c.

(*Same with first down to* *, *and proceed*): "the said H. S. (and the others), with the unlawful intent aforesaid, afterwards, to wit, the same day and year, at the district aforesaid and within the jurisdiction of this court, did counsel, advise and attempt to procure an insurrection, riot and unlawful assembly, to the evil example, &c., against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count. Rescue of person under custody of marshal.

That whereas R. P., Esq., Judge of the District of the United States in and for the District of Pennsylvania, on, &c., at P., in the district aforesaid, did make, direct and deliver his warrants or precepts in writing to W. N., Esq., he the said W. N. then and there being marshal of the said district of Pennsylvania, by which said warrants he the said W. N., the marshal aforesaid, was commanded to take the bodies of D. D. (*and five others, naming them*), with sundry other persons, late of the County of Northampton, yeomen, and bring them before him the said R. P. to find sufficient sureties for their appearance at the next stated session of the Circuit Court of the United States for the Middle Circuit and District of Pennsylvania, to be holden at Philadelphia on, &c., to answer to a charge of being concerned in an unlawful conspiracy and combination to impede the operation of a law of the United States entitled "an act to lay and collect a direct tax within the United States," and to such other matters as should in behalf of the United States be then and there objected against them, and further to be dealt with according to law, † which said W. N., the marshal aforesaid, afterwards, that is to say, on, &c., at the district aforesaid, by virtue of the said warrants did take and arrest them the said D. H. (*and the others, naming them*), for the cause aforesaid, and them the said D. H. (*and the others, naming them*), in his custody by virtue of the said warrant then and there had; and the said H. S. (*and the other defendants, naming them*), well knowing the said D. H. (*and the others, naming them*), to be arrested as aforesaid, afterwards, to wit, on, &c., at, &c., with force and arms and against the will of the said W. N., unlawfully did rescue and set at large the said D. H. (*and the others,*

(*v*) U. S. Cir. Ct. for Pa. 1799. This form was used against the Northampton insurgents.

naming them), to go where they would, in contempt of the said United States and the laws thereof, to the great damage of the said W. N., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Fourth count.

(*Same as third down to* †, *and then proceed*): the said H. S., &c., well knowing the premises, afterwards, to wit, on, &c., at, &c., knowingly and wilfully did obstruct, resist and oppose the said W. N., then and there being marshal as aforesaid, in executing the said warrants, so that the said W. N., the said marshal, by reason of such unlawful obstruction, resistance and opposition was hindered and prevented from executing the said warrants, and could not bring the said D. H., &c., before the said R. P. the said judge of the district aforesaid, as by the said warrants he was commanded, against the form of the act of congress aforesaid in such case made and provided, in contempt, &c., to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Conspiracy to raise an insurrection against the United States. First count, by advising the people to resist the execution of the excise law.(*w*)

That W. B., late of, &c., yeoman, being an evil disposed, pernicious and seditious person and of a wicked and turbulent disposition, falsely, maliciously and unlawfully intending and contriving the peace and tranquillity of the United States of America to disquiet, molest and disturb, and as much as in him lay, seditious insurrection and rebellion against the said United States to incite, move and procure, and to bring the constitution and laws thereof into danger and contempt, and in pursuance of such his false, wicked and unlawful designs he the said W. B. on, &c., at, &c., and with force and arms unlawfully, maliciously and seditiously did assemble, unite, conspire, consult and confederate with D. M. (*and others, naming them*), and divers other false and ill-disposed persons to the grand inquest as aforesaid yet unknown, and with the same other persons he the said W. B. then and there treated at and about carrying into effect his said wicked and seditious compassings, imaginations and intentions, and then and there with force and arms unlawfully, wickedly and seditiously did consult, combine and confederate with the persons aforesaid to raise an insurrection within the said United States, and to levy war against the same, to wit, in the district aforesaid, and to meet and assemble themselves together in, &c., armed in a warlike manner against the said United States, and to array and dispose themselves in a traitorous and hostile manner against the said United States and in opposition to the laws thereof, to wit, in the county aforesaid in the district aforesaid; and he the said W. B. did then and there openly and publicly in pursuance of his said malicious and seditious views and intentions, openly and publicly advise and recom-

(*w*) U. S. *v.* Bonham, 1794. This was one of the indictments against the whisky insurgents. The case was never tried.

mend to the citizens of the said United States then and there met and assembled, to resist and oppose the execution and operation of the laws of the said United States for collecting a revenue; against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count. Setting up a liberty pole for the purpose of inciting the people to sedition.(*x*)

That the said W. B. being a pernicious, seditious and ill-disposed person, and falsely, maliciously and unlawfully contriving and intending the peace and tranquillity of the said United States to disquiet, molest and disturb, and as much as in him lay, seditious insurrection and rebellion against the said states to incite, stir and promote, and to bring the constitution and laws thereof into danger and contempt, on, &c., at, &c., in the public highway with a great number of evil disposed persons whose names to the grand inquest aforesaid are yet unknown, unlawfully, maliciously and seditiously did erect and set up a certain pole, denominating the same a liberty pole, and did then and there maliciously and advisedly affix thereon certain inflammatory and seditious words and sentences, wickedly and maliciously intending thereby and with all his might endeavouring to encourage and incite the citizens of the said United States within the district aforesaid, and to oppose and resist the laws and authority of the said United States, and insurrection and war against the same United States to raise and levy, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Conspiracy to assemble a seditious meeting. First count.(*y*)

That H. V., W. E., J. D. and W. A. T., being seditious and evil disposed persons, intending to disturb the public peace and to excite discontent and disaffection, and to excite her majesty's subjects to hatred and contempt of the government and constitution of this realm, heretofore, to wit, on, &c., at, &c., did conspire, &c., together with divers other persons unknown, unlawfully, maliciously and seditiously to meet and assemble themselves together, and to cause and procure a great number of other persons unlawfully, maliciously and seditiously to meet and assemble themselves together with the said H. V., W. E., J. D. and W. A. T., and the other conspirators, at, &c., for the purpose of exciting discontent and disaffection in the minds of the liege subjects of our said lady the queen, and for the purpose of moving and exciting the liege subjects of our said lady the queen to hatred and contempt of the government and constitution of this realm, as by law established.(*z*)

(*x*) Judge Addison thought that to set up a liberty pole was a mark of sedition and of disrespect to the government, which might be punished by the state courts as a misdemeanor at common law; Pa. *v.* Morrison, Add. R. 274; and under the repealed sedition act of 1798, it might naturally have been considered a seditious act cognizant by the federal courts.

(*y*) R. *v.* Vincent, 9 C. & P. 91. The jury found the defendants not guilty of conspiracy, but guilty of attending seditious meetings.

(*z*) The second count was similar, but stated as an overt act of the conspiracy, that the conspirators assembled at, &c., on, &c., to the number of two thousand and more, in a menac-

Conspiring to raise an insurrection and obstruct the laws. First count.(*a*)

That R. S., on, &c., and on divers other days and times, at, &c., did conspire, confederate, combine and agree together with W. J., and divers other evil disposed persons to the jurors aforesaid unknown, to raise and make insurrections, riots, routs and seditious and unlawful assemblies within this realm, and to obstruct the laws and government of this realm, and to oppose and prevent their due execution, and to procure and obtain arms for the more effectual carrying into effect their said conspiracy, confederacy, &c.; and in furtherance of the said conspiracy, confederacy, &c., the said W. J. during the time aforesaid, to wit, on, &c., with force and arms, to wit, at, &c., together with the said W. J., and divers other persons to the said jurors unknown, to the number of two thousand and more, unlawfully, seditiously, riotously and routously did assemble and meet together, armed with guns, &c., and remained and continued so unlawfully and seditiously assembled and met together, armed as aforesaid, for a long space of time, to wit, for the space of forty-eight hours then next following; and during that time made a great riot, rout and unlawful assembly, and during the time last aforesaid, attacked and broke open divers dwelling houses of divers liege subjects of our said lady the queen, in the county aforesaid, and beat, bruised, wounded and ill-treated divers of the liege subjects of our said lady the queen, then and there being in the county aforesaid, and seized and took from the said last mentioned subjects and other subjects of our said lady the queen, then and there being in the county aforesaid, divers quantities of arms, to wit, one hundred guns, &c., and therewith then and there unlawfully and seditiously armed themselves, against, &c. (*Conclude as in book* 1, *chap.* 3).

ing manner with offensive weapons, and did cause great terror and alarm to the peaceable and well disposed subjects of her majesty.

The third count was in the following form: that the said H. V., W. E., J. D. and W. A. T., being such persons as aforesaid, and unlawfully and maliciously and seditiously intending and devising as aforesaid, heretofore, to wit, on, &c., with force and arms at, &c., unlawfully, maliciously and seditiously and in a tumultuous manner did meet and assemble themselves together with divers other ill-disposed persons, whose names are to the jurors aforesaid unknown, to a large number, to wit, to the number of two thousand, in a formidable and menacing manner, in a certain public and open place near the dwelling houses of divers liege subjects of our said lady the queen, inhabiting therein, for the purpose of raising and exciting discontent and disaffection in the minds of the liege subjects of our said lady the queen, and of exciting the said subjects to hatred and contempt of the government and constitution of this realm as by law established, and of moving the said subjects to unlawful and seditious opposition and resistance to the said government and constitution; and being so met and assembled together for the purpose aforesaid, did then and there unlawfully and tumultuously continue together with the said other ill-disposed persons in such formidable and menacing manner, for a long space of time, to wit, for the space of four hours, and did then and there, during all such time, by loud and seditious speeches, exclamations and cries, raise and excite such discontent and disaffection as aforesaid, and did thereby, then and there, cause great terror and alarm to divers peaceable and well disposed subjects of our said lady the queen, in contempt, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*a*) R. *v.* Shellard, 9 C. & P. 277.

Levying war against the State of Massachusetts.(*b*)

That A. B., of, &c., yeoman, on, &c., at, &c., in the county aforesaid, he the said A. B. being a person then and there abiding within the state and commonwealth aforesaid, and deriving protection from the laws of the same and then and there owing allegiance and fidelity to the said state and commonwealth, and being then and there a member thereof, not regarding the duty of his said allegiance and fidelity, but wickedly devising and intending the peace and tranquillity of the said state and commonwealth to disturb and destroy, on, &c., at, &c., did then and there unlawfully, maliciously and traitorously conspire to levy war against the said state and commonwealth; and to fulfil and bring to effect the said traitorous compassings, intentions and conspirings of him the said A. B., he the said A. B. afterwards, that is to say, on, &c., at, &c., with a great multitude of other persons, whose names are to the jurors aforesaid as yet unknown, to the number of one hundred and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously and traitorously assembled and gathered together, did falsely, maliciously and traitorously assemble, combine, conspire and join themselves together against the said state and commonwealth, and then and there, with force and arms did wickedly, falsely, maliciously and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said state and commonwealth, and then and there, in pursuance of such their malicious and traitorous intentions, conspirings and purposes, he the said A. B. and the said other persons to the jurors aforesaid unknown, so as aforesaid traitorously assembled, armed and arrayed in manner aforesaid, most wickedly, maliciously and traitorously did ordain, prepare and levy public war against the said state and commonwealth, contrary to the duty of the allegiance of the said A. B., against, &c., and contrary, &c. (*Conclude as in book* 1, *chap.* 3).

Conspiring to excite an insurrection against and to subvert the government of the State of Rhode Island, with overt act, consisting of attempt to usurp the place of member of the legislature, &c.(*c*)

That A. B., of, &c., gentleman, being an inhabitant of and residing within the State of Rhode Island and Providence Plantations, and under the protection of the laws of said State of Rhode Island and Providence Plantations, and owing allegiance and fidelity to the said state, not weighing the duty of his said allegiance, but wickedly and traitorously devising and intending the peace of the said state to disturb and stir up, move and excite insurrection, rebellion and war

(*b*) Davis' Prec. 252. "This indictment is drawn under the statute of 1777. See Appendix to Massachusetts Laws, vol. 2, p. 1046; see 2 Chit. 83, 84, for an indictment against Lord George Gordon, for exciting riots in 1780; Cro. C. C. 189; 1 Trem. P. C. 1."

(*c*) This is the indictment used in the trials arising from the Dorr insurrection.

against the said state, and to subvert and alter the legislative rule and government of the said state, and to usurp the sovereign power thereof, and to set up and establish a certain usurped and pretended government in the place of the true and rightful government of the said state, on, &c., at, &c., maliciously and traitorously with force and arms did, with divers other false traitors, whose names are unknown to the said jurors, conspire, compass, imagine and intend to stir up, move and excite insurrection, rebellion and war against the said state, and to subvert and alter the legislature, rule and government of the said state, and to usurp the sovereign power of the said state, and to set up and establish a certain usurped and pretended government in the place and stead of the true, lawful and rightful government of the said state; and to fulfil, perfect and bring to effect his most evil and wicked treason and treasonable compassings and imaginations aforesaid, he the said A. B., did on, &c., with force and arms at, &c., within the territorial limits of the said State of Rhode Island and Providence Plantations, as the same are now actually held and enjoyed, not being duly elected thereto according to the laws of said state, and under a pretended constitution of government for said state, maliciously and traitorously assume to exercise the legislative functions of member of the House of Representatives from the said City of Providence, in a pretended general assembly of said state, then and there held, contrary to the duty of his said allegiance and fidelity, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Second count.

(*Same as first, omitting* "force and arms," *down to* "constitution of government for said state," *and then insert*): And being with divers other false traitors, to the jurors aforesaid unknown, then and there assembled and met together, as a pretended general assembly of said state, did maliciously and traitorously assume to exercise the legislative functions of a member of the House of Representatives from said City of Providence, in said pretended general assembly of said state then and there held, contrary to the duty of his said allegiance and fidelity, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Third count.

(*Same as first down to* "constitution of government for said state," *and then insert*): And being with divers other false traitors, to the jurors aforesaid as yet unknown, then and there assembled and met together, as a general assembly for said state, did then and there maliciously and traitorously assume to exercise the legislative functions of a member of the House of Representatives from the said City of Providence, in the said pretended general assembly of said state, and as such member did then and there vote for the passage of divers pretended acts and laws for the said state, contrary to the duty of his said allegiance and fidelity, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Treason against a state before the federal constitution. Overt act, taking a commission from the British government in 1778.(*d*)

That A. C., late of, &c., carpenter, being an inhabitant of and belonging to and residing within the State of P., and under the protection of its laws, and owing allegiance to the same state, as a false traitor against the same, not having the fear of God before his eyes but being moved and seduced by the instigation of the devil, the fidelity which to the same state he owed wholly withdrawing and with all his might intending the peace and tranquillity of this commonwealth of P. to disturb, and war and rebellion against the same to raise and move, and the government and independency thereof as by law established, to subvert, and to raise again and restore the government and tyranny of the king of G. B. within the same commonwealth, on, &c., and at divers days and times, as well before as after, at, &c., with force and arms did falsely and traitorously take a commission or commissions from the king, &c., and then and there with force and arms did falsely and treacherously also take a commission or commissions from Gen. Sir W. H., then and there acting under the said king, and under the authority of the same king of G. B., to wit, a commission to watch over and guard the gates of the city of P., by the said Sir W. H. erected and set up for the purpose of keeping and maintaining the possession of the said city and of shutting and excluding the faithful and liege inhabitants and subjects of this state of the U. S., from the said city; and then and there also maliciously and traitorously with a great multitude of traitors and rebels against the said commonwealth (whose names are as yet unknown to the jurors), being armed and arrayed in a hostile manner, with force and arms did falsely and traitorously assemble and join himself against this commonwealth, and then and there with force and arms did falsely and traitorously and in a warlike and hostile manner, array and dispose himself against this commonwealth, and then and there, in pursuance and execution of such his wicked and traitorous intentions and purposes aforesaid, did falsely and traitorously prepare, order, wage and levy a public and cruel war against this commonwealth, then and there committing and perpetrating a miserable and cruel slaughter of and amongst the faithful and liege inhabitants thereof, and then and there did with force and arms falsely and traitorously aid and assist the king of G. B., being an enemy at open war against this state, by joining his armies, to wit, his army under the command of Gen. Sir W. H., then actually invading this state, and then and there maliciously and traitorously (with divers other traitors to the jurors aforesaid unknown), with force and arms did combine, plot and conspire to betray this state and the U. S. of A. into the hands and power of the king of G. B., being a foreign enemy to this state and to the U. S. of A., at open war against the same, and then and there did with force and arms maliciously and traitorously give and send intelligence to the same

(*d*) R. *v.* Roberts, 1 Dall. 35. The defendant was sentenced under this indictment after a struggle of great animation. The form of the indictment, it was said by the attorney-general in argument, was similar to that against Eneas M'Donald, Fost. 5.

enemies for that purpose, against the duty of his allegiance, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Misdemeanor in going into the City of Philadelphia while in possession of the British army.(*e*)

That C. M. and J. M., all late of, &c., yeomen, on, &c., at, &c., and within the jurisdiction of this court, did and each of them did go and pass through the County of Philadelphia, into the City of Philadelphia, while in possession of the British army, without obtaining leave in writing for that purpose from congress, from the commander in chief of the armies of the United States of America or of the executive council of this commonwealth, contrary, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

Enticing United States soldiers to desert.

That A.B., late of, &c., in the district and circuit aforesaid, heretofore, to wit, on, &c., in, &c., with force and arms at, &c., in the district and circuit aforesaid, and within the jurisdiction of this court, unlawfully, knowingly and advisedly did procure and entice C. D., E. F., &c. (he (or they) the said then and there being a soldier (or soldiers) in the service of the United States of America aforesaid), to desert from his (or their) service, duty and allegiance to the said United States, he the said A. B. at the time he so procured and enticed the said C. D., E. F., &c., to desert as aforesaid, well knowing that the said C. D., E. F., &c., was (or were) then and there a soldier (or soldiers) in the service of the said United States, against, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*For final count, see p.* 17, 97 *n*, 123 *n*).

Against a deserter and the person harbouring him.(*f*)

That on, &c., at, &c., a certain J. M. was a soldier enlisted in the regiment commanded by the Compte du Ponts, in the service of the king of France, the illustrious ally of these United States, and then co-operating with the American troops against the king of Great Britain, at open war against these said states, and so being enlisted, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, did desert from the regiment aforesaid; and the jurors aforesaid do further present, that J. C., late of, &c., yeoman, not being ignorant of the premises, but well knowing the same aforesaid, to wit, on the day and year aforesaid, at, &c., unlawfully and for wicked gain sake, did harbour, receive, comfort and conceal him the said J. M., then and there well knowing the said J. M., so as aforesaid, to have deserted from the regiment and armies aforesaid, to the evil example of all others in the like cases offending, and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*e*) *Ib.*

(*f*) This indictment was prepared by Mr. Bradford in Pennsylvania before the adoption of the federal constitution.

Supplying unwholesome bread to prisoners of war.(*g*)

That A. B., late of, &c., on, &c., at, &c., knowingly, wilfully, deceitfully and maliciously did provide, furnish and deliver to and for eight hundred French prisoners of war, whose names to the said jurors are yet unknown, and there being under the protection of the king, confined in a certain hospital called Eastwood Hospital, in the parish and county aforesaid, divers large quantities, to wit, five hundred pounds weight of bread, to be eaten as food by the said French prisoners of war, such bread being then and there made and baked in an unwholesome and insufficient manner, and then and there being made of and containing dirt, filth and other pernicious and unwholesome ingredients not fit to be eaten by man, he the said A. B. then and there well knowing the said bread to be baked in an unwholesome and insufficient manner, and to be made of and to contain dirt, filth and other pernicious and unwholesome materials and ingredients not fit to be eaten as aforesaid, whereby the said prisoners of war did then and there eat of the said bread, and thereby then and there became distempered in their bodies, and injured and endangered in their healths, to the great damage of the said prisoners of war, to the great discredit of our said lord the king, to the evil example, &c., and against, &c. (*Conclude as in book* 1, *chap.* 3).

(*g*) Stark. C. P. 466.

BOOK THE SIXTH.

PLEAS.

Not guilty in case of treason or felony.(*a*)

And being immediately asked how he will acquit himself of the premises, (*in case of felony, or* of the treasons, *in case of treason*), above laid to his charge, says that he is not guilty thereof, and thereof for good and for ill he puts himself upon the country.(*b*)

Not guilty in misdemeanors, &c., where the defendant may plead by attorney.

And the said J. S. by A. B. his attorney, comes into court here, and having heard the same indictment (*or* information) read, says that he is not guilty of the said premises in the said indictment (*or* information), above specified and charged upon him; and of this the said J. S. puts himself upon the country, &c.

Similiter generally.

And J. K. K., Esq., attorney-general of the said state (*or* commonwealth), who prosecutes for the said state (*or* commonwealth) in this behalf, does the like.

Plea that the defendant has no addition.(*c*)

And the said A. B. comes in his proper person, and having heard the said indictment read, says that he at the time of the taking of the said indictment, and long before, was and yet is a yeoman; and that the said indictment does not contain an addition of the said estate of

(*a*) Stark. C. P. 472.

(*b*) The English practice is, that in cases of treason and felony no issue is joined with the prisoner on behalf of the crown. *Ib.*

(*c*) Stark. C. P. 474. Mr. Starkie remarks that as the defect is apparent on the record, the objection may be taken on a motion to quash; and this, which is the obvious course, was taken in the Oy. and Ter. of Phil. in 1843, in Com. *v.* Vickers, by Kelley J.; see also R. *v.* Thomas, 3 D. & R. 621.

the said A. B., nor of any estate, degree or mystery of the said A. B.; and this he is ready to verify; wherefore, for want of the addition of the estate, degree or mystery of the said A. B., in the said indictment, he prays judgment of the said indictment, and that the same may be quashed.

Plea of misnomer.(*d*)

And J. L., who is indicted by the name of G. L., in his own proper person cometh into court here, and having heard the said indictment read, says that he was baptized by the name of J., to wit, at the parish aforesaid in the county aforesaid, and by the Christian name of J. has always since his baptizm hitherto been called or known; without this, that he the said J. L. now is or at any time hitherto hath been called or known by the Christian name of G., as by the said indictment is supposed; and this he the said J. L. is ready to verify; wherefore he prays judgment of the said indictment, and that the same may be quashed, &c.

Replication to the above plea.(*e*)

And hereupon J. N., Esq., attorney-general of the said state, who prosecutes for the said state in this behalf, says that the said indictment, by reason of anything by the said J. L. in his said plea above alleged, ought not to be quashed; because he says that the said J. L. long before and at the time of the preferring of the said indictment, was and still is known as well by the name of G. L. as by the name of J. L., to wit, at the parish aforesaid in the county aforesaid; and this he the said J. N. prays may be inquired of the country, &c.

Plea of a wrong addition.(*f*)

And the said A. B., who in and by the said indictment is called by the name and addition, "A. B., late of the parish of K. in the County of M., yeoman," in his own person comes, and having heard the said indictment read, says that at the time of the taking the said indictment, and long before, he the said A. B. was and ever since hath been and still is inhabiting, commorant and resident in the parish of St. James in the liberty of Westminster in the said County of M.; without this, that he the said A. B. now is or at the taking of the said indictment, or at any time before, was inhabiting, resident or commorant at the parish of K. in the said County of M.; and this he is ready to verify; wherefore and because he the said A. B. is not called in the said indictment "A. B., late of the parish of St. James in the liberty of Westminster," he the said A. B. prays judgment of the said indictment, and that the same may be quashed.

(*d*) Arch. C. P. 99; Stark. C. P. 473. (*e*) Arch. C. P. 100.

(*f*) Stark. C. P. 473. A plea of misnomer should commence thus, "Whereupon cometh R. W. who is indicted by the name of J. W." and if he should say "the said J. W.," he would be concluded; Stark. C. P. 473; 2 Hale 175.

It is necessary under the stat. 4 & 5 Ann, c. 16, s. 11, to verify the truth of the plea by affidavit, or to show some probable matter to induce the court to believe that such plea is true. The plea should be signed by counsel; Stark. C. P. 473.

Plea to the jurisdiction.(*g*)

And the said J. S. in his own proper person cometh into court here, and having heard the said indictment read, says that the said court here ought not to take cognizance of the (trespass and assault) in the said indictment above specified; because, protesting that he is not guilty of the same, nevertheless the said J. S. says that, &c., (*so proceeding to state the matter of the plea. See the precedents*, 1 *Went.* 10–18; 4 *Went.* 63. *Conclude thus*): And this he the said J. S. is ready to verify; wherefore he prays judgment if the said court now here will or ought to take cognizance of the indictment aforesaid; and that by the court here he may be dismissed or discharged, &c.

Replication to the above plea.(*h*)

And hereupon J. N., attorney-general, &c., who prosecutes for the said state in this behalf, says that notwithstanding anything by the said J. S. above in pleading alleged, this court ought not to be precluded from taking cognizance of the indictment aforesaid; because he says that, &c., (*stating the matter of the replication*). And this he the said J. N. prays may be inquired of by the country, &c. (*Or if it conclude with a verification, then thus*): And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may answer to the said indictment.

Special pleas generally.(*i*)

And the said J. S. in his own proper person cometh into court here, and having heard the said indictment (*or* information) read, says, that the said state ought not further to prosecute the said indictment against him the said J. S.; because he says that, &c., (*so proceeding to state the matter of the plea, and concluding thus*): And this he the said J. S. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

Replication.(*j*)

And hereupon J. N., attorney-general, &c., who prosecutes for the said state in this behalf, says that by reason of anything in the said plea of the said J. S. above pleaded in bar alleged, the said state ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says that, &c., (*so proceeding to state the matter of the replication, and conclude thus*): And this he the said J. N. prays may be inquired of by the country. (*Or if it conclude with a verification, then thus*): And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may be convicted of the premises in the said indictment above specified.

(*g*) Arch. C. P. 98. (*h*) *Ib.* 99. (*i*) *Ib.* 105. (*j*) *Ib.*

Rejoinder.(*k*)

And the said J. S., as to the said replication of the said J. N. to the said plea by him the said J. S. pleaded, says that the said state, by reason of anything by the said J. N. in that replication alleged, ought not further to prosecute the said indictment against him the said J. S.; because he saith that, &c., (*so proceeding to state the matter of the rejoinder, and concluding thus*): And of this he the said S. puts himself upon the country. (*Or if it be necessary to conclude with a verification, the conclusion may be in the same form as in a plea*).

Plea of autrefois acquit.(*l*)

And the said William Sheen being brought to the bar of this court, and having heard the said indictment read and the matters therein

(*k*) Arch. C. P. 106.

(*l*) R. *v.* Sheen, 2 C. & P. 634. As this plea, when well pleaded, is a rarity, the whole proceedings on it are appended.

"R. N. Cresswell for the prisoner then said, 'And the said William Sheen the younger doth the like.'

"The prisoner's counsel asked if they might add to this plea that the prisoner was also acquitted on the coroner's inquisition, in which the deceased was described as Charles William Sheen.(a)

"Burrough J.: If the prisoner by his plea insists on two records, his plea would be double; but if in the course of the case it shall appear that he ought to have pleaded his acquittal on the inquisition, I will take care that he shall not be prejudiced. The court awarded a venire returnable instanter. And the sheriff having made his return forthwith, and the jury having been sworn—

"R. N. Cresswell for the prisoner opened his case to the jury in support of the plea, and put in an examined copy of the register of baptizms of the parish of St. George the Martyr, Southwark, in which the baptizm of the deceased was entered 'Charles William, the son of Lydia Beadle,' &c.

"A witness was called, who proved the identity of the child, whose mother was an unmarried woman named Lydia Beadle, whom the prisoner had married after the birth of the deceased. This witness stated that the deceased infant was always called William or Billy, but that she should have known him by the name of Charles William Beadle, and if any one had inquired for him by that name, she would have known who was meant. And the prisoner's father stated that the child's name was Charles William Sheen, but that he had never heard him called so.

"Andrews Sergt., addressed the jury on the part of the prosecution. He cited the cases of Rex *v.* Clarke,(*b*) and called two witnesses, one of whom had been told by the mother of the deceased that his name was William, and the other had never heard the deceased called either, or spoken of by any name at all.

"Clarkson for the prisoner replied. Burrough J. (in summing up): The question on this issue is, whether the deceased was as well known by the name of Charles William Beadle, as by any of the names and descriptions in the present indictment, and I ought to say, that if the prisoner could have been convicted on the former indictment, he must be acquitted now. And whether at the former trial the proper evidence was adduced before the jury or not is immaterial, for if by any possible evidence that could have been produced, he could have been convicted on that indictment. He is now entitled to be acquitted.

"The first evidence we have is the register, and, looking at that, would not every one have called the child Charles William Beadle? and it is proved by one of the witnesses that she would have known him by that name. It cannot be necessary that all the world should know the child by that name, because children of so tender an age are hardly known at all and are generally called by a Christian name only. If, however, you should think that the name of the deceased was Charles William Sheen, I wish you would inform me of it by your verdict, because it is agreed that as that is the name in the coroner's inquisition, the prisoner should derive the same advantage from the course he has taken, as if he had pleaded his acquittal in that inquisition; my brother Littledale suggests to me, that if a legacy had been left to this child by the name of Charles William Beadle, he would have taken it

contained, says that he ought not to be put to answer the said indictment, he having been heretofore in due manner of law acquitted of the premises in and by the said indictment above specified and charged upon him; and for plea to the said indictment he says that heretofore, to wit, at, &c., (*here set forth the caption of the session verbatim*), he the said William Sheen was duly arraigned upon a certain indictment which charged him the said William Sheen by the name and description of William Sheen, late, &c., in the county of labourer; not having the fear, &c., (*it here set out the former indictment verbatim*), to which said last mentioned indictment he did then and there plead not guilty, and thereupon a jury then and there duly summoned, empanneled and sworn to try the said issue so joined between the said state and the said William Sheen, upon their oaths did say, that the said William Sheen was not guilty of the said felony and murder by the said indictment supposed and laid to his charge; whereupon it was then and there considered by the said court that the said William Sheen should go thereof acquitted, without day, as appears by the records of the said proceedings now here remaining in court. And the said William Sheen avers that the said William Sheen mentioned in the former indictment, and he the said William Sheen who is charged by this present indictment, are one and the same person and not divers and different persons, and that the said infant mentioned in the said first indictment and the male child in this present indictment mentioned, are one and the same male child and not divers and different children; and the said William Sheen further avers that the felony and murder in the said former mentioned indictment mentioned, and the felony and murder in this present indictment mentioned, are one and the same felony and murder and not divers and different felonies and murders. And the said William Sheen further avers that the said male child described by the name of Charles William Beadle in the said former indictment mentioned, was as well known by the said name of Charles William Beadle as by any of the several names and descriptions of Charles William, William, Billy, Charles, or William Sheen, or a certain male child or a certain male bastard child, as he is in and by the present indictment described; and this he is ready to verify; wherefore he the said William Sheen prays the judgment of the court here, if he ought to be put further to answer this present indictment; and whether the said state ought further to prosecute or impeach him the said William Sheen on account of the premises in this present indictment contained; and that he may be dismissed the court and go without day.

upon this evidence, and if this evidence of the child's name had been given at the former trial, I think the prisoner should have been convicted. The case of Rex *v.* Clarke has been cited, but in that case there was an entire absence of evidence as to the surname of the deceased. If you think that in the present case the name of the deceased was either Charles William Beadle or Charles William Sheen, or if you think that he was known at all by those names or either of those names, you ought to find a verdict for the prisoner.

"The jury found, that the deceased was as well known by the name of Charles William Beadle as by any of the other names.

"Burrough J.: There must be judgment for the prisoner. We are obliged to Mr. Creswell for drawing that plea; it was very properly done."

Replication to same.(*ll*) (*To be made ore tenus*).

And J. K., Esq., who for the said state prosecutes on this behalf, says that the said state ought not to be barred from further prosecuting the said indictment, because he saith that the said William Sheen was not heretofore acquitted of the premises charged in and upon him by this present indictment; for although true it is that the said William Sheen was acquitted upon the said indictment in this said plea mentioned, and although true it is that the said infant in the said former indictment mentioned and the male child in this present indictment mentioned, is the same child and not another and different child, yet for replication in this behalf, he says that the said male child was not known as well by the name of Charles William Beadle as by any or either of the several names by which he is named in the present indictment; and this the said J. K., Esq., on behalf of the said state prays may be inquired of by the country.

Plea that defendant was duly charged, examined and tried for the murder of the deceased before a court legally constituted, and upon this trial and examination was duly and legally acquitted of the said murder and felony with which he stood charged, and was adjudged by the court not guilty thereof.(*m*)

And the said S. M. for plea (by leave of the court), saith that he ought not now to be charged with the murder and felony aforesaid, charged upon him in the indictment aforesaid, because he saith that he the said S. M., by the name and description of S. M., heretofore, to wit, at a court of aldermen of the borough of Norfolk, summoned according to law for the examination of the said S. M., for the murder and felony aforesaid, and held on the thirty-first day of May, in the year of our Lord one thousand eight hundred and eleven, at the court house of the borough aforesaid, before W. B. L., mayor, J. N., recorder, W. V., L. W., M. K., J. E. H., R. E. L. and M. K. Jr., aldermen of the said borough, was duly charged, examined and tried for having on the twenty-fifth day of May, one thousand eight hundred and eleven, between the hours of six and eight o'clock of the morning of that day, in the stone house of L. B. in the said borough of Norfolk, feloniously, wilfully and of his malice aforethought, killed and murdered the said R. B., who was then and there in the peace of God and of the commonwealth, and that he the said S. M. upon this trial and examination was duly and legally acquitted by the said court, of the said murder and felony with which he was then and there so charged, and was adjudged by the said court not to be guilty thereof; and this he the said S. M. is ready to verify and prove by the record of the said borough court of Norfolk. And the said S. M. further saith, that the said R. B. named in the said indictment, and the said R. B. named in the said record of acquittal, are one and the same, and not different

(*ll*) Where on the record the offence set forth in the first indictment is substantially the same as that set forth in the second, and where there is no averment of identity of offence, the proper course is to demur.

(*m*) This plea was held good in Com. v. Myers, 1 Va. Cases 249.

persons; that he the said S. M. named in the said indictment, and the said S. M. named in the said record and acquittal as aforesaid by the said corporation court of the felony and murder aforesaid, are one and the same, and not different persons, and that the felony and murder charged upon him the said S. M. before the said corporation court, and the felony and murder charged upon him the said S. M. in the indictment aforesaid, are one and the same, and not different felonies; and this he is ready to verify; wherefore since he the said S. M. hath already been heretofore acquitted of the felony and murder of the said R. B. aforesaid, he prays the judgment of the court here, if he the said S. M. should be again charged with the same felony and murder of which he hath once already at another time been acquitted.

Autrefois convict, plea of, where the original indictment on which the defendant was convicted, was one for arson, and the second indictment was for murder in burning a house whereby one J. H. was killed, &c.(*n*)

And the said S. C., in his own proper person, cometh into court here, and having heard the said indictment read, saith that the said State of New Jersey ought not further to prosecute the said indictment against him, the said S. C., because, he saith, that heretofore, to

(*n*) State *v.* Cooper, 1 Green. 375. The indictment on which the above proceeding took place is to be found *ante*, p. 54. "The defendant," said the court, "has been convicted of the crime of arson. He has plead that conviction in bar of the indictment for murder. What effect shall that plea have upon this prosecution? If I am right in supposing that the defendant cannot be convicted and punished for two distinct felonies, growing out of the same identical act, and where one is a necessary ingredient in the other, and the state has selected and prosecuted one to conviction, it appears to present a proper case to interpose the benign principle, that a man shall not be twice put in jeopardy for the same cause in favour of the life of the defendant.

"Judge Blackstone in his Commentaries, says that, 'a conviction of manslaughter, or an appeal on an indictment, is a bar even in another appeal, and much more in an indictment of murder, for the fact prosecuted is the same in both, though the offences differ in colouring and degree.' This is well established; 4 Coke, 45, 46; 2 Hale 246; Arch. 52; Fost. Cr. Law, 329; Hawk. b. 2, c. 36, s. 10. And in the case of Robert M. Goodwin, who was indicted for manslaughter and subsequently for murder, Colden (mayor), fully recognizes the same principle, where he says, 'if we were to try the prisoner on the indictment for manslaughter, unquestionably we should put an end to the prosecution for murder.'

"If in civil cases, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen by unnecessary prosecutions. Under the numerous British statutes imposing severe penalties and even taking away the benefit of clergy from larcenies perpetrated under certain specified circumstances, it is the practice to indict the crime with all its aggravations under the statute, and if the aggravating circumstances are not proved, to convict of the simple larceny only. I have met with no instance of an attempt on the part of the crown, after indicting for a simple larceny and establishing that, to proceed by another indictment, to establish the higher offence. The case of Rex *v.* Smith, 3 C. & P. 412, cited in 14 Eng. C. Law Rep. 374, and the Com. *v.* Cunningham, 13 Mass. 245, are authorities against such a practice. And I am satisfied that a conviction of larceny would be a good bar to a prosecution for burglary and stealing the same goods, whatever might be its effect upon an indictment for burglary with intent to steal; as to which see 7 S. & R. 491. I consider the present case as not affected by those where the first indictment was insufficient, and where a train of decisions has established that the criminal was never legally in jeopardy from the first prosecution; 4 Coke 44, 45; Hawk. b. 2, c. 36, s. 15; 1 Johns. Rep. 77. There is no defect in the first indictment; it is a case where the state has thought proper to prosecute the offence in its mildest form, and it is better that the residue of the offence go unpunished, than by sustaining a second indictment, to sanction a practice which might be rendered an instrument of oppression to the citizen."

wit, at a Court of General Quarter Sessions of the Peace, holden at Morristown, in and for the County of Morris, of the term of July, A. D., &c., it was by the jurors of the State of New Jersey for the body of the County of Morris, upon their oaths presented "that (*here recite indictment*), then, there and thereby described as S. C., late of the township of Hanover, in the County of Morris, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of April, A. D. one thousand eight hundred and thirty, with force and arms at the township aforesaid in the county aforesaid, and within the jurisdiction of the said Court of General Quarter Sessions of the peace, wilfully and maliciously did burn a certain dwelling house of one R. S., there situate. And the jurors aforesaid, upon their oaths aforesaid, did further present, that C. C. and J. V. G. late of the township of Hanover aforesaid in the county aforesaid, before the said arson was committed in form aforesaid, to wit, on the twelfth day of February, in the year aforesaid, with force and arms at the township aforesaid, in the county and within the jurisdiction aforesaid, did unlawfully, wilfully and maliciously aid, counsel and procure the said S. C. to commit the said arson in manner and form aforesaid, against the form of the statute in such case made and provided, and against the peace of the said State of New Jersey, the government and dignity of the same."

Which said indictment is endorsed a true bill, and signed by D. J. C., Esq., as foreman, and by J. W. M., Esq., as prosecutor of the pleas, &c.

And the said S. C., in his own proper person further saith, that at a Court of Oyer and Terminer and General Gaol Delivery, holden at Morristown, in and for the County of Morris, of the term of September, A. D. one thousand eight hundred and thirty, present the Hon. G. K. D., justice, and J. U., D. T., J. S. and S. C., Esqrs., judges, he, the said S. C., together with C. C. and J. V. G., were charged on the above recited indictment for arson, and their plea to the same being demanded, they, the said S., C. and J. pleaded thereto not guilty; whereupon, the said court remanded them the said S., C. and J. to prison. And the said S. in his own proper person further saith, that afterwards, to wit, on Monday the fourth day of October, A. D. one thousand eight hundred and thirty, before the said Court of Oyer and and Terminer and General Gaol Delivery, and in the same September term of said court, on motion of J. W. M., Esq., prosecutor of the pleas for the County of Morris, the said court ordered on the trial of the said S., C. and J., on said indictment for arson. Whereupon, the sheriff having returned a panel, the following persons appeared and were sworn, viz. A. C., &c. After hearing the testimony, and a charge from the court, the jury retired to consider of their verdict with constable S. F., sworn to attend them; after some time the said jury returned into court and said they had agreed on the verdict, and by A. C. their foreman, said, they found the said S. C. guilty in manner and form as he stood charged, and as to C. C. and J. V. G. not guilty in manner and form as they stood charged, and so said they all, as by the record thereof more fully and at large appears, which said judgment still remains in full force and effect, and not in the least reversed or made void. And the said S. C. in fact saith, that

he the said S. C., and the said S. C. so indicted and convicted as last aforesaid, are one and the same person, and not other and different persons, and that the wilful and malicious burning a certain dwelling house of one R. S. (as in the indictment for arson is mentioned, and on which he has been so as aforesaid convicted), and the wilful and malicious burning a certain dwelling house of one R. S., whereby one J. H. in the said dwelling house then and there being, before, at and during the same burning, was then and there by reason and means of the said burning so committed and done by the said S. C., in manner aforesaid, mortally burned and killed, as described in the above indictment for murder against him (in the first count thereof), are one and the same wilful and malicious burning of the dwelling house of the said R. S. and not other and different burnings or arsons.

And the said S. C. further in fact saith, that the wilful and malicious burning a dwelling house of one R. S., of which he the said S. C. was so indicted and convicted as aforesaid, and his contriving and intending one J. H. then being in a certain dwelling house of one R. S., in the township and county aforesaid, feloniously, wilfully and of his malice aforethought to burn, kill and murder and his wilfully and maliciously setting fire to and burning the said dwelling house, the said J. H., then and there, before, at and during the said burning being in the said dwelling house, and that he, the said S. C., in so setting fire to and burning the said dwelling house as aforesaid, there and then feloniously, wilfully and of his malice aforethought, did mortally burn the body of the said J. H., by means of which said mortally burning of the body of the said J. H., as aforesaid, he the said J. H. did die, of which he is now indicted, as alleged in the second count of said indictment, are one and the same wilful and malicious burnings of the dwelling house of the said R. S., and not other and different burnings or arsons.

And of this he the said S. C. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified; (*here follows plea of not guilty*).

Replication to said plea.

And J. W. M., who prosecutes for the State of New Jersey, in this behalf, as to the said plea of the said S. C., by him first above pleaded, saith, that the same and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said state from prosecuting the said indictment against him the said S. C., and that the said state is not bound by the law of the court to answer the same, and this he the said J. W. M., who prosecutes as aforesaid, is ready to verify, wherefore:

For want of a sufficient plea in this behalf, he, the said J. W. M., for the State of New Jersey, prays judgment, and that the said S. C. may be convicted of the premises in the said indictment specified.

Rejoinder to said replication.

And the said S. C. saith, that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same

are above pleaded and set forth, are sufficient in law to bar and preclude the said State of New Jersey from prosecuting the said indictment against him the said S. C., and the said S. C. is ready to verify and prove the same as the said court here shall direct and award; wherefore, inasmuch as the said J. W. M. who prosecutes for the said State of New Jersey, hath not answered the said plea, nor hitherto in any manner denied the same, the said S. C. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.

Plea of once in jeopardy.

That on the said indictment at the said Court of Oyer and Terminer and General Gaol Delivery, on Thursday the twelfth of April aforesaid, the said defendant in due form of law was arraigned and pleaded not guilty of the premises contained in the said indictment, and for her trial put herself upon God and her country, and was by the said commonwealth in due form of law placed on her trial before a jury of the said country. And the said J. C. further says, that on the twenty-first, twenty-second and twenty-third days of April aforesaid, the witnesses were examined in due form of law before the said court and jury as well on behalf of the said commonwealth as her the said defendant; that the counsel for the commonwealth and the defendant then addressed the court and jury in due form of law; that on the evening of the twenty-third of April aforesaid the court charged the jury relative to the premises contained in the said indictment as set forth, and that the said jury then according to law retired to deliberate on their verdict; that on Monday the twenty-fifth day of April aforesaid, at ten o'clock in the forenoon of that day, the said jury came into the said court, and answered to their names and declared that they had not agreed upon their verdict, and that they did not think they were likely to agree upon their verdict; that two of the jury, viz. E. F. and A. H., then and there stated that they were unwell, and one of the jury, viz. E. F., then and there declared that if he were much longer confined in his present state of privation his life would be endangered; that one of the jury, E. F., being duly sworn before the said court, declared that he was seventy-six years of age, that the health of him the said E. F. was greatly impaired by an attack of illness from which he the said E. F. had only been relieved about a month, that he the said E. F., from his peculiar state of privation and suffering was so ill and feeble that he could not walk into court without assistance, and that he the said E. F. firmly believed that if he should be compelled to continue on the said jury any further length of time under his then state of privation and restriction, the life of him the said E. F. would be in danger. And A. H., another of the said jury, being duly affirmed according to law, declared that he was then quite ill, that he had been confined all the month of December then next preceding, with bilious fever; that the effects of this attack still left his frame debilitated, and that he firmly believed that his health would be in danger by being kept longer on the jury under his then state of privation and restriction, as ordered by the court; that the jury was then ordered by the court to with-

draw to their room where they had been deliberating, and Dr. J. K., a physician of great respectability, was then and there directed by the court to visit the said jurors who alleged that they were sick; that the said Dr. J. K. did so visit the jurors in their room, in the absence of the defendant and her counsel, and without their consent, and returned to the said court, and being then for the first time sworn, did depose that he had attended the said E. F. about a month previous to the said time, the said E. F. having then a disease of the brain, and that the life of the said E. F. would in the opinion of the said J. K. be endangered by a continuance of his present state of privation and restriction, as it might produce a return of the disease. And the said Dr. J. K. then and there further deposed as his opinion to the said court, that the life of the said A. H. was not in immediate danger, but that he was ill, and that his health would be endangered if he continued to remain in his present state of privation and restriction. And the said J. C. further says, that at half-past twelve o'clock in the afternoon of the same day, the said court ordered the said jury to be brought into court, and the said jury being then and there asked if they had agreed upon their verdict, answered that they had not. And the said court then and there, without and against the consent of the said J. C., ordered the said jury to be dismissed, the said court declaring then and there their opinion that a case of necessity for the discharge of the said jury, as contemplated by the Supreme Court of this commonwealth, in the case of *The Commonwealth v. Cook*, had been made to appear. And the said J. C. further says, that during all this time, viz. from Saturday the twenty-third of April, from half-past ten o'clock in the evening of that day, until Monday the twenty-fifth day of April, at half-past twelve o'clock in the afternoon of that day, the said jury were kept by order of the said court without meat or drink, but had the use of fire and candles, and that during the trial the said jury were allowed to eat and drink. And the said J. C. further says, that after the said jury had been without meat or drink for the space of twenty-four hours, the said court then and there, after asking the consent of the commonwealth and the defendant, authorized the said jury to take some refreshment, if a majority of the said jury would agree to the same; but that a majority of the jury would not agree to the taking of such refreshment at that time, until the verdict was agreed upon; after which declaration the court refused to grant permission to any one of the said jury to take any food or refreshment whatever. And the said J. C. further says, that during the time of the privations and restrictions of the said jury, the said defendant prayed the said court that the said jury or any of them might take food and refreshments; and after the declaration of the said jurors that they were sick, the said defendant then prayed that the said sick jurors might be allowed food and refreshment. All which said praying of the said defendant the said court then and there refused. And the said J. C. further says, that he the said J. C. now here pleading and the said J. C. in the said indictment last mentioned, is the same identical person, &c.(*o*)

(*o*) The authorities bearing on this species of plea are collected in Wh. C. L. 146, *et*

Plea that six of the grand jurors by whom the bill was found were not duly qualified.(*p*)

That J. N. C., R. M. C. S., H. B., J. F., T. J. H. and J. B., six of the grand jurors by whom the said indictment was found and returned into the said court, at the said April term thereof, were not all of them the above named six grand jurors, nor any one of them, at the time they so acted and at the time the said indictment was found and returned, duly and legally qualified to act as such grand jurors; in this they the said six grand jurors, nor any one of them, had not then and there been drawn by the clerk and sheriff of the County of Warren aforesaid, either at a regular term of the said Circuit Court, (next preceding the said April term of the said Circuit Court), there in open court, or by the said clerk and sheriff and in the presence of the judge of probate of the County of Warren aforesaid, sixty days next before the said April term of the said Circuit Court of the County of Warren aforesaid, as jurors liable to serve out for the first week of the aforesaid Circuit Court, at the said April term thereof, then and there from a list of the names of all the freeholders (being citizens of the United States), and householders of the County of Warren aforesaid, as liable to serve as jurors in the Circuit Court of the County of Warren aforesaid, as returned either in term time of the said Circuit Court or to the clerk thereof at his office in vacation, by the assessor of taxes of the County of Warren aforesaid; nor were all of them the above named six grand jurors, nor was any one of them, then and there summoned as persons liable to serve as jurors for the first week of the said April term of the said Circuit Court of Warren county aforesaid, then and there by virtue of a special writ of venire facias, then and there awarded by the said Circuit Court at the said April term thereof, directing the said sheriff of the said County of Warren to summon persons there liable to serve as jurors at the said April term of the said Circuit Court, for the first week thereof; nor were all or any of the above named six grand jurors then and there summoned as tales jurors by the said sheriff, as liable to serve as such jurors for the first week of the said term of said court, then and there by virtue of an order of said court; nor had all and every one of the jurors of the regular panel of the jurors summoned and in attendance at the said term of the said court for the first week thereof, affailed in their attendance at the said April term of said court for the first week thereof; nor had the regular panel of the jurors summoned and in attendance upon the said court at the said term thereof, as liable to serve as jurors for the first week, been gone through with, then and there to constitute a grand jury to serve at the said term of

seq.; and it was there shown that while the federal courts and the courts of Massachusetts, New York, Mississippi and Kentucky held that the discharge of a jury in a previous trial for a capital offence was no bar to subsequent proceedings, the courts of Pennsylvania, North Carolina, Tennessee and perhaps of Alabama, maintained the doctrine that where a prisoner in such case was once on trial he was in jeopardy in the meaning of the constitution, and could not be retried.

The arguments in favour of the position assumed in the latter cases treated, are powerfully expressed by Gibson C. J. in Com. *v.* Clue, 5 Rawle 498, the case from which the indictment in the text is taken.

(*p*) See State *v.* Rawlins, 8 Sm. & Marshall 600.

said court, by lot, when the names of the said six grand jurors above mentioned were drawn, by lot, to serve as grand jurors for the said term of said Circuit Court; nor were all the above named six grand jurors, nor any one of them, summoned by the sheriff of said county from the by-standers then and there to serve as jurors for the first week of this said term of said court. (*Conclude as ante, p.* 600).

Plea that goods which defendant was charged with rescuing from the sheriff who had seized them under an execution against a third party, were in fact, at the time, the property of and in the possession of the defendant.(*q*)

And now said A. K., protesting that he is not guilty of the premises charged in said indictment, and reserving a right to waive this

(*q*) This plea was sustained by the Supreme Court of Massachusetts in Com. *v.* Kennard, 8 Pick. 133, as a bar to an indictment which is given *ante*, p. 501, charging the defendant with rescuing goods from the sheriff's custody. "The question," said Parker C. J., "is reduced to this, whether the owner of goods which are in his actual possession may not lawfully defend his possession of them against a seizure or an attachment by an officer, who comes to take them on a precept against another person who has no right or interest in the goods.

"Certainly the officer in such case would be trespasser, for he does not act under any precept against such owners, nor is he commanded to take their goods. Actions of trespass against officers thus transgressing are among the most common actions in our courts, and they depend upon the same principle as actions of assault and battery or false imprisonment, by one who is arrested on a writ or warrant against another person. In such case there is no authority for the arrest, and the person making it, whether by mistake or design, is a mere trespasser. And the same facts which would sustain an action of trespass by the person arrested, will justify any resistance which may be necessary to defend his personal liberty, short of injurious violence to the officer.

"We cannot distinguish between an officer who assumes to act under a void precept and a stranger who should do the same act without any precept; for a command to arrest the person or seize the goods of B. is no authority against the person or goods of A. And an officer without a precept is no officer in the particular case in which he so undertakes to act. The officer must judge at his peril in regard to the person against whom he is commanded to act. This is said to be hard, but it is a hardship resulting from the voluntary assumption of a hazardous office, and considering that in all cases of doubt the officer may require indemnity before he executes his precept, the hardship is imaginary; Marshall *v.* Hosmer, 4 Mass. R. 63; Bond *v.* Ward, 7 Mass. R. 123.

"It is said that the owner of goods seized or attached on a precept against another, has legal remedies by action of replevin, trover or trespass, and therefore ought not to be allowed to protect his goods with a strong hand, for this power may be abused so as to recover the property of the debtor, and so the creditor may be disabled from obtaining satisfaction. Such a mischief may happen; but it is not a fair argument against the existence of a right, that it may be abused. If the right did not exist, great abuses might come from the power in officers to take any person's property upon suspicion or suggestion that it belongs to the debtor, and the owner might be driven to a replevin, in which he must give bond with surety, or to his action for damages, in which the expense may consume the value of the property.

"But it is again said, that the rule sought to be established by the defence will deprive creditors of the power of trying the question of property in cases where there may be grounds to believe that it is covered by the person in possession claiming to be the owner. But the creditor is not without a legal remedy. He may have an action on the case for interrupting unlawfully his attachment. The officer may have an action of trespass if the goods are taken out of his possession. And the trustee process will compel the possessor to make full disclosure of his right to hold. And besides all this, the party is liable to indictment, and if he fails in making out his right strictly, will incur a severe penalty.

"It will be recollected that this is a criminal prosecution against persons who were in actual possession of the goods, being the acknowledged owners, or their servants to whose care they were committed; that they did nothing more than defend with no more than necessary force, their possession. This decision, therefore, will form no precedent for

plea and plead anew at the court above, demands judgment of said indictment, and all and every part thereof, and for plea says as to the force and arms and whatever is against the peace in said first and second counts in said indictment mentioned, and the wounding therein supposed to be done, he is not guilty thereof in manner and form as he is charged therewith in said indictment, and of this he puts himself upon the country. And as to the residue of the offences charged in said indictment, and as to the assaulting, beating, bruising, evil treating and forcibly and with a strong hand depriving of the care, custody and keeping and possession of goods and chattels, the said K. says that said commonwealth ought not to prosecute and charge him therefor, because he says that said D. D. B. in said indictment mentioned, and one S. F. C., before and on the said second day of October last, and at the time when said offence is supposed to have been committed, were lawfully possessed of a certain shop in Congress street in said Boston and of certain goods and chattels then and there in said shop, being the same goods and chattels in said second count in said indictment mentioned, which said goods and chattels were then and there the proper goods and chattels of said B. and C., and being so possessed and seized thereof, the said T. I. S., just before the said time when, &c., to wit, on said second day of October, was unlawfully in said shop and with force and arms making a great noise and disturbance, and at said time, when, &c., staid and continued therein making such noise and disturbance, without leave or license and against the will of said B. and C., and then and there with force and arms and with a strong hand kept said B. and C. out of possession of said shop and of said goods and chattels, and then and there and during a long time, disturbed said B. and C. in the use and enjoyment of said shop and of said goods and chattels, and greatly annoyed said B. and C. in the peaceable possession and enjoyment of said shop and of said goods and chattels, and thereupon the said B. then and there requested said S. to cease from making his said noise and disturbance, and to go and depart from said shop and to give up and relinquish said goods and chattels to said B. and C., the lawful owners thereof, which said S. then and there refused to do. Whereupon the said B. did specially pray and request said K. to aid and assist him the said B. in the defence of the possession of said shop and of said goods and chattels; and thereupon said B. and

cases which may be differently circumstanced; Mooney *v.* Leach, 1 W. Bl. 555; Ackworth *v.* Kemp, 1 Dougl. 40; Sanderson *v.* Baker, 2 W. Bl. 832.

"We have had no authorities cited on the part of the commonwealth which have any tendency to show that the owner and possessor of goods may not defend them against an officer who comes to seize them as another person's. That a man may defend his person, his lands or goods, against the intrusion or invasion of those who have no lawful authority over them, would seem entirely unquestionable. If the officer believes the possession is only colourable and the claim of property fraudulent, if backed by the creditor's orders or secured by bond of indemnity, he will take care to be so attended as to be protected against insult in the execution of his precept.

"There are cases which show that if an officer having a precept against a person privileged from arrest, shall arrest him, he will not be a trespasser. But in such case he is commanded to arrest the particular person, and is supposed to know nothing of the privilege; the party therefore shall be held to apply for his discharge to the court having jurisdiction of the matter."

K., in defence of said possession of said shop and of said goods and chattels, gently laid their hands upon said S. in order to remove him from said shop, and did then and there remove said S. from said shop and from said goods and chattels, as they lawfully might do for the cause aforesaid, doing the said S. no unnecessary harm or injury; all which are the same assaulting, beating, bruising and evil treating and with force and a strong hand depriving said S. of the care, custody and possession of said goods and chattels in said first and second counts mentioned, and therein supposed to be done; and this said K. is ready to verify; wherefore he prays judgment of said indictment, whether said commonwealth ought or can prosecute him for the premises, and that he may be discharged thereof without day. A. K.

Replication.

And now J. T. A., the attorney of said commonwealth, here in court agrees to the above reservation as to so much of said plea as that whereof the said A. puts himself on the country, for the commonwealth doth the like. And as to the rest and residue of said plea he says that the said commonwealth ought not by reason of anything therein contained, to be precluded from prosecuting the said A. for the several matters and things in said indictment charged upon him; because he says that at the time in said indictment alleged, he the said A. committed the several assaults, batteries and trespasses in said indictment set forth of his own wrong, and without any such cause as he hath in pleading alleged; and this he prays may be inquired of by the country. J. T. A., Attorney, &c.

And the said K. doth the like. A. K.

Demurrer to an indictment or information.(r)

And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment (*or* information) read, says that the said indictment (*or* information) and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he the said J. S. is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore for want of a sufficient indictment (*or* information), in this behalf, the said J. S. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment (*or* information) specified.

Joinder to same.(s)

And J. N., who prosecutes for the said state in this behalf, says that the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said J. S. to answer the same; and the said J. N., who prosecutes as aforesaid, is ready to verify and prove the same, as the court here shall direct and award; wherefore, inasmuch

(r) Arch. C. P. 102. (s) *Ib.* 103.

as the said J. S. hath not answered to the said indictment, nor hitherto in any manner denied the same, the said J. N. for our said (lady the queen) prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified.

(*The like form, mutatis mutandis, may be adopted in the case of informations*).

Demurrer to a plea in bar.(*t*)

And J. N., who prosecutes for the said state in this behalf, as to the said plea of the said J. S., by him above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said state from prosecuting the said indictment against him the said J. S.; and that the said state is not bound by the law of the land to answer the same; and this he the said J. N., who prosecutes as aforesaid, is ready to verify; wherefore for want of a sufficient plea in this behalf, he the said J. N. for the said state prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified.

Joinder to same.(*u*)

And the said J. S. says that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said state from prosecuting the said indictment against him the said J. S.; and the said J. S. is ready to verify and prove the same, as the said court here shall direct and award; wherefore, inasmuch as the said J. N., for the said state, hath not answered the said plea, nor hitherto in any manner denied the same, the said J. S. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.

Demurrer to plea of autrefois acquit.(*v*)

And J. K., who prosecutes for the said state in this behalf, cometh and saith that, for and notwithstanding anything in the said plea of the said J. A. and J. V., by them above pleaded, our said (lord the king) ought further to prosecute them the said J. A. and J. V., by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; because he saith that the said plea, and the matters therein contained, are not sufficient in law to bar the said state from further prosecuting them the said J. A. and J. V., by reason of the premises in the said indictment to which the said plea

(*t*) Arch. C. P. 103.

A demurrer to a plea in abatement is in the same form, except that it concludes with praying "judgment, and that the said indictment may be adjudged good, and that the said J. S. may further answer thereto," &c.

(*u*) Arch. C. P. 103.

The joinder is the same if the demurrer be to a plea in abatement, except that it concludes with praying "judgment and that the said indictment may be quashed," &c.

(*v*) See Stark. C. P. 474.

is above pleaded, mentioned; and this the said T. S. is ready to verify; wherefore he prays judgment, that the said state may further prosecute them the said J. A. and J. V., by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; and that the said J. A. and J. V. may answer over to the same indictment.

Joinder in demurrer to same.

And the said J. V. and J. A. being now here as aforesaid in their proper persons, under the custody of the said sheriff of the County of Middlesex, say that the said plea of them the said J. V. and J. A. in form aforesaid, above pleaded, and the matters therein contained, are sufficient in law to bar the said state from further prosecuting them the said J. V. and J. A., by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; and this they are ready to verify, &c.; wherefore as before, they pray judgment, and that the said state may be barred from further prosecuting, by reason of the premises mentioned in the said indictment; to which the said plea of them the said J. V. and J. A. is above pleaded; and that they may be dismissed this court without day, &c.

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WHARTON'S

AMERICAN CRIMINAL LAW.

LATELY PUBLISHED BY

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LAW BOOKSELLERS,

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A TREATISE on the Criminal Law of the United States, comprising a Digest of the Penal Statutes of the General Government, and of Massachusetts, New York, Pennsylvania, and Virginia: with the Decisions of Cases arising upon those Statutes; together with the English and American Authorities upon Criminal Law in general. In one octavo volume.

BY FRANCIS WHARTON.

RECOMMENDATIONS.

From the Chief Justice of the United States.

WASHINGTON, January 26, 1847.

GENTLEMEN:—I have looked with some care into Wharton's American Criminal Law, which you were kind enough to send me.

It gives me pleasure to say that, in my opinion, it is a work of much merit. Its references to different State Laws and decisions in criminal cases, and more especially to decisions made by the Courts of the United States upon the laws of the United States, give it a peculiar value to the American Bench and Bar, which no English work can possess, and must, I think, procure for it the general patronage and support of the Profession.

R. B. TANEY.

Messrs KAY & BROTHER, Philadelphia.

From Chancellor Kent.

Wharton's American Criminal Law.—I have examined the whole work, turned over every page, and read a very considerable part of it, and I consider it a work of the highest utility, and admirably executed. There was no work on American Law more wanted, and it will be generally called for, studied, and adopted. I congratulate you on the publication and undoubted success of a work of so much labour, industry, and judgment.

New York, Nov. 3, 1846.

From Mr. Justice Grier, of the Supreme Court of the United States.

Messrs KAY & BROTHER:

You had the kindness some time ago to send me a copy of "Wharton's Criminal Law." My engagements have been such as to prevent a close and critical examination of the

work; but I have had occasion to consult it with great advantage several times in the course of my official duties. A work of this kind, on Criminal Law, which would afford a synopsis of the decisions of the Courts of the United States, and of the several States, connected with the English cases, was much needed. The execution of the work you have just published, reflects great credit on its author for his learning and industry, and I have no doubt it will receive the approbation and patronage of the Profession.

Washington, Jan. 4, 1847.

From Chief Justice Gibson.

Messrs Kay & Brother:

Mr. Wharton's American Criminal Law, which you sent me some time since, I find to be an excellent book. The plan is judicious, and its execution able. As a book of reference the volume will be a valuable addition to the American Lawyer's library.

Philadelphia, January, 1847.

From the Hon. John C. Calhoun.

Fort Hill, 23 March, 1847.

I have devoted the first leisure I had, since my return from Washington, to examining Wharton's American Criminal Law. I regard the subject as one of much importance and take great pleasure in saying that, in my opinion, the arrangement and execution of the work do the author great credit.

From the Hon. Edward King.

Messrs Kay & Brother:

I have great pleasure in acknowledging the receipt of a Treatise on the Criminal Law of the United States, by Francis Wharton, Esq. I regard the work as one of peculiar merit; admirably suited to furnish clear and precise ideas of the state of the Criminal Law, not only to the student, but to the more matured practitioner. I shall be much mistaken in my judgment if it should fail to secure the general approbation of the Profession.

Philadelphia, Nov. 28, 1846.

From Simon Greenleaf, L. L. D., Professor of Law in Harvard University.

Cambridge, 14 April, 1847.

Messrs Kay & Brother:

I have looked over Mr. Wharton's Treatise on American Criminal Law with as much attention as my avocations would permit, and think that for clearness of method, compactness and elegance of finish, it will prove most acceptable to the Profession. We have no similar Treatise; and to practitioners in the Criminal Courts this manual must be of great use.

From the North American, September, 1846.

Wharton's American Criminal Law is one among many evidences of the improvements introduced by the Kays in the style of publishing law books. They have redeemed this branch of our scientific literature from the dingy paper and battered type in which it was so long buried; and over the clear pages of their publications, the professional student rejoices in the exemption from the dangers heretofore incurred from the war against eyes so long waged against lawyers. That this work is far in advance of any hitherto published in this country upon Criminal Law, will not be gainsayed by any one who has examined it; but we regret to find the statutes of but four States incorporated. A future edition will doubtless comprise a perfect review of American law in all the States—that is, in all where they boast a penal system beyond the jurisdiction of Judge Lynch. * * * *

The work before us is important, because it is the first valuable effort to instruct our people that there exists an American Criminal Code. We have too often been heretofore administering English Criminal law, harsh, bloody and reckless as are its spirit and principles; and English decisions have too often tinged American law with the British temper.

We have, it is vain to deny it, a common law of our own, arising from the temper, condition and principles of our people. For instance, though Chitty and Russell, Archbold and Roscoe, recognize the right at common law of the husband to chastise his wife, what American judge would dare to administer the law in accordance with such principles? We have an American code, not merely arising from statute, but from custom and necessity; and the great difficulty has been that no attempt has hitherto been made to embody and harmonize it. We find this deferred duty performed, and admirably too, by Mr. Wharton. In giving this volume to the Profession he has not merely paid the tribute which all lawyers are, by high authority, said to owe it; but he has contributed vastly to the important work of erecting a system of Criminal Law, in its leading principles common to the entire Republic, and worthy the advances made by the American people in the science of government.

In a careful examination of this work, we noted down many points worthy, as it seemed to us, the consideration of the Public as well as of the Profession; but we have already transcended the limits which a regard for the general character of our journal assigns us for such a subject. Let us speak of the work. We commend it, with all emphasis, to the Profession. In its arrangement, its mode of treating the subjects considered, its citation of authorities upon disputed points, in short, in all that a practitioner in a Criminal Court needs, we consider it by far the best work within reach of the American lawyer. It manifests great industry in the collection of authorities, and great ability in their collation; and embodies a mass of information, condensed and arranged with a skill no where else to be found. He must be singularly elevated above the ordinary necessities of the legal Profession, to whom this work is not indispensable.

From Hunt's Merchant's Magazine, February, 1847.

Wharton's American Criminal Law.—Such a work as this has long been a desideratum with the Profession. The works of Barbour and the Davis's—the only American treatises, strange to say, attempted, upon the same subject—amount to simple examinations into the duties of justices of the peace, and as such are beneficial only to those who stand in need of the most elementary expositions of Criminal Law. The book of Mr. D. Davis, it is true, also goes to enlighten citizens as to their office when called upon to act as grand jurors; but this scarcely enlarges its sphere of usefulness. Practitioners at the Bar have been hitherto obliged, for their part, to rely upon the labours of Chitty, Russell, Archbold, and Roscoe, who give us the old crown law, which the British judicial decisions added to it—a code, which every day causes to differ more and more from our own, which is the offspring of freer institutions and a larger personal liberty. The ordinary expedient, of compensating for the defects of these writers by a supply of domestic foot-notes and references, has become altogether insufficient; since the decisions of our Courts have so increased in number as to be often of really more importance than the English text upon which they profess to comment. It is on this account that the work now before us, has been so sincerely welcomed. Its author is Mr. Wharton, a gentleman whom Pennsylvanians have been complimenting for his able performance of the duties of prosecuting attorney of the Commonwealth, for Philadelphia. It is what it professes to be—the Criminal Law of the *United States* digested, as well as compiled, and possessing every requisite that could be desired in it. An able legal writer has remarked upon the concluding book, On Trial and its Incidents, that the reader will find in it, "the subject, not only masterly treated, but an amount of information embodied, divided, and digested, in a manner altogether unattempted in any previous work on Criminal Law, English or American." This may be said truly of all of the six books of which it is composed. It is, throughout, executed in a painstaking and industrious, yet finished and scholarlike manner.

From the New York Tribune, November, 1846.

Wharton's American Criminal Law.—This is a treatise on Criminal Law which we consider one of the most valuable which has yet been given to the Public. It is composed of six books, lucidly arranged and ably expounding the subjects on which they treat. It is a volume valuable not only to the student and professional advocate, but also to every citizen desirous of becoming acquainted with Criminal jurisprudence. In the few treatises we already possess, the attention of the authors has been more confined to the examination of local statutes defining particular offences than applied to the investigation of general principles; but the present volume not only gives in ample detail the statutes defining offences

where the common law is silent, but shows what alterations and restrictions affect the common law, and are peculiar to the government under which we live. The judicial decisions on mooted points of the various Federal and State Courts are set forth with much discrimination, and in such a manner as to show the reasons governing the adjudication of the subject in dispute. The examination of what offences are indictable, and in what court cognizable, of principal and accessary, and an inquiry into the powers of the respective State jurisdictions, of the form and finding of the indictment, of demurrers and pleas, compose the first book. The second and third books relate to evidence and offences against the person; the fourth and fifth books to offences against society; and the sixth to the trial and its incidents. The multifarious subjects treated of in the different books, are accompanied with references to the judicial decisions sustaining the text. Those references are very copious, comprising the latest decisions of the English and American courts. Among the mass of valuable and well-digested information, will be found much that is peculiar to the work itself, and which supplies the deficiencies of other treatises. It is peculiarly acceptable to the inexperienced practitioner, who can acquire more knowledge from its perusal, than he could otherwise obtain by the loose reading and practice of years. It occupies the same relative position to our Criminal Law, that is occupied by Russell, Roscoe, and Archbold, in British jurisprudence; and we hail with pleasure and with pride the existence of a work bearing the impress of American genius, and which in legal literature will, we doubt not, be found in the library of every lawyer, beside the productions of a Story and a Kent. We understand that the author is but a young man, who has thus given to his professional brethren and the Public this evidence of a matured and powerful mind; and much do we hope that the success which will attend the present work will prove an incentive to renewed exertions in his legal research and literary labours.

From the Legal Intelligencer, August, 1846.

Wharton's American Criminal Law.—This work is the production of a highly accomplished criminal pleader, whose recent services in the conduct of the public prosecutions of the county of Philadelphia secured for him the best regards of the community, and have prepared his professional brethren to accept his book as one of full authority in the law.

It is the first and only thorough treatise on the Criminal Law of our country that has found its way to the press. It includes not only the descriptions and distinctions of the several classes of crime, as known to the common law of England, and as modified by the statutes of the Union or of the States, with an analytical and well expressed summary of the decisions to which they have led; but it enters largely into the departments of practice, pleading, and evidence. Thus, the first book treats of indictments, the duties and power of grand juries, and the rights of the accused; the second is a liberal abstract of the principles and minor rules of proof; the three next are appropriated to the consideration of offences against the person, against property, and against society, under thirty-eight distinct titles; and the sixth is devoted to the modes of trial, and all its incidents.

This last will be found peculiarly valuable to the practitioner; especially the chapter on the motion for new trial, a topic very imperfectly discussed in other treatises, but which in Mr. Wharton's hands is as full of interest as it is confessedly important.

The whole work bears the marks of a clear, well disciplined, and practical mind, entirely familar with all the details and difficulties of the subject, leaving nothing to doubtful inference, but marking, by clear and copious quotations, the precise line, beyond which precedents cease to guide, and resort must be had to analogy or induction. We hazard nothing in the remark, that hereafter the treatise of Mr. Wharton will be a manual for every practitioner in our Criminal Courts.

From the Boston Law Reporter, January, 1847.

Wharton's American Criminal Law.—We hasten to say that we think it a book worth its price to the criminal practitioner. It contains a much fuller collection of American cases than Russell, with the able editing of Mr. Metcalf at an early day, and of Mr. Sharswood in 1844; or than Chitty, with Mr. Perkins's valuable notes, (ed. 1841); or than Roscoe in Mr. Sharswood's edition of 1840. Neither is it an imitation or revamping of any of the treatises with which we are acquainted. It wants at present a table of cases, and a better index, which, perhaps, have led to a greater complaint of deficiencies on our part

than really exists; but with these, which we trust the author will by all means supply in a future edition, we hesitate not to say that it will be really serviceable to any one who is disposed to investigate the Criminal Law of the Union.

From the Western Law Journal.

Wharton's American Criminal Law.—This work, recently published in Philadelphia, supplies a want which was very much felt by all engaged in the trial of criminal cases. There has been heretofore no American work upon Criminal Law, so thorough in its details as to be of general utility. This book is intended to present the Criminal Law as it exists in the United States. It treats of the progress of the cause from the arraignment of the prisoner to the final judgment; of the duties of grand jurors, the indictment, and the different offences punishable by law. Portions of the criminal statutes of the United States New York, Massachusetts, Pennsylvania and Virginia, are set out, and references are given to such of the English decisions as are applicable in this Country. The decisions of all the States of the Union are also embraced, either in the text or the notes, and probably none of the American authorities have escaped the vigilance of the author. The arrangement is methodical, and the index renders reference easy. The book bears evidence of great research and industry, and may be recommended as an important addition to our law library.

ALSO, LATELY PUBLISHED BY

KAY & BROTHER, LAW BOOKSELLERS:—

WATTS AND SERGEANT'S REPORTS, VOL. 9.

REPORTS of Cases adjudged in the Supreme Court of Pennsylvania, by Frederick Watts and Henry J. Sergeant; vol. 9, containing the Cases decided in part of May Term, 1845. With a general Index of the principal matters contained in the nine volumes of Watts and Sergeant's Reports, and a Table of all the Cases in the same. In one octavo volume.

N. B.—The General Index contained in the 9th volume of Watts and Sergeant's Reports, (preceded by the 4th and last edition of Wharton's Digest) forms a complete Digest of the Decisions of the Supreme Court of Pennsylvania, from the commencement to the year 1845; and thus for years relieve the Profession from the expense of paying once more for matter, the far larger portion of which they already possess in their Libraries.

ROBERTS'S BRITISH STATUTES IN FORCE IN PENNSYLVANIA.—SECOND EDITION.

A DIGEST of Select British Statutes, comprising those which, according to the Report of the Judges of the Supreme Court, made to the Legislature, appear to be in force in Pennsylvania, with some others; with notes and illustrations. By Samuel Roberts, President of the Court of Common Pleas of the Fifth Judicial District of Pennsylvania. Second Edition, with additional notes and references to English and American Decisions, giving construction to these Statutes, down to the present time; and also, the Report made by the Judges of the Supreme Court to the Legislature. By Robert E. Wright, Counsellor at Law. In one volume, octavo. Kay & Brother, Philadelphia.

From the Pennsylvania Law Journal, February, 1847.

A new Edition of Roberts's Digest has been for some time a desideratum. The number of British Statutes in force in Pennsylvania, notwithstanding the labour of the Revisers of the

Civil Code, is still considerable, and the importance of their careful preservation cannot be overrated. The Editor of the present volume has carefully preserved the arrangement, even to the paging of the original text; has added, on the authority of the Supreme Court, several Statutes, which are not contained in the first Edition, and has enriched the whole with valuable Explanatory Notes and References. The Report of the Judges of the Supreme Court of Pennsylvania is also prefixed.

HOOD ON EXECUTORS, ADMINISTRATORS, &c.

A Practical Treatise on the Law relating to Registers, Registers' Courts, Orphans' Courts, Auditors, Executors, Administrators, Guardians and Trustees, in Pennsylvania, with Appendixes of Acts of Assembly, Forms, &c., and an Index. By Samuel Hood, of the Philadelphia Bar. In one large volume, octavo. Kay & Brother, Philadelphia.

From the Hon. Judge Ellis Lewis.

Lancaster, Feb. 15, 1847.

Hood on Executors.—The People and Profession are deeply indebted to Mr. Hood for his valuable work relating to the Registers' Courts, Orphans' Courts, Executors, &c. The practice in this branch of jurisprudence is so moulded by our peculiar legislation and usages, that we look in vain into English books for light. The work of Mr. Gordon was of great value, but in the twenty years which have elapsed since it made its appearance, an entire revolution has taken place, and a new work on the subject became a matter of urgent necessity. This book supplies the want, and satisfies the expectation of those most conversant with the subject.

Death is certain, and as sure as our lifeless bodies shall seek repose under the clods of the valley, our widows and orphans and their estates must seek protection under the jurisdiction of the Orphans' Court. Every man in society is most deeply interested in the enlightened and faithful administration of this branch of the law. In this country alone, the interests involved in it are of the highest importance in their nature, as well as immense in their magnitude.

The work is prepared with great care and ability. No Pennsylvania Lawyer should neglect to purchase it; it contains a mass of useful knowledge to be obtained nowhere else. It is gratifying to perceive that the publishers have taken care to present the work in a dress which recommends itself.

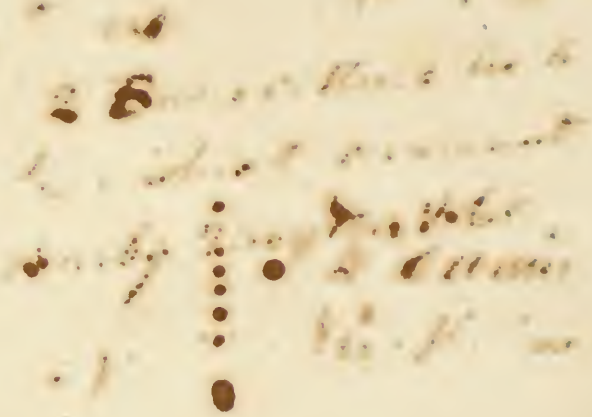
From an Eminent and Experienced Member of the Pittsburg Bar.

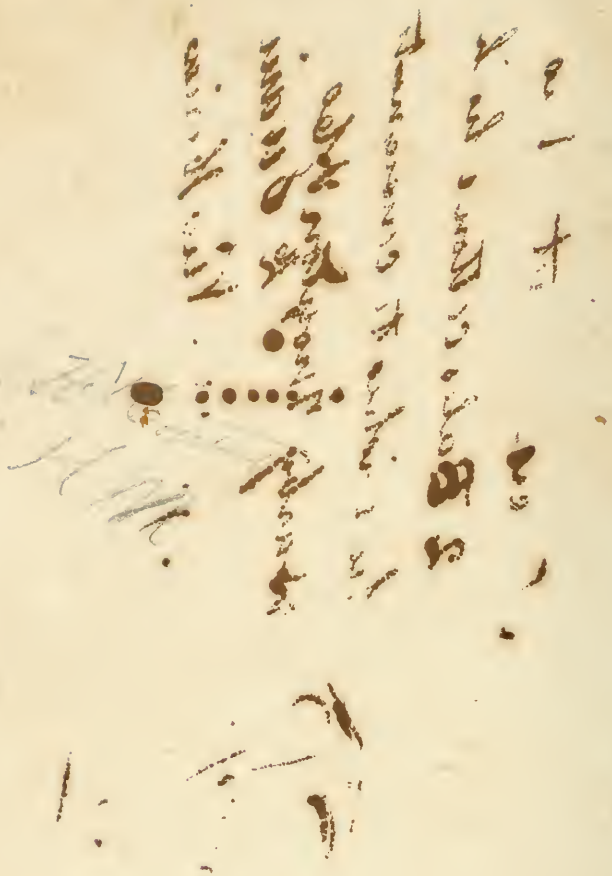
Hood on Executors.—In this age of book making—so many publications are thrown off by steam, and we are so oppressively taxed by all sorts of levies and temptations—that our first impulse is to resist all expenditures that we can avoid. This is especially true as to Law Books. The tools of the trade, if all that are offered were purchased, would come to more than the revenue of the Profession. Some selection being strictly necessary, any notice that tends to limit purchasers to works *really* useful and valuable, may be of general service.

There is no substitute for, or rival to "Hood on Executors" in our Libraries, for the use of the student or lawyer of Pennsylvania. "Gordon on Decedents" was edited before the Revised Code, and is therefore antiquated.

The whole Orphans' Court system of this State is original, peculiar, and of modern erection by eminent Judges. Its basement, laid in the leading case of M'Pherson *v.* Cunliffe, by the lamented Justice Duncan, has been built up in strength and symmetry by his colleagues of that era, and his successors; at the head of whom (and indeed, among the highest of any State or Nation, in his giant proportions as a lawyer and logician) stands that colleague, our present Chief Justice. The outline, elevations and plans of the system are presented in this Treatise in form and shape, distinct and definite to all.

The subject matter of the book is nearest to "*men's business and bosoms.*" The Work should be in the hands of every Magistrate and Officer of our Courts, and of every administrator of his own or of others' estates—and who is not one of these? Many, even the most judicious, in their best efforts of settlement prove to be but Executors *de son tort*, that is in their own wrong. He who would most surely escape this perilous office, had better choose for his guide, "Hood on Executors."





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